

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

COMMODITY FUTURES TRADING)
COMMISSION,)
)
Plaintiff,)
)
v.) 11-cv-10949-LPZ-MKM
)
ALAN JAMES WATSON, MICHAEL POTTS)
and CASH FLOW FINANCIAL LLC,)
)
Defendants,)
)
and)
)
THE JEDBURGH GROUP,)
)
Relief Defendant)

**COMMODITY FUTURES TRADING COMMISSION'S
MOTION FOR SUMMARY JUDGMENT AGAINST MICHAEL S. POTTS**

Plaintiff U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”), pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, files this Motion for Summary Judgment against Defendant Michael Potts (“Potts”).

On March 10, 2011, the Commission filed a six-count Complaint against Defendants Alan James Watson (“Watson”), Potts, and Cash Flow Financial LLC (“CFF”) and Relief Defendant The Jedburgh Group. Docket No. 2. The Complaint seeks injunctive and equitable relief for violations of the Commodity Exchange Act (the “Act”), 7 U.S.C. §§1 *et seq.* (2006), and the regulations promulgated thereunder (the “Regulations”), 17 C.F.R. §§1.1 *et seq.* (2010).

The Court previously entered a Consent Order Of Permanent Injunction, Civil Monetary Penalty And For Other Equitable Relief Against Alan James Watson, Docket No. 54, and the Clerk entered default against Defendant Cash Flow Financial LLC. Docket No. 62.

The Commission has reached a settlement with Relief Defendant The Jedburgh Group and submitted a proposed Consent Order For Equitable Relief And Final Judgment Against Relief Defendant The Jedburgh Group on June 20, 2012.

The only remaining issues for consideration by the Court are the allegations in the Complaint against Potts.

The Commission now moves for Summary Judgment against Potts on Counts Four and Five of the Complaint, which represent all of the counts against Potts. Count Four alleges that Potts, while acting as an associated person of a commodity pool operator, committed fraud through material misrepresentations and omissions in violation of Section 4q(1)(B) of the Act, 7 U.S.C. §6o(1)(B) (2006). Count Five alleges that Potts failed to register as an associated person of a commodity pool operator (“CPO”) in violation of Section 4k(2) of the Act, 7 U.S.C. §6k(2) (2006).

There are no pending counterclaims or third party claims. Plaintiff now moves for summary judgment.

Because there are no genuine issues of material facts, the Court should grant Plaintiff’s Motion for Summary Judgment.

Plaintiff relies on the following in support of its Motion for Summary Judgment:

- a. Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Summary Judgment;

b. Statement Of Undisputed Facts In Support Of Commodity Futures Trading Commission's Motion For Summary Judgment Against Defendant Michael S. Potts and attached exhibits.

Counsel for the Commission has attempted to contact Potts as required by Local Rule 7.1(a) to obtain his consent to this Motion, but Potts did not respond to the Commission's requests.

Plaintiff respectfully moves this Court to grant Plaintiff's Motion for Summary Judgment Against Michael S. Potts for the reasons set forth in the Memorandum of Points and Authorities.

Respectfully submitted on July 2, 2012,

/s/ Allison Baker Shealy

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Certificate of Service

I hereby certify that on July 2, 2012, I caused to be served **Plaintiff Commodity Futures Trading Commission's Motion for Summary Judgment Against Michael S. Potts** in the following manner:

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/s/ Allison Baker Shealy

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COMMODITY FUTURES TRADING COMMISSION'S
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Plaintiff Commodity Futures Trading Commission (“Commission”) submits this Memorandum of Law in Support of its Motion for Partial Summary Judgment against Defendant Michael S. Potts as to Counts Four and Five of the Complaint, as follows:

I. INTRODUCTION

On March 10, 2011, the Commission filed a six-count Complaint against Defendants Alan James Watson (“Watson”), Michael S. Potts (“Potts”), and Cash Flow Financial LLC (“CFF”) and Relief Defendant The Jedburgh Group. Docket No. 2. The Complaint seeks injunctive and equitable relief for violations of the Commodity Exchange Act (the “Act”), 7 U.S.C. §§1 *et seq.* (2006), and the regulations promulgated thereunder (the “Regulations”), 17 C.F.R. §§1.1 *et seq.* (2010).

