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MIDDLE DISTRICT OF FLORIDA
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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

KEITH ELSESSER and

PHOENIX GLOBAL TRADING, INC.,
A Florida corporation,

Defendants.

CIVIL ACTION NO. 03-3-CV-681-T-23TBM

**COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF AND
FOR CIVIL PENALTIES UNDER THE COMMODITY EXCHANGE ACT**

I.

SUMMARY

1. Since at least September 2001 and continuing through the present (the "relevant time"), Keith Elsesser ("Elsesser") and Phoenix Global Trading, Inc. ("Phoenix") (collectively the "defendants") made false representations while soliciting approximately \$72,000 in funds from at least three investors. Defendants solicited these funds for the alleged purpose of trading options on foreign currencies.

2. Defendants made oral and written fraudulent misrepresentations to investors which concealed that: no investor funds were actually being traded in options on foreign currencies as promised; a small amount of trading in foreign currencies did take place, but that such trading

resulted in losses, not profits as reported by defendants to investors; most of the funds given to defendants for trading were never traded in any manner; investors' accounts never grew in value as defendants' represented; and defendants misappropriated investor funds to their personal use and benefit.

3. Thus, defendants have engaged, are engaging, or are about to engage in acts and practices which violate Sections 4c(b) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6c(b) (2001), and Commission Regulation 32.9 thereunder, 17 C.F.R. § 32.9 (2002). In addition to his liability as an individual, Elsesser, as a controlling person of Phoenix, is liable for the violations of Phoenix, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13(b) (2001).

4. Because the options offered by the defendants are not consummated on or subject to the rules of a contract market or a derivatives transaction execution facility designated by the Commodity Futures Trading Commission ("Commission"), defendants have offered to sell illegal foreign currency options, in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2001), and Commission Regulations 32.11 and 33.3(a), 17 C.F.R. § 32.11 and 33.3(a) (2002).

5. Accordingly, pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (2001), Plaintiff Commission brings this action to enjoin the unlawful acts and practices of defendants Elsesser and Phoenix and to compel their compliance with the provisions of the Act and Regulations thereunder. In addition, the Commission seeks restitution, civil penalties, a freeze of defendants' assets, disgorgement of defendants' ill-gotten gains, and such other equitable relief as the Court may deem necessary or appropriate.

II.

JURISDICTION AND VENUE

6. The Act prohibits fraud in connection with the trading of options on foreign currencies, and establishes a comprehensive system for regulating the purchase and sale of such contracts. Section 2(c)(2)(B) of the Act, 7 U.S.C. § 2(c)(2)(B) (2001), provides that the Commission has jurisdiction over certain retail currency options, such as those represented in this matter. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2001), 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, 7 U.S.C. § 13a-1(e) (2001), 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

8. Plaintiff Commodity Futures Trading Commission is an independent federal regulatory agency that is charged with responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.* (2001), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 *et seq.* (2002).

9. Defendant Keith Elsesser, age 36, resided in St. Petersburg, Florida throughout the relevant time period until March 2003. Currently Elsesser is incarcerated at the Federal

Correctional Institution located at Elkton, Ohio. Elsesser's mailing address at the Elkton, FCI is: Keith Elsesser, Inmate #39703-018, Elkton, FCI, 8730 Scroggs Road., P.O. Box 89, Elkton, OH 44415. Elsesser has never been registered with the Commission in any capacity. Elsesser formed, is the president of, and at all relevant times was the day-to-day decision maker for, defendant Phoenix. Elsesser committed the acts alleged in this complaint individually and as a controlling person of Phoenix.

10. Defendant Phoenix Global Trading, Inc. is a Florida corporation incorporated in June 2001, and was located until approximately August 2002 at 5900 Central Ave., South, Suite D, St. Petersburg, Florida. Phoenix has never been registered with the Commission in any capacity.

IV.

FACTS

11. In or around September 2001, Elsesser, individually and as a controlling person of Phoenix, began to solicit investment funds from members of the public. Elsesser, and others under his direction and control at Phoenix, told potential investors that he would trade options on foreign currencies ("options") for them.

