

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COMMODITY FUTURES TRADING) Civil Case No. 1:02-CV-1381
COMMISSION,)
)
)
Plaintiff,) COMPLAINT FOR INJUNCTIVE AND
) OTHER EQUITABLE RELIEF AND
) FOR CIVIL PENALTIES UNDER THE
vs.) COMMODITY EXCHANGE ACT, AS
) AMENDED, 7 U.S.C. §§ 1-25
Advent Capital Partners, Ltd.)
and Samuel Daley,)
)
)
Defendants.)
)
_____)

I. SUMMARY

1. Since at least December 21, 2000, Defendants Advent Capital Partners, Ltd. ("Advent") and Samuel Daley ("Daley") (collectively, "Defendants") have solicited and accepted funds from retail investors to engage in speculative trading of foreign currency futures contracts. Because these transactions are not (a) conducted on or subject to the rules of a board of trade which has been designated or registered by the Commodity Futures Trading Commission ("Commission") as a contract market or derivatives transaction execution facility for such commodity, (b) executed or consummated by or through a contract market, and (c) evidenced by a record in writing

which shows the date, the parties to the contract and their addresses, the property covered and its price, and the terms of delivery, Defendants have violated Section 4(a) of the Commodity Exchange Act ("Act"), as amended by the Commodity Futures Modernization Act of 2000 ("CFMA"), Appendix E of Pub. L. No. 106-554, 114 Stat. 2763, 7 U.S.C. § 6(a).

2. Recently, Advent customers have not been able to contact any brokers or traders at Advent. In addition, Advent has sent checks to customers that have been returned by Advent's bank as having insufficient funds. Furthermore, it appears that Advent has shut its offices.

3. Daley, as a controlling person of Advent, is also liable for its violation of Section 4(a) of the Act pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (1994).

4. Accordingly, pursuant to Section 6c of the Act, as amended by the CFMA, 7 U.S.C. § 13a-1, Plaintiff Commission brings this action to enjoin the unlawful acts and practices of Defendants and to bar them from engaging in any commodity-related activity, including soliciting new customers or customers' funds. In addition, the Commission seeks civil monetary penalties in the amount of not more than the higher of \$120,000 or triple the monetary gain to

Defendants for each violation of the Act, disgorgement of Defendants' ill-gotten gains, restitution to customers, prejudgment interest and such other relief as this Court may deem necessary or appropriate.

5. Unless enjoined by this Court, Defendants are likely to continue to engage in the acts and practices alleged in this Complaint, as more fully described below.

II. JURISDICTION AND VENUE

6. Section 2(c)(2)(B)(i) and (ii) of the Act, as amended, 7 U.S.C. § 2, expressly grants the Commission jurisdiction over certain transactions in foreign currency that are contracts for the sale of a commodity for future delivery, including the transactions alleged in this Complaint. This Court has jurisdiction over this action pursuant to Section 6c of the Act, which authorizes the Commission to seek injunctive relief against any person whenever it shall appear 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 thereunder.

7. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, in that Defendants are found in, inhabit, or transact business in this District, and the

acts and practices in violation of the Act have occurred, are occurring, or are about to occur, within this District, among other places.

III. THE PARTIES

The Plaintiff

8. Commodity Futures Trading Commission is an independent federal regulatory agency that is charged with responsibility for administering and enforcing the provisions of the Act, as amended, 7 U.S.C. §§ 1 et seq. (1994), and the regulations promulgated thereunder.

The Defendants

9. Advent Capital Partners, Ltd. is both a Georgia and Nevada corporation. Advent was incorporated in Georgia on June 20, 2001 and in Nevada on August 18, 1999. From at least December 21, 2000 to February 13, 2002, Advent's principal place of business has been located at 3620 DeKalb Technology Parkway, Suite 2106, Atlanta, Georgia, 30340. Since February 13, 2002, Advent's principal place of business has been located at Buckhead Piedmont Center, 3525 Piedmont Road, 7 Piedmont Center, Suite 300, Atlanta, Georgia 30305. Advent has never been registered with the Commission in any capacity.

10. Samuel Daley resides at 1046 Palmer Road, Lithonia, Georgia. Daley is the Chief Executive Officer and Head Trader for Advent. Daley is in charge of the day-to-day operations of Advent. Daley has never been registered with the Commission in any capacity.

IV. FACTUAL BACKGROUND

Solicitation of Customers

11. Since at least December 21, 2000, the Defendants have solicited prospective customers to purportedly trade foreign currencies in what the Defendants falsely describe as the "spot" or "forex" markets. Although the investments are marketed to prospective customers as "spot" or "forex" trades, Advent is actually engaged in the trading of illegal, off-exchange futures contracts, as described more fully below.

12. Defendants reach prospective customers through nationwide telephone solicitations, an Internet website located at www.advent-capital.com, and by sending out promotional literature.