The Court previously entered a Consent Order Of Permanent Injunction, Civil Monetary Penalty And For Other Equitable Relief Against Alan James Watson, Docket No. 54, and the Clerk entered default against Defendant Cash Flow Financial LLC. Docket No. 62. The Commission has reached a settlement with Relief Defendant The Jedburgh Group and submitted a proposed Consent Order For Equitable Relief And Final Judgment Against Relief Defendant The Jedburgh Group on June 20, 2012. The only remaining issues for consideration by the Court are the allegations in the Complaint against Potts.

The Commission now moves for Summary Judgment against Potts on Counts Four and Five of the Complaint, which represent all of the counts against Potts. Count Four alleges that Potts, while acting as an associated person of a commodity pool operator, committed fraud through material misrepresentations and omissions in violation of Section 4o(1)(B) of the Act, 7 U.S.C. §6o(1)(B) (2006). Count Five alleges that Potts failed to register as an associated person of a commodity pool operator (“CPO”) in violation of Section 4k(2) of the Act, 7 U.S.C. §6k(2) (2006).

From at least November 27, 2007 through at least July 2009 (the “relevant period”), Watson and Potts fraudulently solicited and accepted at \$44,000,000 from more than six hundred (600) individuals and entities to participate in a commodity pool to trade commodity futures contracts and securities under the guise of CFF. Commission Statement of Undisputed Material Facts (“S.F.”), incorporated by reference, at ¶7. Throughout the relevant period, in order to induce participation in the commodity pool, Watson, acting as an unregistered CPO and Potts as an associated person (“AP”) of a CPO, failed to disclose material facts, including that Watson was misappropriating client funds for personal use and using pool participant funds to pay principal and purported returns to existing pool participants in a manner typical of a Ponzi scheme. S.F. ¶¶6, 8, 15, 50, 52. Further, Potts made material misrepresentations, including that the commodity pool was profitable when it was not; and that all funds invested with CFF were being traded by a third-party named Trade LLC, when in fact they were employed in a variety of programs not approved by CFF pool participants. S.F. ¶¶13, 45-52.

To conceal Watson’s trading losses, Ponzi scheme, and misappropriations, Watson issued or caused to be issued false monthly statements and/or other reports. S.F. ¶53. These documents falsely reflected returns of at least ten percent (10%) profit each month from trading commodity futures and/or securities on behalf of the pool using the Trade LLC program, and failed to reflect the substantial losses incurred as a result of Watson’s use of CFF funds in non-Trade LLC programs. S.F. ¶54. Potts failed to disclaim the profits reported in these statements. S.F. ¶55.

Instead, Potts assisted Watson in the preparation and issuance of Schedule K-1’s to pool participants for use in filing their tax returns that falsely reported profits on investment, and falsely promised that funds would be returned in the near future. S.F. ¶¶56-58.

Moreover, Potts' Answer to the Commission's Complaint against him asserts Potts' right against self-incrimination as guaranteed by the Fifth Amendment to the U.S. Constitution in response to *all* allegations. S.F. ¶2.

II. VENUE AND JURISDICTION

The Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), which authorizes the Commission to seek injunctive relief against any person whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order there under.

Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2006), in that Potts transacted business in this District, and the acts and practices in violation of the Act have occurred within this District, among other places.

III. STATEMENT OF UNDISPUTED FACTS

The Commission's Statement of Undisputed Facts ("S.F.") is attached hereto as Exhibit A and incorporated herein by reference.

IV. ARGUMENT

Summary judgment is appropriate where, as here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986). The movant bears the burden of establishing the absence of factual issues and entitlement to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322; *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 811 (6th Cir. 2011).. The court must consider the entire record, drawing reasonable inferences and resolving factual disputes in favor of the non-movant. *Petit v.*

Steppingstone Center for the Potentially Gifted, 429 Fed. Appx. 524, at *4 (6th Cir. 2011); *Schneiker v. Fortis Inc.*, 200 F.3d 1055, 1057 (7th Cir. 1999); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999).