12. During the relevant time, the defendants collected at least \$72,000 from at least three investors for the purported purpose of investing in options on foreign currencies. Elsesser never used investors' funds to trade options as represented. The defendants misappropriated the majority of investor funds for non-investment related purposes, including Elsesser's own personal use and benefit.

13. The defendants established a trading account in the name of one of the investors at Global Capital Investment, Inc. ("GCI"), an unregistered dealer in foreign currency, in or

around September 2001. The defendants deposited only a small proportion of the investor funds, \$15,000, into the GCI trading account. Elsesser controlled the trading in that account.

14. While under Elsesser's direction and control, the GCI trading account suffered \$1,359 in losses trading Japanese yen. In addition, Elsesser charged the GCI account \$5,760 in commissions. By October 14, 2001, Elsesser withdrew the remaining funds from the GCI trading account, which he proceeded to use for his own personal use and benefit.

15. Elsesser, individually and as a controlling person of Phoenix, induced investors to maintain and add to their investments with him by concealing the trading losses and exaggerating the true value of the trading account. Such false representations were made orally and were contained in written representations that Elsesser created and sent to investors.

16. For example, during the relevant time, Elsesser falsely represented to the investors that he had invested their funds in options on Japanese yen. Elsesser also represented to one investor that the aggregate balance in the investor's trading account had in three months increased from approximately \$39,000 to \$120,000 as of January 7, 2002. In reality, Elsesser traded only one day in October 2001 in Japanese yen and lost approximately \$7,119, including commissions.

17. Elsesser knew his written and oral representations to investors were false and intended that investors would rely on those misrepresentations in determining whether to maintain or add to their investments with defendants.

18. Despite the repeated demands of investors for return of their funds, the defendants failed to return any funds to the investors. In total, the three investors lost \$72,000.

V.

**VIOLATIONS OF THE COMMODITY EXCHANGE ACT
AND COMMISSION REGULATIONS**

COUNT I

**VIOLATIONS OF SECTION 4c(b) OF THE ACT
AND COMMISSION REGULATIONS 32.9(a)
and (c) and 1.1(b)(1) and (3): FRAUD BY MISAPPROPRIATION
AND MISREPRESENTATIONS**

19. Paragraphs 1 through 18 are re-alleged and incorporated herein.

20. During the relevant time, defendants Elsesser and Phoenix violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2001), and Commission Regulation 32.9(a) and (c), 17 C.F.R. § 32.9(a) and (c) (2002), and, for their activities occurring on or after October 9, 2001, violated Commission Regulation 1.1(b), (1) and (3), 17 C.F.R. § 1.1(b) (1) and (3) (2002), in that, in or in connection with offers to enter into, the entry into, or the confirmation of the execution of, commodity option transactions, they cheated or defrauded or attempted to cheat or defraud investors or prospective investors and willfully deceived or attempted to deceive investors or prospective investors by, among other things: misappropriating funds received from investors and using them for business and personal expenses; misrepresenting to investors that their funds were being used to trade options on foreign currency when they were not; and misrepresenting to investors the profits and values of their accounts.

21. Each material misrepresentation or omission, act of misappropriation, and each willful deception made during the relevant time, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation.

22. Throughout the relevant time, Elsesser, directly or indirectly, controlled Phoenix and did not act in good faith, or knowingly induced, directly or indirectly, the acts constituting the

violations of Phoenix alleged in this count, and thereby is also liable for Phoenix's violations of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2001), and Regulations 1.1(b) (1) and (3) and 32.9(a) and (c), § 17 C.F.R. §§ 1.1(b) (1) and (3) and 32.9(a) and (c) (2002), pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001).

