

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

JUN - 1 2004

DAVID J. MALAND, CLERK

BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

1. JOHN A. WHEELER,
2. LONG POINT INVESTMENTS, LLC
and
3. CDM TECHNOLOGIES, LLC

Defendants,

and

4. WALTER S. COLE
5. MARC DONATELLI,
6. MICHAEL FAGAN,
7. ROBERT MENDOZA, and
8. GARY WOOD

Relief Defendants.

CIVIL ACTION NO-6:03 CV 42

U.S. District Judge Davis

**ORDER GRANTING SUMMARY JUDGMENT AGAINST
RELIEF DEFENDANT WALTER COLE**

THIS MATTER came before the Court on Plaintiff's Motion for Summary Judgment Against Relief Defendant Walter S. Cole ("Cole"). The Court has reviewed the Motion and the evidence submitted in Support of the Motion, as well as the entire record in the case. The Court finds that Plaintiff is entitled as a matter of law to a judgment of disgorgement of ill-gotten gains against Cole.

On January 30, 2003, Plaintiff, Commodity Futures Trading Commission ("Commission"), filed a Complaint against John A. Wheeler ("Wheeler"), Long Point Investments, LLC ("Long Point") and CDM Technologies, LLC ("CDM") (collectively "the Defendants"), which in Counts I and II seeks injunctive and other equitable relief for violations of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. §§ 1 et seq. (2001), and Regulations promulgated thereunder, 17 C.F.R. §§ 1 et seq. (2002). Count III of the Commission's complaint alleges that Walter Cole ("Cole"), Marc Donatelli ("Donatelli"), Michael Fagan ("Fagan"), Robert Mendoza ("Mendoza") and Gary Wood ("Wood") (collectively "the Relief Defendants") received ill-gotten gains from Defendants to which they have no legitimate entitlement. In particular, Count III alleges that Relief Defendant Cole received ill-gotten gains from Defendants of at least \$319,500 and that he should be required to disgorge funds up to that amount because he has no legitimate entitlement to those funds and was unjustly enriched by his receipt of them.

On December 1, 2003, the Commission filed a Motion for Summary Judgment and Disgorgement against the Relief Defendants ("Motion"). In its Motion, the Commission asserts that as a profit sharing account ("PSA") agent for Defendants, Cole received exorbitant commissions for soliciting unwitting investors for Defendants. In addition, the Commission asserts that Cole invested personal funds with Defendants and received fictitious interest payments in excess of his respective investment. Specifically, the Commission's Motion seeks disgorgement from Cole in the amount of \$318,169.80, which represents the ill-gotten gains he received from Defendants to which he has no legitimate entitlement.

The Court has reviewed the Motion and the evidence submitted in support of the Motion, as well as the entire record in the case, and being fully advised in the premises, finds that there is no genuine issue of material fact to be tried with regard to Relief Defendant Cole.

THE COURT FINDS THAT:

1. This Court has subject matter jurisdiction of this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002) and the allegations in the complaint.
2. This Court has personal jurisdiction over Cole, and he has received service of the summons and Complaint.
3. Venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).
4. The Court directs the entry of an order for ancillary equitable relief, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).

The Parties

5. 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.* (2002), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 *et seq.* (2004).
6. Walter Cole, who is 51 years old, currently resides in Hardin, Texas. He has never been registered with the Commission in any capacity.

Wheeler's Fraudulent Scheme

7. From at least December 2000 through May 2002 ("the relevant period"), Wheeler, individually and as an agent of Long Point or CDM, solicited investment funds totaling at least

\$35 million from at least 810 investors for purposes of trading foreign currencies, among other investments.

8. Wheeler structured the transactions on paper as purported "loans" for "business purposes." The Defendants gave promissory notes to the purported lenders and the parties also executed a loan agreement. The typical loan agreement was for a one-year period and promised the lender interest at the rate of 6 or 8 per cent per month, compounded monthly on the outstanding balance of principal and accrued unpaid interest.

9. Wheeler solicited funds by telling prospective investors that their funds would be pooled together and that repayment of their so-called loans was tied to the success of his investments in foreign currencies, among other investments. Wheeler's primary method of soliciting investors was through referrals received from the Relief Defendants, who Wheeler called his PSA agents, and by hosting free dinner meetings and barbeques. Wheeler held the dinner meetings at hotels in California, Nevada and Texas, and he hosted the barbeques at his ranch in Nacogdoches, Texas.

10. In soliciting investors, Wheeler falsely represented that he was able to repay investors full principal and interest because of his "guaranteed" monthly profit of 25 per cent earned through trading foreign currencies. To allay investor fears, Wheeler downplayed the risks of foreign currency trading by stating that he could limit losses.

11. Prior to December 2000 and continuing through March 2001, Wheeler funded an account in the name of Long Point with an entity named Giovanni Fleury Investments ("Fleury") for purposes of trading foreign currency futures contracts. During the period November 2000 through March 2001, Wheeler funded this account with investor funds totaling \$860,000. In less

than five months, by the end of March 2001, Long Point lost its entire investment with Fleury. In soliciting investors after March 2001, Wheeler failed to disclose to prospective investors that Long Point lost \$860,000 through foreign currency futures trading with Fleury, or about any losses his investments had incurred.

12. During the relevant period, Wheeler misappropriated at least \$8.4 million of investor funds, which he used for personal expenditures and to pay commission and interest payments to the Relief Defendants. Wheeler also sent false written account statements to investors, concealing material facts, including that he could not repay investors the amounts of money reported on the statements due to his investment losses and his diversion of investor funds for his personal use. Wheeler concealed his losses by using monies received from “new” investors to repay “earlier” investors, in a manner akin to a Ponzi scheme.

The Role of Relief Defendant Cole

13. Cole operated on an informal basis referring investors to Defendants. He executed no written contract with Defendants and kept no records detailing the time he spent referring investors to Wheeler.

14. Cole invested a total of \$41,000 with Defendants.

15. Cole received commissions from Defendants for referring investors. Specifically, for each investor he referred to Wheeler, who invested with Wheeler, commencing the second month after receiving the investment, Wheeler paid him a trailing monthly commission equal to 2 per cent of the compounded value of the purported loans he referred. If an individual had multiple loans, he received a 2 per cent commission on each loan and if a loan was renewed each

additional year, he received a commission for eleven of the twelve months the "renewed" loan was outstanding. Neither Defendants nor Cole disclosed this commission structure to investors.

16. Cole received from Defendants ill-gotten gains totaling \$318,169.80, representing commissions and interest in excess of his investment with Defendants. Cole does not have a legitimate claim to those funds.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that final judgment shall be and hereby is entered in favor of Plaintiff Commission and against Relief Defendant Cole as follows:

Cole is ordered to disgorge \$318,169.80 (three hundred eighteen thousand, one hundred sixty-nine and 80 cents), representing profits or proceeds he received as a result of the acts and/or conduct alleged in the complaint, to the Court-appointed Receiver, Robb Evans, 11450 Sheldon Street, Sun Valley, California 91352-1121, within thirty (30) days of the date of this Judgment, by cashier's check, certified check or postal money order, under cover of a letter that identifies the name and number of this action and the name of this Court, with a copy to Diane M. Romaniuk, Esq., counsel of record for the Plaintiff Commodity Futures Trading Commission.

IT IS FURTHER ORDERED AND ADJUDGED that this Court shall retain jurisdiction of this action for all purposes, including the implementation and enforcement of this Final Judgment.

IT IS SO ORDERED.

DATED: June 3, 2004


UNITED STATES DISTRICT JUDGE