In response to a motion for summary judgment, the non-movant may not simply rest on the allegations as stated in the pleadings. *Petit*, 429 Fed. Appx. 524, at *4; *Walker v. Shansky*, 28 F.3d 666, 670-71 (7th Cir.1994), *aff'd*, 51 F.3d 276 (citing *Celotex*, 477 U.S. at 324). Rather, the non-movant must show through specific evidence that an issue of fact remains on matters for which the non-movant bears the burden of proof at trial. Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986); *Petit*, 429 Fed. Appx. 524, at *4; *Warsco v. Preferred Tech. Group*, 258 F.3d 557, 563 (7th Cir. 2001). There is not a “genuine issue” over a material fact unless “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 247. Unsubstantiated assertions that a fact issue exists will not suffice. See *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir.1993); *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir.1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Krim*, 989 F.2d at 1442.

There are no genuine disputes of any material facts. Therefore, judgment against Potts is warranted as a matter of law.

A. Potts Committed Fraud in Connection with a Commodity Pool in Violation of Section 40(1)(B) of the Act.

Section 40(1)(B) of the Act, in relevant part, makes it unlawful for a CPO, or an AP of a CPO, by using the mails or any means or instrumentality of interstate commerce, to directly or indirectly “engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any pool participant.” 7 U.S.C. § 60(1)(B) (2006). This section of the Act applies to

all CPOs and APs of CPOs whether registered, required to be registered, or exempt from registration. *CFTC v. Skorupskas*, 605 F. Supp. 923, 932-33 (E.D. Mich. 1985).

To establish a violation of Section 4o(1)(B), the Commission must prove that: (1) the defendant was a CPO or associated person of a CPO;¹ (2) the defendant made a misrepresentation or an omission to a commodity pool participant; (3) the misrepresentation or omission was material; and (4) the defendant made use of the mails or a means or instrumentality of interstate commerce in connection with the misrepresentation or omission. *In re Wright*, CFTC Docket No. 97-2, 2003 CFTC LEXIS 24, at *146-147, Comm. Fut. L. Rep. (CCH) 29,412 (Feb. 25, 2003). Although scienter must be proved to establish violations of Sections 4b and 4o(1)(A) of the Act, it is not necessary to prove scienter to establish a violation of Section 4o(1)(B) of the Act. *See Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cir. 1988); *CTS v. CFTC*, 233 F.3d 981, 993 (7th Cir. 2000); *CFTC v. Perkins*, 2009 WL 806576, at * 7 (D.N.J. 2009).

Potts violated Section 4o(1)(B) because he used instrumentalities of interstate commerce, principally the telephone lines, electronic mail, and the Internet, to make material misrepresentations and omissions to CFF pool participants.

1. Potts Acted As an AP of a CPO.

By operating a business in the nature of an investment trust, syndicate or similar form of enterprise and by soliciting, accepting or receiving funds and pooling those funds in bank accounts for the purpose of trading commodity futures or options (S.F. ¶¶4, 6), Watson was acting as a CPO. 7 U.S.C. § 1(a)(5) (2006). *See, e.g., CFTC v. Equity Fin. Grp. LLC*, 572 F.3d 150, 152 (3d Cir. 2009) (holding that defendant, which was a feeder fund that did not itself trade

¹ Section 4o(1)(B) also applies to commodity trading advisors and associated persons of commodity trading advisors, which are not at issue in this case.

futures, was a CPO because it engaged in the business of providing “a vehicle for a collective or group investment” and solicited for the purpose of trading commodity futures; actual futures trading is not required); *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,701 at 48,310 (CFTC July 19, 1999), *aff’d in relevant part sub nom. Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000) (respondent acted as a CPO when it accepted investment funds from individual investors who deposited funds in respondent’s bank account for the purpose of trading in a commodity pool). Potts solicited new pool participants and additional deposits from existing pool participants directly, including but not limited to through events held in Ohio and Florida, and indirectly through other Executive Club Members. S.F. ¶¶6, 8-9, 40-44. Therefore, Potts acted as an AP of a CPO. 7 U.S.C. § 6k(2) (2006).

2. Potts Made Misrepresentations and Omissions to Pool Participants.

In each and every communication with pool participants and prospective pool participants, including those made via electronic mail and during the monthly webinars that were conducted via telephone and the Internet, Potts represented that all of the funds deposited with CFF were being traded by Trade LLC, which was not true. S.F. ¶¶6, 12-13, 45. Only \$8,100,000 of the \$44,000,000 solicited from CFF pool participants was transferred to Trade LLC. S.F. ¶14.

