

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION AT MEMPHIS

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Robert R. Di Trolo
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COMMODITY FUTURES TRADING COMMISSION,)

Plaintiff,)

FxTRADE FINANCIAL, LLC; JEFFREY A.)
MISCHLER; LEE N. ROMANO II; MARY JO)
SIBBITT; ERNST H. BEHR; GORDON J.)
VANDEVELD; AND REVERIE LLC,)

Defendants,)

JOSEPH J CECALA, JR.,)

Relief Defendant.)

Case No. 04-2181-BBD
**First Amended Complaint for a
Permanent Injunction, Other
Equitable Relief, and Civil
Monetary Penalties**

I. SUMMARY

1. From at least June 2003 through at least May 2004, FxTrade Financial, LLC (FxTrade), by and through Jeffrey A. Mischler (Mischler), Lee N. Romano II (Romano), Mary Jo Sibbitt (Sibbitt), Reverie LLC (Reverie), Ernst H. Behr (Behr), and Gordon J. Vandeveld (Vandeveld) (collectively, Defendants) solicited retail investors to open accounts or to otherwise provide funds for trading off-exchange foreign currency. Thus far, Defendants have solicited more than \$1.1 million from at least nine investors.

2. It appears that most of the investors' funds were deposited into bank accounts of FxTrade or its counsel, Joseph Cecala, Jr. (Cecala or relief defendant). Only \$202,000 of the more than \$1.1 million solicited from customers was deposited into an FxTrade trading account. Of that amount, \$152,000 was placed in trading accounts located in the United States, and

\$50,000 was placed in a trading account in Switzerland. With respect to activity in FxTrade's domestic trading accounts, approximately \$39,000 was lost trading and more than \$93,000 was withdrawn. The Swiss trading account made a small profit.

3. Defendants have fraudulently solicited, made material misrepresentations, and misappropriated investor funds, all in violation of Section 4b(a)(2)(i) and (iii) of the Commodity Exchange Act, as amended (the Act), 7 U.S.C. § 6b(a)(2)(i) and (iii) (2002).

4. Accordingly, the Commodity Futures Trading Commission (the Commission) brings this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, to enjoin Defendants' unlawful acts and practices and to compel their compliance with the Act. In addition, the Commission seeks disgorgement of Defendants' ill-gotten gains, restitution for damages proximately caused by Defendants' violations, civil monetary penalties, and such other relief as the Court may deem necessary and appropriate.

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

II. JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1, which authorizes Plaintiff 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 the Act or any rule, regulation, or order thereunder.

7. Section 2(c)(2)(B) and (C) of the Act, 7 U.S.C. § 2, confers on the Commission jurisdiction, including anti-fraud jurisdiction, over transactions in foreign currency futures

contracts offered and/or entered into by defendants for or on behalf of their retail investors, as alleged in this Complaint.

8 Venue properly lies with the Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), because certain Defendants are found in, inhabit, or transact business in the Western District of Tennessee and certain of the transactions, acts, practices and courses of business alleged occurred, are occurring, and/or are about to occur within this District.

III. THE PARTIES

9 Plaintiff Commission is a federal independent regulatory agency that is charged with the administration and enforcement of the Act, 7 U.S.C. §§ 1 *et. seq.*, and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et. seq.* The Commission maintains its principal office at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

10. FxTrade Financial, LLC is a Tennessee company with its principal place of business at 8653 Heatherly Cove, Germantown, TN 38138. FxTrade has never been registered with the Commission in any capacity.

11. Jeffrey A. Mischler is an individual with a last known address of 8653 Heatherly Cove, Germantown, TN 38138. He has never been registered with the Commission. Mischler is FxTrade's chief executive officer and managing partner.

12. Lee N. Romano II is an individual with last known mailing addresses of 6403 Main Street, Union, IL 60180 and P.O. Box 17, Union, IL 60180. He has never been registered with the Commission.

13. Mary Jo Sibbitt is an individual with a last known address of 21 W. 611 Glen Park Road, Glen Ellyn, IL 60137. She has never been registered with the Commission.

14. Reverie LLC is an Illinois corporation with its principal place of business at 21 W. 611 Glen Park Road, Glen Ellyn, IL 60137. Reverie is owned by Sibbitt and her husband. It has never been registered with the Commission.

15. Ernst H. Behr is an individual with a last known address of 1575 Delucchi Lane, #115, Reno, NV 89502. Behr has never been registered with the Commission.

16. Gordon J. Vandeveld is an individual with a last known home address of 2530 Iroquois Road, Wilmette, IL 60091 and a last known business address of 1765 Maple Street, Suite 10, Northfield, IL 60137. Vandeveld has never been registered with the Commission.