13. Advent brokers, including Daley, tell prospective customers that their accounts will be "managed" accounts and that Advent makes all of the trading decisions for its customer accounts. Customers sign power of attorney

authorizations granting discretion over their account to their account broker or "such other persons as the broker may deem fit" to manage the account.

14. Advent brokers tell prospective customers that Daley is a very experienced and successful trader. At least one Advent customer was told that Daley has been a trader for over twenty years.

15. Daley is in charge of the day-to-day operations of Advent, oversees all of its business operations, and is Advent's head trader.

16. Advent brokers tell prospective customers that only 50% of customer funds will be used to trade. In addition, prospective customers are told that Advent limits customer losses to 15% per trade by placing stop-loss limits.

17. Advent brokers also tell customers that each currency contract generally costs \$1000 and leverages approximately \$100,000 worth of foreign currency.

18. Once prospective customers decide to invest with Advent, they are sent a package of material, including a brochure regarding the foreign exchange market entitled "An Introduction to Forex 24 Hour Foreign Exchange Dealing At Interbank Rates," a "Customer Information" page, a "Customer Financial Questionnaire," a "Foreign Exchange

Trading Agreement," and a "Notice of Appointment and Power of Attorney."

19. To open an account with Advent, customers are instructed to complete and sign the account opening documents, including the "Foreign Exchange Trading Agreement," and the "Notice of Appointment and Power of Attorney." Customers are also instructed to send their checks payable to "Advent Capital Partners Limited Customer Segregated Account." Customers who wish to send to Advent their funds via wire transfer are told to send the funds for credit to an "Advent Capital Partners Customer Segregated Account." Each customer is told that his or her funds are placed in segregated customer accounts in his or her name at First Union Bank.

Purported Trading in Customer Accounts

20. After a customer opens an account with Advent, he or she receives account statements from Advent that purport to show the status of their account. The account statements are printed on Advent letterhead, show the name of the customer along the top of the page as well as the customer's Advent trading account number. Some customers also subsequently received copies of order tickets from Advent, purportedly representing trades placed for customers.

21. Initially, Advent reported to customers that their trades remained as open positions for only two to three days before they were closed out. On or about early March 2001, Advent began to report that it kept its customer positions open for longer periods of time, sometimes for as long as one to two months. Advent's customer account statements show that Advent never charged rollover fees to its customers, nor did it ever account for daily fluctuations of the interest rates for any of its open positions.

22. The Advent customer account statements generally show the customer accounts to be steadily increasing in value. In addition, Advent brokers, including Daley, almost always inform customers orally that their accounts were increasing in value.

23. To the extent that Advent engaged in any trading, Advent conducted limited trading in its own name, and not in the name of or on behalf of customers.

Customers Have Been Unable To Close Their Accounts or Obtain Their Funds

24. In spite of the fact that their accounts have purportedly increased in value, since on or about March 2002, one or more Advent customers have been unable to withdraw funds from their accounts and/or close their

accounts with Advent. Customer investments with Advent total over \$400,000.

25. Since on or about May 3, 2002, customers have experienced difficulty contacting Advent brokers or traders to determine the status of their accounts. In addition, since on or about May 14, 2002, customers have been informed by a representative of the company that leased office space to Advent that Advent has closed its business without any forwarding information.

26. On or about May 3, 2002, Advent sent to at least two customers checks in the amount of \$20,000 each. The checks were postdated for May 8, 2002 and were apparently written on bank "starter" checks. Both customers were unable to deposit these checks. One check was returned for insufficient funds and another check was returned as invalid. First Union Bank informed the customer who received the invalid check that Advent had insufficient funds in its account to cover the amount of the check.

Defendants' Foreign Currency Transactions Are Illegal Futures

27. Defendants purport to offer contracts in "spot" foreign currency to retail investors that operate as follows: on a given trade date, an investor acquires a position in a foreign currency at a stated price. A long

position is recorded as "bought" on the customer's account statement and a short position is recorded as "sold" on the statement. At a date subsequent to the "trade date," the position in the currency is offset when the investor enters into an equal but opposite position. The Defendants are the counterparties to these transactions with the retail customers.

28. Investors are led to believe that contracts stay open indefinitely until offset. The positions are not marked to market each day based on changes in currency rates, nor are the customers charged rollover fees, practices that would occur if these were spot transactions.

29. The foreign currency contracts that defendants offer and sell are futures contracts because they have the characteristics indicative of a futures contract. The contracts are for future delivery of foreign currencies that are cash settled in US dollars. The prices or pricing formulas are established at the time the contracts are initiated, and may be settled through offset, cancellation, cash settlement or other means to avoid delivery.

30. The Defendants market these contracts to the general public. The customers who purchase these futures contracts have no commercial need for the foreign currency. Instead, customers enter into these transactions to

speculate and profit from anticipated price fluctuations in the markets for these currencies.

