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JUL 29 2004
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

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JUL 29 2004
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff,

v.

EMERALD WORLDWIDE
HOLDINGS, INC., et al.,

Defendants,

and

LYNWOOD JEN, et al.,

Relief Defendants.

CASE NO. CV 03-8339 AHM (Ex)

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION FOR
CIVIL CONTEMPT.

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

This matter is before the Court on Plaintiff Commodity Futures Trading Commission's ("CFTC's") Motion for an Order of Civil Contempt, Immediate Compliance with Court Order and Sanctions. For the reasons that follow, the Court GRANTS the CFTC's motion.

FACTUAL AND PROCEDURAL BACKGROUND

The parties are familiar with the facts of this case, and only those relevant to the issues currently before the Court will be re-iterated here. On November 17, 2003, CFTC filed a complaint naming Emerald Worldwide Holdings, Inc. ("Emerald"), Jan

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1 Hao Lu ("Lu") and Jian Zhuang ("Zhuang") as defendants. The complaint alleged
2 that the three defendants violated the Commodity Exchange Act, 7 U.S.C. § 1061 ^{et seq.},
3 by engaging in a PONZI scheme whereby they fraudulently solicited customers to
4 invest in foreign currency future trades, did not actually use the money to trade on
5 investors' behalf, and paid the old investors "returns" from funds they obtained from
6 later, fraudulently-solicited investors.

7 On the same date that the CFTC filed its complaint, it also filed an *ex parte*
8 application for a statutory restraining order ("SRO"), which the Court granted on
9 November 18, 2003. The SRO ordered the three defendants to do, and enjoined them
10 from doing, the following things:

11 Section I of the SRO enjoined the Defendants from,

12 directly or indirectly transferring, selling, alienating, liquidating,
13 encumbering, pledging, leasing, loaning, assigning, concealing,
14 dissipating, converting, withdrawing, or otherwise disposing of any
15 assets, wherever located, including assets held outside of the United
16 States...The assets affected by this paragraph shall include both existing
17 assets and assets acquired after the effective date of this Order.

18 *SRO* ¶ 11.

19 Section II of the SRO directed financial institutions that held, controlled or
20 maintained custody of the three defendants' assets to freeze those assets. *Id.* ¶¶ 14-
21 15.

22 Section III of the SRO ordered the three defendants, within five business days
23 following service of the SRO: (1) to provide the CFTC with a full accounting of all
24 funds, documents and assets located outside of the United States that were held by
25 them, for their benefit, or under their direct or indirect control; (2) to transfer to the
26 United States all funds, documents and assets located in foreign countries which are
27 held by the three defendants, for their benefit or under their direct or indirect control;
28 and (3) to sign a consent form permitting the CFTC to access records held by
financial institutions located outside of the United States. *Id.* ¶¶ 18-20.

Section IV of the SRO enjoined the three defendants from destroying,

1 mutilating, erasing, altering, concealing or disposing of any documents relating to
2 their business practices or personal finances. *Id.* ¶ 21.

3 Section V of the SRO ordered the three defendants to permit the CFTC to
4 inspect and copy their books and records, including electronically stored data and
5 computer discs. *Id.* ¶¶ 22-23.

6 On January 5, 2004, the Court held a preliminary injunction hearing, at which
7 it dissolved the SRO as to defendant Lu, but extended it pending a final judgment
8 in this case as to defendants Emerald and Zhuang.¹

9 The CFTC now moves for an Order of Civil Contempt, arguing that Zhuang
10 and Emerald (hereinafter "Defendants") violated the SRO by: (1) transferring
11 overseas approximately \$1,020,000 from two frozen bank accounts; (2) failing to
12 repatriate those funds; (3) refusing to provide the CFTC with an accounting of their
13 foreign assets; (4) refusing to allow the CFTC to inspect or copy their books and
14 records; and (5) concealing assets acquired after issuance of the SRO.

15 On June 28, 2004, the Court held a hearing on this matter. Defendant Zhuang
16 did not personally appear at the hearing, although counsel appeared on behalf of both
17 Zhuang and Emerald.²

18 ///

19 ///

20 ///

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22
23 ¹ On May 10, 2004, the CFTC filed a First Amended Complaint ("FAC"),
24 naming additional defendants and relief defendants. The SRO and the preliminary
25 injunction as to Emerald and Zhuang were issued on the basis of the original
26 Complaint.

27 ² At the hearing, counsel for Defendants proffered the declaration of Benny
28 Tam, which had not been previously filed with the Court. The Court ordered that the
declaration be accepted for filing. However, upon review, the Court finds that, given
the declaration's lack of foundation and hearsay basis, it is not entitled to any
evidentiary weight.