COUNT II

VIOLATIONS OF SECTION 4c(b) OF THE ACT AND COMMISSION REGULATION 32.11 and 33.3(a): OFFER AND SALE OF COMMODITY OPTIONS NOT CONDUCTED ON A BOARD OF TRADE WHICH HAS BEEN DESIGNATED BY THE COMMISSION AS A CONTRACT MARKET

23. Paragraphs 1 through 22 are re-alleged and incorporated herein.

24. Section 2(c)(2)(B)(ii) of the Act, 7 U.S.C. § 2(c)(2)(B)(ii) (2001), provides that the Commission shall have jurisdiction over options contracts on foreign currency, so long as the option is "offered to, or entered into with, a person that is not an eligible contract participant" and the counter-party to the option, or the person offering to be the counter-party, is not a regulated entity.

25. In the case of an individual, Section 1a(12)(A)(xi) of the Act, 7 U.S.C. § 1a(12)(A)(xi) (2001), defines an eligible contract participant as an individual who has total assets in excess of: (a) \$10 million or (b) in excess of \$5 million if hedging a risk associated with an asset or liability. None of the customers solicited by defendants were eligible contract participants.

26. By controlling every aspect of the fraudulent retail option transactions from solicitation through possession of the invested funds, defendants were acting as the counter-

party to the transactions. Defendants are not regulated entities as defined in Section 2(c)(2)(B)(ii) of the Act and are subject to the Commission's jurisdiction under the Act.

27. Sections 32.11 and 33.3 of the Regulations, 17 C.F.R. §§ 32.11 and 33.3 (2002), together provide that it shall be unlawful for any person to solicit, accept orders for, or accept funds in connection with, the purchase or sale of any commodity option, or supervise any person or persons so engaged, unless the commodity option is conducted (1) on or subject to the rules of a contract market which has been designated by the Commission to trade options and (2) by or through a member thereof in accordance with the Act and Regulations.

28. Beginning on September 2001 and continuing to the present the defendants Elsesser and Phoenix have offered to enter into, entered into, executed, confirmed the execution of, or conducted business for the purpose of soliciting, accepting any order for, or otherwise dealing in any transaction in, or in connection with, a commodity option when: (a) such transactions have not been executed, (b) such transactions, if executed, 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" for such commodity, and (c) such contracts, if executed, have not been executed or consummated by or through a member of such contract market, in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b)(2001), and Commission Regulations 32.11 and 33.3(a), 17 C.F.R. §§ 32.11 and 33.3(a)(2002).

29. Throughout the relevant time, Elsesser, directly or indirectly, controlled Phoenix and did not act in good faith, or knowingly induced, directly or indirectly, the acts constituting the violations of Phoenix alleged in this count, and thereby is also liable for Phoenix's violations of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2001), and Regulations 32.11 and 33.3(a), 17 C.F.R. §§ 32.11 and 33.3(a) (2002), pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2001).

VI.

RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests that this Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1, and pursuant to the Court's own equitable powers, enter:

1. a statutory restraining order, and preliminary and permanent injunctions prohibiting defendants and any other person or entity associated with them, including any successor thereof, from engaging in conduct violative of Sections 4c(b) of the Act, 7 U.S.C. § 6c(b), and Commission Regulations 1.1(b) (1) and (3), 32.11, 33.3(a) and 32.9(a) and (c), and from engaging in any commodity, or options on futures or options on foreign currency related activity, including soliciting new customers or customer funds;
2. an order directing defendants 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 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 Regulations, as described herein, and interest thereon from the date of such violations;
4. an order requiring defendants to pay civil penalties under the Act in

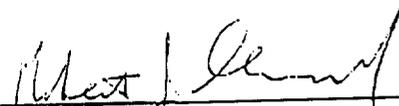
amounts of not more than the higher of \$120,000 for each violation of the Act and Regulations, or triple the monetary gain to defendants, for each violation of the Act and Regulations described herein;

- 5. an order requiring defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2) (2001); and
- 6. an order for such other and further remedial ancillary relief as this Court may deem necessary and appropriate under the circumstances.

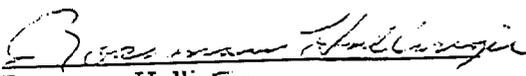
Date: April 11, 2003

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