17. Joseph J. Cecala, Jr. has a business address of the Law Offices of Joseph J. Cecala, Jr., 222 Albion Street, Park Ridge, IL 60068. Cecala has never been registered with the Commission.

IV. FACTUAL BACKGROUND

A. Solicitations

18. From at least June 2003 through at least May 2004, Defendants solicited individuals to invest in or otherwise provide funds to FxTrade for the purported purpose of trading foreign currency.

19. In June 2003, Defendant Sibbitt approached a prospective investor (Investor One) about investing in a company called "FX." Sibbitt informed Investor One that Defendant Romano and another man operated FX. Investor One soon learned that "FX" was Defendant FxTrade. According to Sibbitt, FxTrade had an established track record of success in trading foreign currency. In addition, Sibbitt told Investor One that she invested in FxTrade and made approximately \$50,000 in only three weeks.

20. On numerous occasions shortly thereafter, Investor One met with both Sibbitt and Romano. Sibbitt and Romano told Investor One that FxTrade investments are "100% guaranteed." Romano also stated that FxTrade pays a monthly commission or finder's fee of one percent to anyone who introduces additional investors to FxTrade.

21. Romano informed Investor One that FxTrade requires a minimum initial investment of \$100,000, but Investor One was willing to invest only \$25,000. To meet the alleged minimum investment requirement and prove to Investor One that FxTrade could generate a significant investment return, Romano offered to pool \$75,000 of his own funds with Investor One's money.

22. On June 27, 2003, Investor One entered into an agreement with Romano to invest \$25,000 trading foreign currency through FxTrade for a one-month period. In turn, Romano promised to return Investor One's \$25,000 investment, along with a guaranteed return, on July 30, 2003.

23. On June 28, 2003, per Romano's instructions, Investor One wired \$25,000 to Romano's personal bank account. Romano told Investor One that her funds, along with \$75,000 of his funds, would be invested with FxTrade in Memphis, Tennessee.

24. In July 2003, Sibbitt and Romano explained to Investor One that FxTrade uses an advisory software program that generates recommendations regarding the type and timing of foreign currency transactions.

25. After repeated requests, Sibbitt and Romano provided Investor One an FxTrade brochure in August 2003. They also suggested that Investor One consult FxTrade's website for additional information.

26. In August 2003, Investor One shared with a friend (Investor Two) the FxTrade information she had received from Sibbitt and Romano. During that conversation, Investor Two indicated to Investor One that she would like to invest in FxTrade. Investor One put Investor Two in contact with Mischler, who mailed an FxTrade account agreement to Investor Two.

27. On August 25, 2003, Investor Two entered into an agreement with FxTrade to trade \$100,000 in foreign currency for a period of six months. As part of the agreement, Investor Two was to receive certain guaranteed payments.

28. On or about August 26, 2003, per Mischler's instructions, Investor Two wired \$100,000 to FxTrade's bank account in Memphis, Tennessee. Mischler confirmed receipt of the \$100,000 via e-mail on August 27, 2003.

29. On or about October 30, 2003, FxTrade entered into a broker agreement with Reverie. Sibbitt and her husband signed the agreement on behalf of Reverie. Since entering into the broker agreement, Sibbitt has continued to solicit investors to provide money to FxTrade and to tell them that FxTrade would use their money to trade foreign currency. Sibbitt told at least one investor that Sibbitt's parents invested money with FxTrade. Sibbitt touted FxTrade to potential investors by, among other things, informing them about FxTrade's ability to provide investors returns ranging between 36 and 84 percent a year. In addition, she provided FxTrade brochures to potential investors that were substantially similar to what was provided to Investor One. Sibbitt's representations described herein occurred in both her individual capacity and on behalf of Reverie. Further, Reverie and Sibbitt received tens of thousands of dollars in commission payments from FxTrade for their services.

30. FxTrade entered into a broker agreement with Vandeveld on or about November 14, 2003. Beginning no later than December 2003, Vandeveld began soliciting

investors to provide money to FxTrade. He represented that FxTrade would use the investors' money to trade foreign currency. Among other things, Vandeveld told investors that his wife had invested \$100,000 or more with FxTrade and that FxTrade would provide returns ranging from 36 to 84 percent a year. Vandeveld provided investors and potential investors FxTrade brochures substantially similar to the one provided to Investor One. Further, Vandeveld told investors that he had performed substantial research and due diligence concerning FxTrade and learned that it had been doing business for three years and that the investment was legitimate. As a result of Vandeveld's solicitations, investors provided hundreds of thousands of dollars to FxTrade, and Vandeveld received tens of thousands of dollars in commission payments from FxTrade.