ANALYSIS

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3 **A. The Legal Standard for Holding a Party in Civil Contempt.**

4 A court may hold a party in civil contempt for violating a court order. *See*
5 *United States v. Ayres*, 166 F.3d 991, 994 (9th Cir. 1999). Civil contempt sanctions
6 serve two purposes: “to coerce obedience to a court order, or to compensate the party
7 pursuing the contempt action for injuries resulting from the contemptuous behavior.”
8 *See General Signal v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986). In order
9 to obtain contempt sanctions, the moving party must demonstrate by clear and
10 convincing evidence that the other party violated a court order. *See Ayres*, 166 F.3d
11 at 994. Once the moving party establishes the violation, the burden shifts to the
12 alleged contemnor to produce evidence justifying his non-compliance. *See Nat’l*
13 *Labor Relations Bd. v. Trans Ocean Export Packing*, 473 F.2d 612, 616 (9th Cir.
14 1973). Unlike criminal contempt proceedings, the party petitioning the court for
15 civil contempt does not have to establish that the respondent intended to violate, or
16 willfully violated, the order. *See N.L.R.B. v. Ironworkers Local 433*, 169 F.3d 1217,
17 1222 (9th Cir. 1999). However, a party should not be held in contempt “if his action
18 ‘appears to be based on a good faith and reasonable interpretation of the [court’s
19 order].’” *See In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693,
20 695 (9th Cir. 1993) (quoting *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689
21 F.2d 885, 889 (9th Cir. 1982)).³

22
23 ³Defendants contend that “[t]he standard for imposing civil contempt sanctions
24 requires proof beyond a reasonable doubt, and a full blown trial where, as here, the
25 order allegedly contravened is complex.” *Opp.*, at 6. In support of this proposition,
26 Defendants cite *Federal Trade Comm’n v. Kuykendall*, 312 F.3d 1329 (10th Cir.
27 2002) (“Kuykendall I”), a case that was reversed by the Tenth Circuit, sitting en banc,
seven days before Defendants filed their opposition. *See Federal Trade Commission*
28 *v. Kuykendall*, — F.3d —, 2004 WL 1279583 (10th Cir. 2004) (“Kuykendall II”).

In *Int’l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827-

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B. Defendants Cannot Challenge the Validity of the SRO in a Contempt Proceeding.

Defendants contend that the Court should not enforce the SRO against them by holding them in civil contempt because the SRO, itself, is “transparently” invalid. Specifically, Defendants argue that the SRO is invalid because the CFTC lacks regulatory jurisdiction to even bring this case against them.

Ordinarily, the validity of an injunction is not reviewable in a civil or criminal contempt proceeding. *See GTE Sylvania, Inc. v. Consumers Union of United States*, 445 U.S. 375, 386 (1980) (discussing the “established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they do have proper grounds to object to the order.”) Defendants acknowledge this proposition, but contend that, “the underlying lawfulness of an injunction may be challenged when the order was ‘transparently invalid or had only a frivolous pretense to validity.’” *Opp.*, at 5 (citing *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967)). The Ninth Circuit has

29, 838-39 (1994), the Supreme Court held that because civil contempt sanctions (unlike criminal contempt sanctions) are designed to compel future compliance with a court order, and are avoidable through compliance, fewer procedural protections are necessary, and therefore neither a jury trial nor proof beyond a reasonable doubt is required. However, in dicta, the Court did acknowledge that contempts involving disobedience to a complex injunction “often require elaborate and reliable factfinding,” and thus a trial by jury *Id.* at 833-34.

In this case, because the CFTC is seeking only to compel Defendants’ future compliance with the SRO, because the SRO at issue is not particularly complex, and because (as discussed below), Defendants have not proffered any evidence supporting their contention that they did not violate the SRO, Defendants’ requests for a jury trial (or for a full-scale evidentiary hearing including the right to cross-examine foreign witnesses) and for a heightened standard of proof are DENIED. Before the hearing on this motion, Defendants were notified that the Court would conduct a hearing and they were given a chance to be heard at that hearing. These procedural protections are sufficient to protect Defendants’ due process rights.

1 noted that the “transparently invalid” exception applies only in the First Amendment
2 context:

3 Only in the rarest of situations do federal courts countenance a party’s
4 disregard of an existing court order because it was mistakenly issued – a
5 clearly invalid prior restraint in the First Amendment context, “where the
6 injunction was transparently invalid or had only a frivolous pretense to
validity,” is the only example that comes to mind. In all other situations
obedience to even an assertedly void (not merely voidable) order is required
unless and until it has been vacated or reversed.

7 *Zapon v. U.S. Dept. of Justice*, 53 F.3d 283, 285 (9th Cir. 1995) (citing *Walker*,
8 388 U.S. at 315). Therefore, because this case does not involve a prior restraint on
9 speech, Defendants cannot attack the validity of the SRO in this contempt
10 proceeding. They should have challenged it in opposition to the CFTC’s motion for
11 a preliminary injunction or any time thereafter, before violating it.

12
13 **C. In Any Case, the SRO Is Valid.**

14 Notwithstanding the abovementioned rule, in order to provide clarity to the
15 parties, the Court will address Defendants’ argument that the SRO is invalid.
16 Defendants argue that the CFTC lacks regulatory authority over the conduct alleged
17 in the FAC for two reasons: (1) because the CFTC has not established that any of
18 Defendants’ customers were located in the United States; and (2) because the
19 transactions at issue were spot transactions, rather than futures transactions.

