

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

JUN 16 2004

DAVID J. MALAND, CLERK

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

**CONSENT ORDER OF DISGORGEMENT AS TO
RELIEF DEFENDANT MICHAEL FAGAN**

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 Fagan received ill-gotten gains from Defendants of at least \$233,000 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. The Commission has not alleged any wrongdoing or malfeasance on the part of Relief Defendants Cole, Donatelli, Fagan, Mendoza and Wood.

I.

CONSENTS AND AGREEMENTS

To effect settlement of the matters alleged in the Complaint against Fagan without a trial on the merits or any further judicial proceedings, Fagan:

1. Consents to the entry of this Consent Order of Disgorgement Against Michael Fagan ("Order").
2. Affirms that he has agreed to this Order voluntarily, and that no promise or threat has been made by the Commission or any member, officer, agent or representative thereof, or by any other person, to induce his consent to this Order, other than as set forth specifically herein.
3. Acknowledges receipt of service of the Summons and Complaint.
4. Admits both personal and subject matter jurisdiction of this Court in this action pursuant to Sections 6c and 2(c)(2)(B)(i)-(ii) of the Act, 7 U.S.C. §§ 13a-1, 2(c)(2)(B)(i)-(ii) (2002).
5. Admits that venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).
6. Waives:

a. all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), relating to, or arising from, this action;

b. any claim of double jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief; and

c. all rights of appeal from this Order.

7. By consenting to the entry of this Order, Fagan neither admits nor denies the allegations of the Complaint except as to jurisdiction and venue, which he admits. Fagan agrees that neither he nor any of his agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the Complaint or findings or conclusions in this Order, or creating, or tending to create, the impression that the Complaint or this Order is without a factual basis; provided, however, that nothing in this provision shall affect Fagan's (i) testimonial obligations; or (ii) his right to take legal positions in other proceedings to which the Commission is not a party. Fagan shall take all necessary steps to ensure that all of his agents and employees understand and comply with this agreement.

8. Fagan consents to the continued jurisdiction of this Court for the purpose of enforcing the terms and conditions of this Order and for any other purposes relevant to this case.

9. Fagan agrees to cooperate fully with the Commission in this proceeding and in any investigation, civil litigation and administrative proceeding related to this proceeding by, among other things: 1) responding promptly, completely, and truthfully to any inquiries or requests for information; 2) authenticating documents; and 3) testifying completely and truthfully.

II.

FINDINGS AND CONCLUSIONS

It further appearing to this Court that there is no just reason to delay, the Court being fully advised in the premises and the Court finding there is just cause for entry of this Order that fully disposes of all issues in this matter, THE COURT FINDS THAT:

1. 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).
2. 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.
3. This Court has personal jurisdiction over Fagan and he has acknowledged service of the summons and Complaint and consented to the Court's jurisdiction over him.
4. Venue properly lies with this Court 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. Michael Fagan, who is 59 years old, currently resides in Lacombe, Louisiana. 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 profit sharing account ("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 neither told prospective investors about Long Point's \$860,000 loss incurred through foreign currency futures trading with Fleury, nor did Wheeler tell investors 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 diverting 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 Fagan

13. Fagan 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. Fagan invested a total of \$120,000 with Defendants.

15. Fagan 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 Fagan disclosed this commission structure to investors. As noted in Section I, Paragraph 7, Fagan neither admits nor denies the

allegations of the Complaint and he neither admits nor denies the findings in Section II of this Order.

16. Fagan received from Defendants ill-gotten gains totaling \$233,487, representing commissions and interest in excess of his investment with Defendants. Fagan does not have a legitimate claim to those funds. As noted in Section I, Paragraph 7, Fagan neither admits nor denies the allegations of the Complaint and he neither admits nor denies the findings in Section II of this Order.

III.

ORDER

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

1. Fagan is ordered to disgorge \$92,000 (ninety-two thousand dollars), representing profits or proceeds he received as a result of the acts and/or conduct alleged in the complaint, to Robb Evans, the Court-appointed Receiver in the related criminal case U.S. v. John Wheeler, Case No. 9:02-CR-34 (Eastern District of Texas, Lufkin Division), 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.

IV.

MISCELLANEOUS PROVISIONS

A. ENTIRE AGREEMENT, AMENDMENTS and SEVERABILITY. This Order incorporates all of the terms and conditions of the settlement among the parties. Nothing shall serve to amend or modify this Order in any respect whatsoever, unless: (1) reduced to writing, (2) signed by all parties, and (3) approved by order of the Court. If any provision of this Order or the application of any provision or circumstance is held invalid, the remainder of this Order shall not be affected by the holding.

B. SUCCESSORS AND ASSIGNS. This Order shall inure to the benefit of and be binding on the parties' successors, assigns, heirs, beneficiaries and administrators.

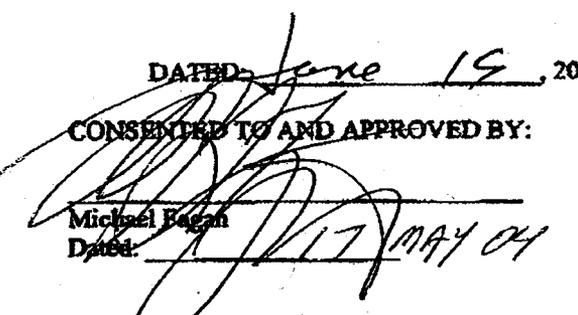
C. JURISDICTION. This Court shall retain jurisdiction of this cause to assure compliance with this Order and for all other purposes related to this action.

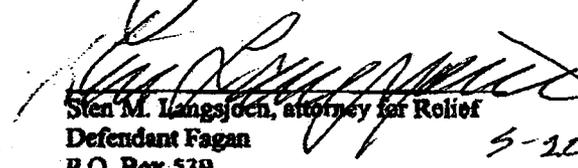
IT IS SO ORDERED.

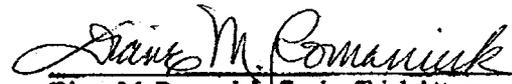

United States District Judge

DATED June 19, 2004

CONSENTED TO AND APPROVED BY:


Michael Fagan
Dated: 17 MAY 04


Sten M. Langsjoen, attorney for Relief
Defendant Fagan
P.O. Box 539
Tyler, Texas 75710-0539
5-20-04


Diane M. Romaniuk, Senior Trial Attorney
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60606
PH (312) 596-0541, Fax (312) 596-0714
(Pro hac vice)