31. FxTrade entered into a broker agreement with Behr in or about February 2004. Beginning no later than February 2004, Behr began soliciting investors to provide money to FxTrade. He represented that FxTrade would use the investors' money to trade foreign currency. Behr represented to investors, among other things, that he had personally invested in FxTrade, that FxTrade investors averaged a 60 percent annual rate of return, and that new FxTrade investors also would earn a 60 percent annual rate of return. Behr further told investors that he performed due diligence on FxTrade by inspecting FxTrade's books and records in Memphis, Tennessee and by speaking to FxTrade investors. Consequently, he told investors that FxTrade had been in business for four years and that it had a good track record. As a result of Behr's solicitations, investors provided hundreds of thousands of dollars to FxTrade, and Behr received tens of thousands of dollars in commission payments from FxTrade.

B. Misrepresentations

32. Sibbitt's representations to Investor One were false and made only to induce Investor One to invest in FxTrade. For example, Sibbitt falsely claimed that she had made significant profits investing in FxTrade. In fact, Sibbitt never invested any money with FxTrade.

33. When Romano and Sibbitt told Investor One about FxTrade in June 2003, the company was not even in existence. It was not until July 11, 2003 that Mischler filed FxTrade's Articles of Incorporation with the State of Tennessee.

34. The FxTrade brochures that Sibbitt and Romano provided to Investor One and that Sibbitt and Vandeveld provided to certain subsequent investors are also fraudulent. To create its brochures, FxTrade merely compiled copies of other foreign currency company web pages. FxTrade "borrowed" the exact language, format, and photographs of people contained on those websites in an effort to demonstrate their purported legitimacy.

35. Although Sibbitt and Romano directed customers to it for information, FxTrade's website has been "down for Database Maintenance" since at least mid-July 2003.

36. Mischler did not establish an appropriate foreign currency futures contracts trading account in FxTrade's name at Forex Capital Markets (FXCM), a registered futures Commission Merchant, until the end of August 2003. Even then, that account traded for only about six weeks during September and the first two weeks of October 2003.

37. Further, Sibbitt made other misrepresentations to FxTrade investors and potential investors, including, but not limited to, statements concerning promised rates of return and her parents' investment with FxTrade.

38. Vandeveld made misrepresentations to FxTrade investors and potential investors, including, but not limited to, statements concerning promised rates of return, his wife's investment with FxTrade, the due diligence he performed on FxTrade, and FxTrade's history.

39. Behr made misrepresentations to FxTrade investors and potential investors, including, but not limited to, statements concerning promised rates of return, his investment with FxTrade, the due diligence he performed on FxTrade, and FxTrade's history.

C. Misappropriation and Misuse of Investor Money

40. Although FxTrade has received more than \$1.1 million from investors, only \$202,000 has ever made it into FxTrade foreign currency trading accounts.

41. In June and August, 2003, FxTrade received \$125,000 from Investors One and Two to invest in foreign currency; however, Defendants deposited only \$52,000 into an FxTrade trading account at FXCM, a registered FCM.

42. During the trading life of this FxTrade account, September and October 2003, Mischler lost approximately \$17,000 trading foreign currency futures contracts and took out the remaining \$35,000 in a series of withdrawals.

43. FxTrade and/or Romano have failed to return Investor One's \$25,000 investment on July 30, 2003 as called for in their agreement. Investor One contacted Romano and Mischler in August 2003 to find out why she had not received her \$25,000 investment and minimum ten percent return on the investment. Romano and Mischler gave Investor One numerous excuses for the past due payout and assured her that payment was forthcoming.

44. In September 2003, Romano revealed to Investor One that he had not invested her money in FxTrade, but had deposited it in an unidentified New York fund. Romano asked Investor One to be patient, claiming that he would double or triple her investment.

45 To date, despite repeated requests, Investor One still has not received her initial investment back. The only money Investor One has received from FX Trade was a \$5,000 check.

46 After making an initial payment of \$5,000 in September 2003, FxTrade also failed to make other payments to Investor Two or to refund Investor Two's initial investment. Since September 2003, the only payment Investor Two has received is a \$20,000 check dated December 30, 2003. In February 2004, Investor Two specifically asked for a refund of her money. To date, she still has not received her initial investment back.

47 In approximately mid to late December 2003, two investors solicited by Vandeveld provided \$280,000 to FxTrade. On or about January 2, 2004, FxTrade and Mischler deposited \$100,000 into a foreign currency trading account at FXCM. Over the next approximately ten weeks, FxTrade and Mischler lost more than \$21,600 trading foreign currency futures contracts and withdrew another \$58,100. The remaining \$180,000 never made it into a foreign currency trading account.