20
21 1. Defendants’ Customers Need Not Be Located in the United States For
22 the CFTC To Have Regulatory Authority Over Defendants’ Alleged
23 Conduct.

24 In the FAC, the CFTC asserts that 7 U.S.C. § 2(c)(2)(B) grants it regulatory
25 authority and jurisdiction over the conduct at issue in this case: futures transactions
26
27
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1 in foreign currency.⁴ See *FAC* ¶ 2. Defendants contend that the CFTC has regulatory
2 authority over foreign transactions only if the participants to those transactions
3 reside in the United States. See *Opp.* at 8. Defendants further argue that because the
4 CFTC has not provided any evidence, to date, that any of Defendants' investors
5 resided in the United States, the CFTC lacks jurisdiction to bring this case.

6 In support of this proposition, Defendants cite 17 C.F.R. § 30.1(a), which
7 defines "foreign futures." Section 30.1(a) provides: "Foreign futures means any
8 contract for the purchase or sale of any commodity for future delivery made, or to
9 be made, on or subject to the rules of any foreign board of trade." Defendants also
10 cite 17 C.F.R. § 30.1(c), which defines "foreign futures customer," and provides in
11 relevant part, "Foreign futures or foreign options customer means any person located
12 in the United States...who trades in foreign futures or foreign options..." However,
13 these provisions are merely definitions promulgated by the CFTC pursuant to its
14 rule-making authority. Nothing in the statute, 7 U.S.C. § 2(c)(2)(B), exempts from
15 the CFTC's jurisdiction "foreign futures" or transactions involving "foreign futures
16 customers." Instead, 7 U.S.C. § 2(c)(2)(B) speaks only of transactions involving
17 "foreign *currency*." (Emphasis added.)

18
19 ⁴7 U.S.C. § 2(c)(2), entitled "Commission jurisdiction," provides: "... (B) This
20 chapter applies to, and the Commission shall have jurisdiction over, an agreement,
21 contract, or transaction in foreign currency that - - (I) is a contract of sale of a
22 commodity for future delivery...; and (ii) is offered to, or entered into with, a person
23 that is not an eligible contract participant, unless the counterparty, or the person
24 offering to be the counterparty, of the person is - - (I) a financial institution; (II) a
25 broker or dealer registered under section 15(b) or 15C of the Securities Exchange Act
26 of 1934 or a futures commission merchant registered under this chapter; (III) an
27 associated person of a broker or dealer registered under section 15(b) or 15C of the
28 Securities Exchange Act of 1934, or an affiliated person of a futures commission
merchant registered under this chapter...; (IV) an insurance company...; (V) a
financial holding company...; or (VI) an investment bank holding company..." In
essence, 7 U.S.C. § 2(c)(2) grants the CFTC regulatory authority over futures
contracts in foreign currency that are not conducted between, or do not involve,
sophisticated or institutional investors.

1 Defendants also cite 7 U.S.C. § 6(a), which exempts from the CFTC's
2 regulatory authority over futures trading, contracts "made on or subject to the rules
3 of a board of trade, exchange, or market located outside the United States..." and 7
4 U.S.C. §6b(c), which exempts from the CFTC's regulatory authority over fraudulent
5 commodities futures transactions, "any activity that occurs on a board of trade,
6 exchange, or market...located outside of the United States..."

7 These statutory provisions also do not support Defendants' contention,
8 because here the CFTC does not allege that any foreign currency futures transactions
9 occurred on, or subject to the rules of, a foreign exchange. The CFTC also does not
10 allege that Defendants held themselves out to investors as willing to conduct futures
11 transactions on, or subject to the rules of, a foreign exchange. Rather, the CFTC
12 alleges that, "...the transactions Emerald purports to offer are not conducted on or
13 subject to the rules of a designated contract market or derivatives transaction
14 execution facility," and that Defendants are "soliciting, or accepting any order for,
15 or otherwise dealing in, illegal *off-exchange* futures contracts..." FAC ¶ 13 (emphasis
16 added). Therefore, the abovementioned statutory provisions which exempt from the
17 CFTC's regulatory jurisdiction futures transactions that occur on a foreign exchange
18 are not applicable here.

19
20 2. The CFTC Has Provided Sufficient Evidence that Defendants Held
21 Themselves Out as Conducting Futures Transactions, Not Spot
22 Transactions.

