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MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,

Plaintiff,

v. CASE NO.: 8:03-CV-54-T-17TGW

INVESTORS FREEDOM CLUB, INC.,
Etc., et al.,

Defendants

/

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS, INVESTORS FREEDOM CLUB LC, WILLIAM A. FOLINO, AND GEORGE BELANGER

This cause is before the Court on Plaintiff, United States Commodity Futures Trading Commission's (CFTC), Motion for Partial Summary Judgment Against Defendants, Investors Freedom Club, LC (IFC) and William A. Folino (Docket No. 31) and response thereto (Docket No. 38), and CFTC's Motion for Partial Summary Judgment against Defendant, George Belanger (Docket No. 33).

JURISDICTION OF CFTC

Before the issue of Summary Judgment is discussed, the Court must address jurisdiction. Defendant, William Folino, argues that the CFTC does not have jurisdiction over this action because the financial instruments in question are not "futures contracts." According to 7 U.S.C. Section 2(c)(2)(B)(i) and (ii), the CFTC has jurisdiction over a transaction in foreign currency that is "contract of sale of a commodity for future delivery," provided that the contract is "offered to, entered into with, a person that is not an eligible contract participant," unless the counterparty is a regulated entity as set forth in Section 2(c)(2)(B)(ii). However, according to 7 U.S.C. Section 2(c)(2)(B)(ii), the

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CFTC does not have jurisdiction over retail sales of foreign currency futures contracts "if the counterparty, or the person offering to be the counterparty, of the retail customer is a (I) a financial institution; (II) a [securities] broker or dealer . . . or a [registered] futures commission merchant . . . (III) an associated person of a [securities] broker or dealer . . . or an affiliated person of a [registered] futures commission merchant . . .(IV) an insurance company . . . (V) a financial holding company . . . or (VI) an investment bank holding company . . . ."

Although the Commodity Exchange Act, (CEA) as amended by the Commodity Futures Modernization Act of 2000, does not define "futures contract," a definition has evolved from caselaw. Courts have defined a "futures contracts" as "a contract for the purchase or sale of a commodity for delivery in the future at a price established at the time the contract is initiated." CFTC v. Noble Wealth Data Information Services, Inc. 90 F. Supp. 2d 676, 688 (D.Md. 2000), aff'd in part, vacated and rem'd in part on other grounds, CFTC v. Baragosh, 278 F.3d 319 (4th Cir. 2002).

Defendant, William Folino, argues that the financial instruments at issue were not "futures contracts," but rather, they were "spot contracts," which would not fall under the jurisdiction of the CFTC. "Spot contracts" are defined as "agreements for the purchase and sale of commodities that anticipate near-term delivery." Dunn v. CFTC, 519 U.S. 465, 472. (1997) "Spot transactions in foreign currencies call for settlement within two days." Noble Wealth Data Information Services, 90 F. Supp. 2d. at 688 citing Bank Brussels Lambert, S.A. v. Intermetals Corp., 779 F. Supp. 741, 742 (S.D.N.Y. 1991). Congress excluded "spot contracts" from the Act because the "transactions in the commodity itself which anticipate actual delivery did not present the same opportunities for speculation, manipulation, and outright wagering that trading in futures and options presented." Noble Wealth Data Information Services, 90 F. Supp. at 688, citing Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 97 (4th Cir. 1993), cert. denied, 511 U.S. 1031 (1994). Congress did not intend "to exclude from the Commission's jurisdiction transactions which are 'sold merely for speculative purposes and which are not predicated upon the expectation that delivery of the actual commodity by the seller to the original contracting buyer will occur in the future.'" Noble Wealth Data Information Services, 90 F. Supp. at 688, citing CFTC v. Co Petro Mktg. Group, Inc., 680 F.2d 573, 579 (9th Cir. 1992).

The financial instruments at issue were "futures contracts," and thus fall within the jurisdiction of the CFTC. IFC's customers contracted with IFC to speculate and make money from price fluctuations in foreign currency. The contracts could be held open indefinitely, and IFC encouraged customers to hold their investments with IFC for extended periods of time because returns would be greater. The customers did not expect to receive foreign currency, rather they expected to receive profits in U.S. currency. Therefore, the contracts were "futures contracts" rather than "spot contracts."