To maintain this ruse that all funds were being traded by Trade LLC, Potts withheld material information and misrepresented material facts. For example, Potts failed to disclose that Watson had misappropriated \$4,850,000 of CFF pool participant funds when he invested them in a money leasing scheme with Darlene Bishop and Paradize Funding Network in Texas. S.F. ¶¶20-23. Potts participated in telephone calls and was aware that CFF funds were being misappropriated in connection with the Bishop/Paradize Funding Network money leasing scheme (S.F. ¶21) and was aware that Watson had filed a civil action against Darlene Bishop on

or about March 27, 2009 (S.F. ¶22), but failed to disclose this material information to CFF pool participants and potential pool participants. S.F. ¶23. The Bishop/Paradize Funding Network money leasing scheme was one of many investments that was neither approved by nor disclosed to CFF pool participants. Watson and CFF filed civil actions in attempts to recover misappropriated CFF pool participant funds in at least three additional cases. *See, e.g.*, S.F. ¶¶24, 28, 30; *see also* S.F. ¶¶26-27 (indicating that Watson deposited funds in a money leasing scheme with Charles Bruce Ferguson that was the subject of a criminal indictment and Potts failed to disclose this information to CFF pool participants). Potts failed to disclose any of these investments to CFF pool participants. S.F. ¶¶25, 29, 31.

Similarly, Potts was aware that Watson was misappropriating CFF pool participant funds and using them for his own personal expenses, but failed to disclose this information to pool participants. S.F. ¶¶32-22. Potts failed to disclose that CFF poled funds were being used to trade commodity futures in accounts held in Watson's name. S.F. ¶¶16-19. Nor did he disclose that Watson was misappropriating pool participant funds by paying expenses, fees and commissions in excess of the 20% profits generated by trading CFF pool participant funds through Trade LLC. S.F. ¶¶34-36, 51. Potts personally received \$186,180.87 of CFF pool participant funds. S.F. ¶¶37-39.

As late as the Florida open house on March 28-29, 2009 (S.F. ¶42), and in subsequent monthly conference calls, including the July 7, 2009 conference call hosted by Potts (S.F. ¶62), he continued to falsely represent that all pool participant funds were being successfully traded by Trade LLC (S.F. ¶¶45, 62) -- even though none of the funds deposited into the CFF pool on or after March 12, 2009 were transferred to or traded by Trade LLC. S.F. ¶¶43, 47-48.

Nevertheless, Potts continued to represent that CFF was profitable when it was not. S.F. ¶¶49, 54, 58, 62. Potts failed to disclose that Watson was using pool participants' funds to pay principal and purported profit returns to existing pool participants in a manner typical of a Ponzi scheme or disclaim Watson's protestations to the contrary. S.F. ¶52 (CFF website update explaining that effective June 1, 2009, CFF will stop accepting new deposits and explaining the reasoning "As long as we continue to accept new and/or additional monies into the club, there will always be that question in the back of everyone's mind whether we are paying current members with new member money. This thought will certainly become a distant memory as we continue to pay out people from the money we have earned for 3-months, 6-months, and 5-years into the future!"); *see also* S.F. ¶15. In the Spring and Summer of 2009, Potts made misrepresentations and omissions to pool participants when he assisted in the preparation and distribution of 2008 IRS Form Schedule K-1 tax documents to pool participants that falsely reflected profits by pool participants and failed to disclose the substantial losses of pool participant funds. S.F. ¶¶56-58.

3. Potts' Misrepresentations and Omissions Were Material.

A statement or omitted fact is material if "there is a substantial likelihood that a reasonable investor would consider the information important in making a decision to invest." *R&W Tech. Serv. Ltd. v. CFTC*, 205 F.3d 165, 169 (5th Cir. 2000). Potts' misrepresentations concerning the manner in which pool participant funds were invested, the purposes for which those funds would be used, reports of false profits generally and on IRS Form Schedule K-1's were all facts that any investor would consider important. *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 447-48 (D.N.J. 2000) (finding that misrepresentations that commodity trading advisor would set up a trading account for client, when he only opened a trading account in his own name, regularly overstated the account's balance and reported the existence of trading profits

when no profits had been earned on account statements and on IRS Form 1099 constituted material misrepresentations in violation of the Act). “[M]aterial misrepresentations about the nature of the organization handling [an] account, the people [dealt] with, and the type of trading [the] funds were being used for” would be sufficient to state a cause of action pursuant to the [Act].” *Saxe v. E.F. Hutton & Co., Inc.*, 789 F.2d 105, 110 (2d Cir. 1986) (quoting *Psimenos v. E.F. Hutton & Co. Inc.*, 722 F.2d 1041, 1043-44 & n.5 (2d Cir. 1983)).