23 Defendants next contend that because they offered and engaged only in spot
24 transactions, rather than futures transactions, the CFTC lacks jurisdiction to sue
25 them. The CFTC's regulatory jurisdiction is limited to, "accounts, agreements...and
26 transactions involving contracts of sale of a commodity for future delivery." 7 U.S.C.
27 § 2(a)(1)(A). Futures contracts are agreements for the future delivery of a
28 commodity at a price agreed upon today. Investors typically enter futures contracts

1 in order to hedge or speculate upon price changes, and the parties to a futures
2 contract rarely take actual physical delivery of the underlying commodity. See
3 *CFTC v. Noble Metals Int'l*, 67 F.3d 766, 772-73 (9th Cir. 1995); *CFTC v. CO Petro*
4 *Mktg Group*, 680 F.2d 573, 578-81 (9th Cir. 1982). In contrast, so-called spot
5 transactions are agreements to purchase a commodity for immediate and actual
6 delivery. "Spot transactions in foreign currencies call for settlement within two
7 days," and are usually motivated by the buyer's actual need for the currency. See
8 *CFTC v. Noble Wealth Data Info Services, Inc.*, 90 F.Supp.2d 676, 688-89 (D. Md.
9 2000), *vacated in part on other grounds*, *CFTC v. Baragosh*, 278 F.3d 319 (4th Cir.
10 2002).

11 The CFTC has proffered sufficient evidence to the Court to establish that the
12 transactions Defendants were offering investors were futures transactions, not spot
13 transactions. This evidence includes:

14
15 (1) Emerald's website and brochure acknowledge that Emerald and Ace Financial
16 Group (Emerald's parent company) are members of, and regulated by, the
17 CFTC, the National Futures Association ("NFA"), and the Futures
18 Commission Merchant ("FCM"). None of these agencies regulates spot
19 transactions. See *SRO Motion, Exh. 1, Attach. B*, at 400 00005-7; *Exh 1,*
20 *Attach. C* at 1, 2, 6.

21
22 (2) Emerald's website and brochure describe the investments that Emerald offers
23 as having the classic characteristics of futures transactions, rather than spot
24 transactions:

25 (A) Although Emerald's website describes in detail the procedures for
26 trading foreign currency, neither Emerald's website nor its brochure
27 mentions actual physical delivery of foreign currency.

28

1 (B) Emerald's website and brochure speak of "speculation," "profit," and
2 "increasing net worth," terms typically associated with speculation, not
3 trading for necessity. See *SRO Mot, Exh. 1, Attach. B*, at 400,00003;
4 *Attach. C*, at 5, 11, 15, 16.

5
6 (3) Two financial consultants at City Trust and Investment Co. ("CTI"),
7 Emerald's exclusive marketing agent in Japan, and named as a party-
8 defendant in the FAC, declared that, (a) "Emerald customers don't expect to
9 take possession of any foreign currency, only the profit or loss from their
10 trades;" (b) "Emerald customers invested solely for the purpose of earning
11 profits;" (c) "Emerald customers were permitted to hold their positions open
12 indefinitely;" and (d) "there is no time limit imposed by Emerald on how long
13 a customer can hold a foreign currency contract." See *Sakamoto Decl.*, ¶ 21,
14 *Kubota Decl.* ¶ 14 (*3rd Gomersall Decl., Exh. 5*).

15
16 The Court finds this to be convincing evidence that the foreign currency
17 transactions Defendants were offering investors were futures transactions, not spot
18 transactions. Accordingly, based on the evidence proffered to the Court so far, the
19 CFTC does have regulatory jurisdiction over the transactions that Defendants offered
20 to investors.

21
22 **D. The CFTC Has Established, by Clear and Convincing Evidence, That**
23 **Defendants Have Violated Several Provisions of the SRO.**

24 The CFTC contends that Defendants have violated the SRO by: (1)
25 transferring overseas approximately \$1,020,000 from two frozen Citibank accounts;
26 (2) failing to repatriate those funds; (3) refusing to provide the CFTC with an
27 accounting of their foreign assets; (4) refusing to permit the CFTC to inspect or copy
28 their books and records; and (5) concealing assets acquired after issuance of the

1 SRO. The Court will address each of these contentions, and the evidence proffered
2 by the CFTC in support of each contention, separately.

3
4 1. Transferring Funds From Frozen Bank Accounts.

5 The CFTC first contends that Zhuang violated the SRO on the evening of
6 November 19, 2003 (the day after the Court issued the SRO) by wiring overseas
7 approximately \$1,020,000 from two of Emerald's Citibank accounts, which were
8 supposed to be frozen.⁵ The Citibank records of the wire transfers indicate that
9 Zhuang wired \$550,000 to an account at UFJ Bank Limited in Japan in the name of
10 CTI, \$200,000 to an account at HSBC in Hong Kong in the name of Emerald
11 Worldwide Holdings, Inc., \$200,000 to an account at HSBC in Hong Kong in the
12 name of Zen Hanping⁶, and \$70,000 to an account at the Bank of China in the name
13 of Huang Bin. *See 3rd Gomersall Decl., Exh. 1A.* In March or April of this year,
14 Citibank was able to repatriate the \$400,000 wired to HSBC in Hong Kong, but to
15 date, it has been unsuccessful in repatriating the remaining \$620,000 that Zhuang
16 wired to CTI in Japan and to Huang Bin in China.⁷

17 Defendants argue in their opposition that they did not violate the SRO by
18 wiring \$1,020,000 overseas because "there is no evidence that the transferred funds
19

20
21 ⁵ In their opposition brief, Defendants did not raise an issue as to whether they
22 were on notice of the SRO as of this date. (See *infra*.)