48 During March 2004, customers solicited by Vandeveld to trade foreign currency agreed to invest \$296,000. These investors were told to write checks payable directly to Cccala, apparently on behalf of FxTrade. These funds were never sent to an FxTrade foreign currency trading account.

49 Between late February 2004 and early May 2004, investors brought to FxTrade by Behr provided FxTrade and Mischler with \$444,500. On or about April 14, 2004, FxTrade and Mischler, through a company called TradeQuest Inc. wired \$50,000 to Advanced Currency Markets, a Swiss FCM, for deposit in a foreign currency trading account. The Swiss trading

account made a small profit. The remaining \$394,500 never was sent to any FxTrade foreign currency trading account.

D Cecala Is a Relief Defendant

50. Pursuant to federal common law, Cecala is a relief defendant because he has received ill-gotten funds from Defendants' fraudulent conduct and, therefore, must disgorge all ill-gotten gains regardless of whether he actually violated the anti-fraud provision of the Act.

51. Cecala is an attorney for FxTrade and Mischler in this action. Prior to the filing of this action, Cecala performed certain legal work and other services for FxTrade and Mischler. Upon information and belief, certain FxTrade investors were told to send their investments directly to and make their payments out to Cecala. In this regard, during March 2004, Cecala received at least \$296,000 from at least two FxTrade investors. Both these investors were told that FxTrade would use their money to trade foreign currency.

V. VIOLATIONS OF THE COMMODITY EXCHANGE ACT

COUNT I

**Violations of § 4b(a)(2)(i) and (iii) of the Act:
Fraud and Deceit in the Sale of Foreign Currency Futures Contracts**

52. The allegations set forth in paragraphs 1 through 51 are realleged and incorporated herein by reference.

53. From at least June 2003 and continuing to at least May 2004, Defendants: (i) cheated or defrauded or attempted to cheat or defraud other persons; and (ii) willfully deceived or attempted to deceive other persons, in or in connection with orders to make, or the making of, contracts of sale of commodities for future delivery, made, or to be made, for or on behalf of any other persons, where such contracts for future delivery were or could be used for the purposes set

forth in Section 4b(a)(2) of the Act, 7 U.S.C. § 6b(a)(2), all in violation of Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii).

54. In the course of their solicitation of investors to invest money with them, Defendants knowingly made material misrepresentations and omitted material facts including, but not limited to, the misrepresentations set forth at paragraphs 19-25, 27, and 29-39 in violation of Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii). Defendants also misappropriated and misused investor funds, as set forth at paragraphs 40-49, in violation of Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii).

55. Cecala is a relief defendant. He has received at least \$296,000 in ill-gotten gains as a result of the fraud committed by Defendants and, therefore, must repay this money.

56. Certain of the foregoing fraudulent acts, misrepresentations, and omissions of Mischler, occurred within the scope of his employment with FxTrade. FxTrade is therefore liable for these acts pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B).

57. Certain of the foregoing fraudulent acts, misrepresentations, and omissions of Sibbitt, occurred within the scope of her employment with Reverie. Reverie is therefore liable for these acts pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B).

58. Each fraudulent misrepresentation and omission and each act of misappropriation, including those specifically alleged herein in paragraphs 1 through 57 above, is alleged as a separate and distinct violation of Section 4b(a)(2) of the Act, 7 U.S.C. § 6(b)(a)(2).

VI. RELIEF REQUESTED

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

- a) Orders of permanent injunctions prohibiting Defendants and any other person or entity associated with them, including any successor thereof, from engaging in conduct violative of Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii);
- b) An order directing Defendants and Cecala, as well as any successors to Defendants and Cecala, to disgorge, pursuant to such procedure as the Court may order, all benefits received from the acts or practices which constitute violations of the Act, as described herein, and interest thereon from the date of such violations;
- c) An order directing Defendants to make full restitution to every person or entity whose funds they received as a result of acts and practices that constituted violations of the Act, as described herein, and interest thereon from the date of such violations;
- d) An order directing Defendants to make an accounting to the Court of all their assets and liabilities, together with all funds they received from and paid to investors and other persons in connection with transactions, or purported transactions, in foreign currency futures contracts, and all disbursements for any purpose whatsoever of funds received from or relating to transactions in foreign currency futures contracts, including salaries, commissions, interest, fees, loans, and other disbursements of money and property of any kind from June 2003 to the date of such accounting;
- e) An order directing Defendants to pay a civil penalty in the amount of not more than the higher of \$120,000.00 for each violation or triple the monetary gain to Defendants for each violation of the Act;

- f) An order requiring Defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2); and
- g) Such other and further relief as the Court deems proper.

Respectfully submitted by,

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Dated: September 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing document was served upon the following by first class mail this 13th day of September 2004:

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