These types of misrepresentations and omissions have time and again been found to constitute fraud in violation of the Act. *See, e.g., CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978) (finding that defendant’s misrepresentations concerning opening of bank account and issuance of fictitious options trade statements was sufficient to support injunction); *CFTC v. McLaurin*, No. 95-C-285, 1996 WL 385334, at *4 (N.D. Ill. July 3, 1996) (defendant’s fraudulent reports and statements violated Act); *Skorupskas*, 605 F. Supp. at 932-33 (finding that defendant's failure to open trading account, failure to make trades in accordance with her representations, and issuance of false monthly statements constituted fraud in violation of Act).

4. Potts Used Instrumentalities of Interstate Commerce In Connection with His Misrepresentations and Omissions.

Potts’ misrepresentations and omissions to pool participants that all pool participant funds were being traded successfully by Trade LLC were made in person at the Florida and Ohio events and via the telephone, via electronic mail and during the monthly webinars that were conducted via telephone and on the Internet. S.F. ¶¶9, 40-42, 44 and 62. The IRS Form Schedule K-1’s, which Potts assisted in the preparation of, were sent via U.S. mail. S.F. ¶56. The telephone, electronic mail, Internet, and U.S. mail constitute instrumentalities of interstate commerce. *SEC v. Shehyn*, No. 04-CV-2003(LAP), 2010 WL 3290977, at *4 (S.D.N.Y. Aug. 9, 2010) (“Instrumentalities of interstate commerce include telephone and email

communications.”); *Jole v. Apple*, No. 3–11–0882, 2011 WL 6101553, at *3 (M.D. Tenn. Dec. 8, 2011) (“The Court agrees with those cases which have found that a connection to the internet is affecting interstate commerce or communication.”) (citations omitted). Therefore, Potts violated Section 4q(1)(B).

B. Potts failed to Register as an AP of a CPO in Violation of Section 4k(2) of the Act.

Section 4k(2) of the Act, in relevant part, provides that it shall be unlawful for any person to be associated with a CPO as an employee or agent or consultant in a capacity that involves the solicitation of funds unless registered as an AP of such CPO. 7 U.S.C. § 6k(2) (2006). Potts solicited new pool participants and additional deposits from existing pool participants directly, through events held in Ohio and Florida, and indirectly through other Executive Club Members. S.F. ¶¶9, 40-42, 44, and 62. Potts acted as an AP of a CPO by soliciting funds from pool participants. *See CFTC v. Prestige Ventures Corp.*, Civ. 09-1284-R, 2010 WL 8355003, at *4 (W.D. Ok. Oct. 27, 2010). Potts failed to register as an AP as required by Section 4k(2) of the Act. Therefore Potts violated Section 4k2 of the Act.

V. RELIEF SOUGHT

The Commission seeks summary judgment in its favor as to Counts Four and Five of the Complaint as to liability, entry of an order of permanent injunction, restitution, disgorgement, and civil monetary penalties and other equitable relief to prevent Potts from further violations of the Act.

A. Permanent Injunction and Trading Prohibition

Section 6c of the Act, 7 U.S.C. § 13a-1, authorizes and directs the Commission to enforce the Act and Regulations. In an action for permanent injunctive relief, the Commission is not required to make a specific showing of irreparable injury or inadequacy of other remedies, which

private litigants must make. *Muller*, 570 F.2d at 1300; *United States v. Quadro Corp.*, 928 F. Supp. 688, 697 (E. D. Tex. 1996), *aff'd*, 127 F.3d 34 (5th Cir. 1997); *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 141-42 (2nd Cir. 1977). Rather, the Commission makes the requisite showing for issuance of injunctive relief when it presents a *prima facie* case that the defendant has engaged, or is engaging, in illegal conduct, and that there is a likelihood of future violations. *CFTC v. Am. Bd. Of Trade, Inc.*, 803 F. 2d 1242, 1250-51 (2nd Cir. 1986); *CFTC v. Hunt*, 591 F. 2d 1211, 1220 (7th Cir. 1979).