23 ⁶ Counsel for the CFTC declares that two CTI employees told her that Zeng
24 Hanping is Zhuang's mother. *See Brown Decl.*, ¶ 13. Counsel for the CFTC also
25 declares that Mr. Weichert, counsel for Defendants, advised her that Zeng Hanping
26 incorporated, under the laws of Hong Kong, a *separate and distinct* corporation (also
named Emerald Worldwide Holdings, Inc. This is the corporation to which Zhuang
wired \$200,000.

27 ⁷ Citibank has apparently acknowledged its liability to the CFTC and has
28 represented that if the CFTC obtains a favorable judgment from this Court, it will
reimburse the CFTC for the remaining funds that its employee mistakenly permitted
Zhuang to wire overseas.

1 were owned by [either Zhuang or Emerald],” and that “a logical explanation for the
2 November 19, 2003 transfer, and one that is consistent with the CFTC’s
3 representations, is that the monies belonged to CTI.” *See Opp.*, at 12. SCANNED

4 This defense fails because regardless of who *owned* the \$1,020,000 at the time
5 Zhuang transferred it overseas, the SRO prohibited Zhuang from transferring assets
6 “owned by, controlled by, or held for the benefit” of either himself or Emerald.
7 Therefore, it is irrelevant whether or not Zhuang or Emerald actually “owned” those
8 assets, so long as they controlled them (which they clearly did). Moreover, the fact
9 that some of the money in the Citibank accounts might have “belonged to” CTI does
10 not explain why Zhuang transferred \$620,000 to other beneficiaries.

11 At the hearing on this motion, the Court discussed with the parties the
12 implication of the fact that Defendants were not served with the November 18, 2003
13 SRO until January 7, 2004. In response to this inquiry, counsel for Defendants
14 argued that his clients lacked notice of SRO on November 19, 2003 (the date they
15 withdrew the funds from the Citibank). The CFTC failed to proffer clear and
16 convincing evidence that Defendants actually had notice of the SRO on November
17 19, 2003. For this reason, the Court finds that although the CFTC has proved by
18 clear and convincing evidence that Zhuang wired \$1,020,000 out of Emerald’s
19 Citibank accounts on November 19, 2003, the CFTC has not proven, by clear and
20 convincing evidence, that Defendants violated the SRO when Zhuang did so.

21
22 **B. Failing to Repatriate the Funds Wired Overseas.**

23 The CFTC contends that Defendants violated the SRO, not only by wiring
24 \$1,020,000 overseas, but also by subsequently failing to repatriate those funds.
25 Section III of the SRO orders Defendants, within five business days following
26 service of the SRO, to “Transfer to the territory of the United States all funds,
27 documents, and assets located in foreign countries which are held by them, for their
28 benefit, or under their direct or indirect control, whether jointly or singly.” *See SRO*,
¶ 19. Defendants were officially served with the SRO on January 7, 2004. Therefore,

1 they had until January 15, 2004 to comply with Section III.

2 Defendants argue in their opposition that CTI was not restricted by, or subject
3 to, the SRO, and therefore CTI's failure to repatriate the \$400,000 wired to it cannot
4 be a violation of the SRO. *See Opp.*, at 12. The same argument presumably applies
5 to Zeng Hanping, Huang Bin, and the Hong Kong corporation carrying the name of
6 one of the defendants - - Emerald Worldwide Holdings, Inc.

7 Defendants' argument fails. The SRO defines the term "assets" to include
8 bank account funds controlled by or held for the benefit of Defendants. *See SRO* ¶
9 9. The SRO also orders Defendants to transfer to the United States all assets held (by
10 others) for their benefit, or under their direct or indirect control. *Id.* ¶ 19. Therefore,
11 if the funds Zhuang transferred are now in bank accounts either controlled by or held
12 for the benefit of Defendants, then Defendants have violated the SRO by failing to
13 repatriate those assets.

14 The CFTC has provided the following evidence that Zhuang retains at least
15 indirect control over the \$550,000 he wired to CTI:⁸

16
17 (1) CTI's marketing brochure states that CTI is the "exclusive Japanese agent of
18 Emerald Worldwide Holdings, Inc., in the Ace Emerald Group." *See 3rd*
19 *Gomersall Decl., Exh. 4B.*

20
21 (2) Two CTI financial consultants and one general manager of a Japanese
22 investment brokerage firm have declared that Zhuang (known in Japan as "So
23 Ken") holds himself out as the shareholder, director and head of business
24 operations of CTI. *See Sakamoto Decl., ¶ 5; Otomo Decl. ¶¶ 5, 9; Kubota*
25 *Decl. ¶ 5 (3rd Gomersall Decl., Exhs. 3- 5).*

26
27
28 ⁸ Although Citibank was eventually able to repatriate these funds on its own on
March or April 2004, Zhuang and Emerald may still be held in contempt for failing
to repatriate the funds themselves before January 15, 2004.