31. Customers do not anticipate taking -- and do not take -- delivery of the foreign currencies they purchase as a consequence of these investments.

32. Defendants do not conduct their foreign currency futures transactions on or subject to the rules of a board of trade that has been designated or registered by the Commission as a contract market or derivatives transaction execution facility for such commodity.

33. Defendants do not execute or consummate their futures contracts by or through a contract market.

34. Defendants have not evidenced any futures contract by a record in writing which shows the date, the property covered and its price, and the terms of delivery.

35. Section 2(c)(2)(B)(i) and (ii) of the Act provides that the Commission shall have jurisdiction over an agreement, contract or transaction in foreign currency that is a sale of a commodity for future delivery, so long as the contract is "offered to, or entered into with, a person that is not an eligible contract participant" unless the counter-party, or the person offering to be the counter-party, is a regulated entity, as defined in the CFMA. No Defendant is a proper counter-party for retail

foreign currency transactions, and therefore the Commission has jurisdiction over the transactions in retail foreign currency alleged herein.

36. Section 1a(12)(A)(xi) of the Act, as amended by the CFMA, 7 U.S.C. § 1, defines an eligible contract participant as an individual who has total assets in excess of: a) \$10 million; or b) \$5 million and who enters the transaction to manage the risk associated with an asset owned or a liability incurred, or reasonably likely to be owned or incurred. At least some, if not all, of the foreign currency futures transactions alleged herein were offered to or entered into with persons who were not eligible contract participants, and so the Commission has jurisdiction over the Advent contracts.

**V. VIOLATION OF SECTION 4(a) OF THE ACT, 7 U.S.C. § 6(a):
OFFER AND SALE OF COMMODITY FUTURES CONTRACTS
NOT CONDUCTED ON A BOARD OF TRADE WHICH HAS BEEN
DESIGNATED AS A CONTRACT MARKET**

37. Plaintiff realleges paragraphs 1 through 36 above and incorporates these allegations herein by reference.

38. Since at least December 21, 2000, and continuing to the present, Defendants have offered to enter into, entered into, executed, confirmed the execution of, or conducted an office or business in the United States for

the purpose of soliciting, accepting any order for, or otherwise dealing in transactions in, or in connection with, a contract for the purchase or sale of a commodity for future delivery when: (a) such transactions have not been conducted on or subject to the rules of a board of trade which has been designated by the Commission as a contract market or derivatives transaction execution facility for such commodity, (b) such contracts have not been executed or consummated by or through a member of such contract market and (c) evidenced by a record in writing which shows the date, the parties to the contract and their addresses, the property covered and its price, and the terms of delivery, in violation of Section 4(a) of the Act, as amended by the CFMA, 7 U.S.C. § 6(a).

39. Each foreign currency futures transaction not conducted on a designated contract market or derivatives transaction execution facility for such commodity made during the relevant time period, including but not limited to those conducted by the Defendants as specifically alleged herein, is alleged as a separate and distinct violation of Section 4(a) of the Act, as amended by the CFMA, 7 U.S.C. § 6(a).

40. Daley, directly or indirectly, controlled Advent and did not act in good faith or knowingly induced,

directly or indirectly, the acts constituting Advent's violations alleged in this count, and thereby is also liable for Advents' violations of Section 4(a) of the Act, as amended by the CFMA, 7 U.S.C. § 6(a) pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (1994).

VI. RELIEF REQUESTED

WHEREFORE, Plaintiff Commodity Futures Trading Commission respectfully requests that this Court, as authorized by Section 6c of the Act, and pursuant to the Court's equitable powers, enter:

1. an order of permanent injunction prohibiting Defendants Advent Capital Partners, Ltd. and Samuel Daley and any other person or entity associated with them, including any successor thereof, from engaging in conduct violative of Section 4(a) of the Act, as amended by the CFMA, 7 U.S.C. § 6(a);
2. an order directing Defendants Advent Capital Partners, Ltd. and Samuel Daley and any successors thereof, to disgorge, pursuant to such procedure as the Court may order, all benefits received from the acts or practices which constituted violations of the Act, as described

herein, and interest thereon from the date of such violations;

3. an order directing Defendants Advent Capital Partners, Ltd. and Samuel Daley to make full restitution to every customer whose funds were received by them as a result of acts and practices which constituted violations of the Act, and interest thereon from the date of such violations;
4. an order directing Defendants Advent Capital Partners, Ltd. and Samuel Daley, Inc., to pay a civil penalty in the amount of not more than the higher of \$120,000 or triple the monetary gain to Defendants for each violation of the Act;
5. an order requiring Defendants Advent Capital Partners, Ltd. and Samuel Daley to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2); and
6. such other and further remedial ancillary relief as the Court may deem just and proper.

Respectfully submitted:

Date: May 21, 2002

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