A district court's finding that there was a likelihood of future violations of the Act and Regulations supports the entry of a permanent injunction. *CFTC v. Sidoti*, 178 F. 3d 1132 (11th Cir. 1999). In *Sidoti*, the Eleventh Circuit affirmed the entry of a permanent injunction on the grounds that "[i]n light of the likelihood of future violations, the district court did not abuse its discretion in enjoining further violations of the [Act]." *Id.* at 1137. Whether such a likelihood of future violations exists depends on the "totality of the circumstances." *SEC v. Mgmt. Dynamics, Inc.*, 515 F. 2d 801, 807 (2nd Cir. 1975); *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 676 (S.D.N.Y. 1979). Foremost among these circumstances is the past illegal conduct of the defendants, from which courts may infer a likelihood of future violations. *British Am. Commodity Options Corp.*, 560. F.2d at 135; *Mgmt. Dynamics, Ltd.*, 515 F. 2d at 807; *SEC v. Carriba Air, Inc.*, 681 F. 2d 1318, 1322 (11th Cir. 1982).

The scope of the injunctive relief can be tailored to meet the circumstances of the violations shown. For example, courts have entered permanent injunctions against future violations of the Act upon the Commission's showing of a violation and likelihood of future violations. *See CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149 (S.D.N.Y. 1979). Other courts have issued broader injunctions prohibiting trading activity based upon: (1) the

egregiousness of the Defendant's actions; (2) the isolated, recurrent, or systematic nature of the wrongfulness of the conduct; and (3) the likelihood that the Defendant's customary business activities will present opportunities for future violations. *Hunt*, 591, F. 2d at 1220; *British Am.*, 560 F. 2d at 142; *see also CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d 676, 692 (D. Md. 2000)("[t]he pervasiveness and seriousness of [the defendant's] violation justify the issuance of a permanent injunction prohibiting him from violating the [Act] and from engaging in any commodity-related activity, including soliciting customers and funds."); *Rosenberg*, 85 F. Supp.2d at 454-55(permanently enjoining defendant from trading commodities on behalf of others). In this case, it is undisputed that Potts' acts were egregious and recurring. The conduct occurred over almost a two year period and effected more than 600 individuals or entities. S.F. ¶7. Potts has no apparent business activities beyond operating "investment clubs," which presents opportunities for future violations. All of these factors make it likely he will resume his illegal activity if not permanently enjoined from further violations of the Act and Regulations.

Accordingly, the Commission moves this Court to enter an order permanently enjoining and prohibiting Potts from engaging 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, in violation of Section 4q(1)(B) of the Act, as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 ("CRA")), §§ 13101 – 13204, 122 Stat. 1651 (enacted June 18, 2008), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010) ("Dodd-Frank"), §§ 701-774, 124 Stat. 1376 (enacted July 21, 2010), to be codified at 7 U.S.C. § 4q(1).

The Commission further moves this Court to enter an order enjoining and prohibiting the Potts from engaging in any activity relating to commodity interest trading, including but not limited to: soliciting, accepting or receiving funds, revenue or other property from any person, giving advice for compensation, or soliciting prospective clients, participants or customers, related to the purchase and sale of any commodity futures or option on commodity futures contracts.

B. Restitution

Section 6c of the Act permits courts to order restitution and other relief to comply with the basic objectives of the CEA. *See, e.g., CFTC v. Co Petro Mrktg Grp. Inc.*, 680 F.2d 573, 583 (9th Cir. 1982); *Hunt*, 591 F.2d at 1222-23; *Skorupskas*, 605 F. Supp. at 943-944. Restitution aims “to make the damaged persons whole and compensate them for a defendant’s wrongful acts.” *CFTC v. Perkins*, No. 06-4679(RBK), 2009 WL 806576, at *10 (D.N.J. Mar. 25, 2009) (internal citations and quotations omitted). In this matter, the Investors were defrauded in the amount of \$36,615,344.67. S.F. ¶¶58-60 (indicating \$44,425,966.96 was received from CFF pool participants, but \$7,810,622.29 was returned to pool participants prior to the filing of the Commission’s Complaint resulting in a loss to pool participants of \$36,615,344.67). Accordingly, the Commission respectfully requests that the Court order Potts to be held liable for restitution in the amount of \$36,615,344.67 plus pre-judgment and post-judgment interest.