1 (3) A copy of "So Ken's" business card indicates that he is the Administrative
2 Director of CTI. *See 3rd Gomersall Decl., Exh. 5E.*

3
4 (4) The majority shareholder/general manager of a Japanese investment brokerage
5 firm that invested funds in Emerald declared that Zhuang was previously a
6 shareholder and director of a now defunct trading company called Unilink
7 International, Ltd. ("Unilink"), which was split to form two separate
8 companies: CTI and Kabushiki Kaisha Kagayaki. *See Otomo Decl. ¶ 6.*

9
10 The Court finds this to be clear and convincing evidence that Zhuang holds
11 a position of significant authority and control at CTI, and therefore that Zhuang and
12 Emerald have at least indirect control over the funds wired to CTI. Defendants do not
13 contend otherwise. In addition, the timing of the wire transfers suggests that the
14 funds are being held by the recipients for Defendants' benefit (*i.e.*, to negate the
15 Court's order freezing the funds and to prevent the CFTC from ultimately seizing
16 them). Therefore, the Court finds that Defendants also violated the SRO by failing
17 to repatriate the funds wired to CTI. However, because the record is less clear
18 regarding the relationship and degree of control between Defendants and Zen
19 Hanping, Huang Bin and the Hong Kong corporation named Emerald Worldwide
20 Holdings, Inc., the Court cannot find that those Defendants violated the SRO by
21 failing to repatriate the funds wired to them.

22
23 3. Failure to Provide an Accounting for Assets Located Overseas.

24 The CFTC next contends that Defendants violated the SRO by failing to,
25 within five business days of service of the SRO (or any time thereafter), provide it
26 with "a full accounting of all funds, documents, and assets outside of the United
27 States that are held by them, for their benefit, or under their direct or indirect control,
28 whether jointly or singly," as required by Section III of the SRO. *See SRO ¶ 19.*
Defendants, in their opposition, do not respond to this argument.

1 The only overseas assets that the CFTC has identified are the \$1,020,000 that
2 Zhuang wired overseas on November 19, 2003. (The CFTC has not provided any
3 evidence that Defendants own or control any other overseas funds or assets.) As
4 discussed above, the CFTC has presented clear and convincing evidence that Zhuang
5 wired that money out of Emerald's Citibank accounts. The CFTC contends, and
6 Defendants do not dispute, that Defendants did not deliver to the CFTC an
7 accounting of those off-shore assets by January 15, 2004 (or at any time thereafter).
8 Therefore, the Court finds that Zhuang and Emerald violated the SRO by failing to
9 provide an accounting, by January 15, 2004, of the \$1,020,000 wired overseas on
10 November 19, 2003. The required accounting is not limited to the \$550,000 that
11 Zhuang wired to CTI in Japan. Rather, Defendants violated the SRO by failing to
12 account for the entire \$1,020,000 that Zhuang wired overseas.

13
14 4. Refusal to Permit Inspection and Copying of Books and Records.

15 The CFTC also contends that Defendants violated the SRO by refusing to
16 make available to the CFTC for inspection and copying numerous documents,
17 including electronic documents maintained on computer hard drives. Section V of
18 the SRO ordered Defendants to permit the CFTC to inspect and copy their "books,
19 records, and other documents...including, but not limited to, electronically stored
20 data, tape recordings, and computer discs, wherever they may be situated and
21 whether they are in the person of the Defendants or others..." *See SRO* ¶ 22.

22 The CFTC contends that on November 18, 2003, (the day the Court issued the
23 SRO), its counsel went to Emerald's Castleton Street office in the City of Industry
24 to serve Emerald with a copy of the SRO and to collect documents. *See Brown Decl.*
25 ¶ 4. However, upon arrival, counsel learned from the cleaning personnel that
26 Emerald had closed its offices and removed the contents three weeks earlier. *Id.* The
27 following afternoon, on November 19, 2003, counsel for the CFTC visited the
28 Rosemead office of ACE Diversified Capital, Inc. ("ACE"), another subsidiary of
ACE Financial Group, where post office records indicated that Emerald was having

1 its mail forwarded. *Id.* ¶ 6. At ACE's office, Lynwood Jen informed counsel for the
2 CFTC, and counsel subsequently confirmed by inspection, that no documents
3 regarding Emerald's business activities were located there. *Id.*

4 Later the same day, counsel for the CFTC visited the residence of Joseph Mok
5 (an Emerald employee), who did provide counsel with documents relating to
6 Emerald. *Id.* ¶ 8. Mr. Mok also advised the CFTC that he possessed and used one
7 computer previously located in Emerald's Castleton Street office, but that morning
8 he had taken the hard drive to a computer shop. *Id.* Mr. Mok provided counsel with
9 a copy of the work order, which stated that the store had been instructed to "delete
10 everything" and not to back up the hard drive. *Id.*; 3rd *Gomersall Decl.*, ¶ 9 n. 1.