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). A material fact is one that "might affect the outcome of the suit under governing law." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). "Where the record taken as a while could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The evidence presented must be construed in favor of the non-moving party, and that party must receive the benefit of all favorable inferences that can be drawn from that party's evidenced. United States v. Diebold Incorporated, 369 U.S. 654, 655, (1962). The court's function is not to weigh the evidence and determine whether there is a genuine issue for trial. Liberty Lobby, Inc. 477 U.S. at 249. If the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial, summary judgment should be granted. Jones v. Gerwens, 874 F.2d 1534, 1538 (11th Cir. 1989) (citing Celotex, 477 U.S. at 324-25).

A. Section 4(a)

According to Section 4(a) of 7 U.S.C. Section 6(a), it is unlawful to deal in futures contracts if the transactions are not "conducted on or subject to the rules of a board of trade which has been designated by the [CFTC] as a contract market or

derivatives transaction execution facility for such commodity [and] . . . executed or consummated by or through a contract market; and such contract is evidenced by a record in writing . . ." CFTC v. Noble Metals Int'l., 67 F.3d 766, 772 (9th Cir. 1995).

William Folino was a Controlling Person of IFC. He exercised control over IFC and did not act in good faith. William Folino held himself out as the "Chief Investment Officer," or "Chief Executive Officer" of IFC. He solicited customers through an IFC web site.

George Belanger registered the domain name for the IFC web site and managed the web site. In addition, Belanger drafted and delivered statements to IFC customers, encouraged customers to invest more money, and was William Folino's partner in IFC.

The contracts IFC customers entered into were "futures contracts," however, IFC, William Folino, and George Belanger did not conduct the transactions through a board of trade that was designated or registered by the CFTC as a contract market. Additionally, the contracts IFC customers entered into failed to evidence the date, the parties to the contracts, the items covered and price, and the delivery terms. Therefore, the contracts were illegal and IFC, William Folino, and George Belanger violated Section 4(a).

B. Section 4b(a)

The anti-fraud provisions of Section 4b(a) of the Commodity Exchange Act are violated when "(1) an entity or person makes misrepresentations or deceptive omissions (2) with scienter and (3) the misrepresentations are material." Noble Wealth, 90 F. Supp. 2d. at 685. Scienter can be established "(1) by demonstrating that a defendant knew his representations were false and calculated to cause harm; or (2) by showing that he made the representations with a reckless disregard for their truth or falsity." Id.

On the IFC web site, IFC and William Folino made misrepresentations to customers regarding the likelihood of obtaining profits, the risks, and trading record of the firm. The misrepresentations were material because there was "a substantial likelihood that a reasonable investor would consider it important in making an investment decision." CFTC v. AVCO Financial Corp., 28 F. Supp. 2d 104, 115 (S.D.N.Y. 1998). This was done with scienter because the representations were made with disregard for their truth. In addition, William Folino knowingly misappropriated customer funds. Folino spent over $638,000.00 of his customers' money on personal expenses while the

IFC web site indicated that there was "one low fee" and "no commission." Folino held himself out as the "Chief Investment Officer," or "Chief Executive Officer" of IFC. As such, he was responsible for misrepresentations made on the IFC web site.

The web site failed to mention that some of the money IFC customers forwarded was deposited into Folino's personal checking account. The web site indicated that IFC traded in foreign currency or foreign currency exchange, however, little money was actually forwarded by IFC to firms purporting to trade in foreign currency. In addition, Folino knew that customers periodically received account statements indicating that the customers were making profits. However, Folino had to have known this was false because much of the funds were placed in his personal checking account and never invested.

ORDERED Plaintiff's Motion for Partial Summary Judgment Against Defendants, IFC LC and William Folino (Docket No. 31) as to liability be **GRANTED**. The issue of damages remains open for determination at a later date.

ORDERED Plaintiff's Motion for Partial Summary Judgment (Docket No. 33) against George Belanger as to liability be **GRANTED**. The issue of damages remains open for determination at later date.

DONE and **ORDERED** in Chambers, in Tampa, Florida, this 8th day of April, 2004.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record