C. Disgorgement

Equitable remedies, including disgorgement of ill-gotten gains, are remedies for violations of the Act. *See CFTC v. American Metals Exch. Corp.*, 991 F.2d 71, 76 (3d Cir. 1993) (“A number of courts have held that district courts have the power to order disgorgement as a remedy for violations of the Commodity Exchange Act for the purpose of depriving the wrongdoer of his ill-gotten gains and deterring violations of the law.”) The Commission

requests that this Court order Potts to disgorge a total of \$186,180.87, which is the amount of ill-gotten gains that Potts received as a result of his fraud in connection with the CFF commodity pool minus Potts' own contributions to the CFF pool. S.F. ¶¶32-34 (indicating that Potts received \$186,180.87, after excluding Potts' own deposit of \$1,800 into the pool and purported return of that investment).

D. Civil Monetary Penalties

In any action brought under Section 6c of the Act, the Commission may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation a civil penalty in the amount of not more than the higher of \$100,000 or triple the monetary gain to the person for each violation. 7 U.S.C. § 13a-1(d)(1) (2006 & Supp. IV). For violations of the Act committed between October 22, 2004 and October 22, 2008, the amount has been adjusted for inflation to be "not more than the greater of \$130,000 or triple the monetary gain to such person for each such violation." 17 C.F.R. § 143.8(a)(1)(iii) (2012). For violations of the Act committed on or after October 23, 2008, the amount has been further adjusted for inflation to be "not more than the greater of \$140,000 or triple the monetary gain to such person for each such violation." 17 C.F.R. §143.8(a)(1)(iv) (2012).

The maximum civil penalty "is limited by the number of violations alleged in the Complaint times the maximum fine per violation." *Slusser v. CFTC*, 210 F.3d 783, 786 (7th Cir. 2000). Civil penalties should be imposed to act as a deterrent, but should also be proportional to the gravity of the offenses committed. *See Miller v. CFTC*, 197 F.3d 1227, 1236 (9th Cir. 1999). The civil monetary penalty "may be determined by focusing on the 'relative gravity of ...misconduct' in light of factors such as: (1) the relationship of the violation to the regulatory purposes of the Act; (2) [Defendant's] state of mind; (3)the consequences flowing from the violative conduct; and (4)[Defendant's] post-violation conduct." *R&W Tech. Serv. Ltd.*,

205 F.3d at 177 (citations omitted). Furthermore, “[t]he level of sanctions should reflect ‘the particular mitigating or aggravating circumstances presented by the unique facts of the individual conduct at issue.’” *Id.* (citations omitted).

Consistent with the provisions of the Act, the Complaint filed by the Commission alleges that “[e]ach misrepresentation or omission of material fact, issuance of a false statement or report, and misappropriation, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4o(1)(B) of the Act, 7 U.S.C. § 6o(1)(B) (2006).” S.F. ¶1, Complaint at ¶88.

Potts committed a unique and separate violation of the Act each and every time he represented to CFF pool participants that all CFF pooled funds were being traded by Trade LLC and each time he failed to disclose a material fact. The actual number of misrepresentations and omissions is impossible to quantify. However, the number of pool participants and therefore the number of persons and/or entities defrauded is quantifiable and there were over six hundred (600) individuals and/or entities that participated in the CFF commodity pool when it stopped accepting new deposits in July 2009. S.F. ¶7. Therefore, the Commission may seek a maximum civil monetary penalty in excess of \$84,000,000. (600 victims x \$140,000 per victim = \$84,000,000.) *See* 17 C.F.R. §143.8(a)(1)(iv) (2012).

Given Potts’ role as an associated person and not as the primary orchestrator of the fraud like Watson, a lesser amount may be more appropriate. Therefore, the Commission proposes a civil monetary penalty of \$558,542.61, which is equivalent to three times the personal monetary gain to Potts. (3 x \$186,180.87 the amount received by Potts = \$558,542.61). *See generally* S.F. ¶¶37-39 (indicating that Potts received \$186,250.65 of pool participant funds). This amount seems appropriate given the gravity of the offense, the number of victims, Potts’ role in the

scheme, and Potts refusal to accept responsibility for his actions. The Commission believes that a penalty of \$558,542.61 recognizes the seriousness of the violations and will act as a deterrent to future violations of the Act and Regulations.

Respectfully submitted on July 2, 2012,

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