11 Counsel for the CFTC has since requested on two occasions that Mr.
12 Wiechert, Defendants' counsel, make available Emerald's books and records for
13 inspection. *See Brown Decl.* ¶ 15. However, Mr. Wiechert has not responded to
14 either request. *Id.* The CFTC contends that Emerald must have more documents than
15 it recovered from Mr. Mok because Mr. Lu testified at his deposition that he spent
16 more than \$40,000 on office equipment for Emerald, in part for the purchase of six
17 or more computers. *See Lu Depo.*, at 47-48.

18 Defendants, in their opposition, contend that they have complied with Section
19 V of the SRO because, "[a]t the same time that the CFTC obtained a statutory
20 restraining order it seized the records at Emerald's business office," and that the
21 CFTC's contention that there must be more documents "is object speculation."
22 Defendants further argue that even if there are a small number of undisclosed
23 documents or records, they have substantially complied with the SRO and therefore
24 should not be held in contempt. *See General Signal Corp. v. Donalco, Inc.*, 787
25 F.2d 1376, 1379 (9th Cir. 1986) ("If a violating party has taken 'all reasonable steps'
26 to comply with the court order, technical or inadvertent violations of the court order
27 will not support a finding of civil contempt.")

28 Defendants' arguments are unpersuasive. First, Defendants do not provide any
evidence, in the form of declarations or otherwise, that the CFTC actually seized

1 Emerald's business records from its Castleton Street office on November 18, 2003.
2 Second, Defendants do not explain, or provide any evidence about how they have
3 substantially complied with the SRO; whether there actually are additional
4 documents that they have not provided to the CFTC; and if so why, perhaps through
5 inadvertence or inability, they have not turned over any additional materials. *See*
6 *Food Lion, Inc. v. United Food and Comm'l Workers Int'l Union*, 103 F.3d 1007,
7 1017 (D.C. Cir. 1997) (the burden of proving substantial compliance is on the party
8 asserting the defense).

9 For these reasons, the Court finds that the CFTC has provided clear and
10 convincing evidence, which Defendants have failed to rebut, that Defendants have
11 also violated Section V of the SRO.

12
13 5. Concealing Assets Acquired After Issuance of the SRO.

14 Finally, the CFTC contends that Defendants violated the SRO by transferring
15 and concealing assets obtained after the issuance of the SRO by directing Emerald's
16 customers to deposit investment funds into newly-opened bank accounts in the
17 names of other parties. Section I of the SRO prohibits Defendants from transferring
18 and concealing assets, including assets held outside of the United States and assets
19 acquired after the issuance of the SRO. *See SRO* ¶ 11.

20 The CFTC has provided the following evidence that Emerald has opened new
21 bank accounts, and has directed its investors to deposit their funds into these new
22 accounts, in order to avoid detection by the CFTC and/or avoid those assets being
23 frozen:

- 24
25 (1) Ace Capital Advisory Group was incorporated in California on November 15,
26 2003. *See 3rd Gomersall Decl.*, ¶ 25. Its registered business address is 8855
27 Valley Blvd. #205, Rosemead, California 91770, the same address to which
28 Emerald has been having its mail forwarded since November 2003. *Id.*; *2nd*
Gomersall Decl. ¶ 6.

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- (2) On November 26, 2003 (approximately one week after the Court issued the SRO), Esther Pranolo and Lynwood Jen opened a new Citibank account in the name of Ace Capital Advisory Group. *See Mot., Exh. A.* The account number is 200777993. *Id.*

- (3) On December 1, 2003, Emerald and Ace Capital Advisory Group sent a memo to Emerald investors, requesting investors to begin wiring their funds to Ace Capital Advisory Group's Citibank account # 200777993. *See 3rd Gomersall Decl., Exh. 3B.* The memo explained that the new wiring instructions were necessary "in view of the recently enacted Patriot Act by U.S. Congress to prevent terrorist [sic] using wired fund [sic] for their own cause." *Id.*

- (4) The bank records of Ace Capital Advisory Group's Citibank account # 200777933 indicate that between November 2003 and April 2004, many international wire transfers were made in and out of that account. *Id.*

- (5) On December 9, 2003, Ace Emerald W. Holding, Inc. was incorporated in Nevada by Kon Sang Mok. *See 3rd Gomersall Decl., Exh. 1D.*

- (6) On January 15, 2004, Emerald sent a memo to CTI, explaining that in order "to provide better service to out client [sic], we are going to change a bank account in the USA," and requesting investors to wire funds to a Bank of America account in California in the name of Ace Emerald W. Holdings, Inc. The account number was 000422715407. *See 3rd Gomersall Decl., Exh. 3D.* Bank of America records of that account indicate that between December 2003 and the end of April 2004, many international wire transfers were made into that account. *See Mot., Exh. B.*

1 Defendants argue in their opposition that the abovementioned activities
2 somehow have to do with CTI's conduct, rather than Emerald's, and that Emerald
3 should not be held accountable for CTI's activities. *See Opp.* at 11. Defendants
4 misconstrue the nature of the CFTC's argument and evidence. The evidence
5 provided by the CFTC has little, if anything, to do with CTI. Rather, both the
6 December 1, 2003 and January 15, 2004 memos were authored by Emerald
7 representatives. The timing of the opening of the two new bank accounts, the
8 misleading explanations given for the new wiring instructions, the substantial
9 amount of money subsequently wired in and out of those accounts, and Emerald's
10 failure to provide an accounting of those transactions to the CFTC is clear and
11 convincing evidence that Emerald continued to obtain, transfer, and perhaps even
12 conceal, assets after the issuance of the SRO, in violation of Section I of the SRO.

13
14 The foregoing are the Court's findings and conclusions. Any finding of fact
15 that may be construed as a conclusion of law shall be so construed, and vice-versa.

16
17 **E. The Relief to Which the CFTC is Entitled.**

18 Good cause appearing therefore, the Court ORDERS as follows:

- 19
20 1. Defendants Emerald and Zhuang shall:
- 21
- 22 A. Fully comply with all the terms and conditions of the Court's
23 November 18, 2003 SRO;
- 24
- 25 B. Immediately cease soliciting and collecting funds from customers,
26 wherever located, for the purpose of investing in speculative foreign
27 currency transactions in the United States through Emerald, if and to
28 the extent that such solicitation and collection of funds would result in
or be a part of a violation of the Commodity Exchange Act, 7 U.S.C. §

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1 *et seq.*;

C. Within ten (10) business days of service of this Contempt Order, advise CTI in writing, with a copy submitted to the CFTC, that Emerald terminates CTI's authority to solicit customers on behalf of Emerald to invest in speculative foreign currency transactions in the United States, if and to the extent that CTI's solicitation would constitute, lead up to, or be part of a violation of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*;

D. Within ten (10) business days of service of this Contempt Order, advise in writing each customer who currently maintains funds with Emerald or maintains an investment account for the purpose of investing in speculative foreign currency investments in the United States through Emerald, that CTI no longer has authority to accept funds on behalf of Emerald for the purpose of investments in speculative foreign currency transactions in the United States, if and to the extent that accepting such funds would constitute, lead up to, or be part of a violation of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* This written notice shall be mailed separately to each customer, with each customer's name and address appearing on the notice. Zhuang and Emerald shall also provide the CFTC with a copy of the notice sent to each customer (bearing each customer's name and address);

E. Within ten (10) business days after the service of this Contempt Order, repatriate to Emerald's Citibank account #200113892 the sum of \$550,000, which was transferred to CTI on November 19, 2003;

F. Within ten (10) business days after this service of this Contempt Order,

1 each execute and deliver to the CFTC the Consent to Release of
2 Financial Records form attached to the November 18, 2003 SRO;
3

4 G. Within ten (10) business days after service of this Contempt Order,
5 make available to the CFTC, for inspection and reproduction, all of
6 Emerald's books, records and other documents, including electronically
7 stored data, or, if Emerald is unable to make books, records and other
8 documents, including electronically stored data, available to the CFTC,
9 file with the District Court, with a copy submitted to the CFTC, a
10 declaration under penalty of perjury by Zhuang setting forth in detail
11 all efforts by Emerald, Zhuang and their agents to locate Emerald's
12 books, records and other documents, including electronically stored
13 data, and the disposition of the contents of Emerald's Castleton Street
14 offices;

15
16 H. Within ten (10) business days after the service of this Contempt Order,
17 pay to the CFTC \$4,672.33 in compensatory damages for expenses and
18 attorneys' fees incurred in the investigation and prosecution of this
19 contempt proceeding. The money should be sent to the attention of the
20 lead attorney, Christine Ryall;

21
22 I. Within twenty (20) days of the service of this Contempt Order, Emerald
23 and Zhuang shall each file with the District Court, with a copy
24 submitted to the CFTC, a sworn affidavit setting forth with specificity
25 the manner in which each has complied with the terms of this Contempt
26 Order;

27
28 2. A failure by either Zhuang or Emerald to comply with the foregoing
provisions will constitute clear and convincing evidence that coercive

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sanctions are necessary to ensure compliance and future compliance. Accordingly, upon a satisfactory showing by the CFTC that either has failed to comply with this Contempt Order, the Court intends to impose the following sanctions:

A. Zhuang shall pay to the District Court a daily compliance fine of \$250.00. If, thereafter, Zhuang fails to pay such fine, the Court will entertain an application from the CFTC for a writ of body attachment, arrest warrant or other comparable remedy.

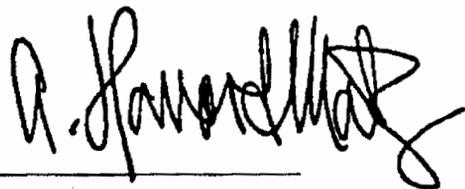
B. Emerald shall pay to the District Court a daily compliance fine of \$200.

3. Any monetary sanction imposed and collected from Defendants Zhuang and Emerald shall neither be paid by nor reimbursed by Defendant CTI.

4. The CFTC shall serve CTI with this Contempt Order and CTI is bound by it.

IT IS SO ORDERED.

DATE: July 29, 2004



A. Howard Matz
United States District Judge