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In The United States District Court
For The District Of New Jersey
Camden Vicinage

Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, Robert W. Shimer, Coyt E. Murray, and J. Vernon Abernethy, Defendants.	Hon. Robert B. Kugler District Court Judge Hon. Ann Marie Donio Magistrate **Civil Action No: 04-1512 (RBK)** **MOTION DATE: June 17, 2005**

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CFTC's RESPONSE TO THE EQUITY DEFENDANTS' MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) or 12(b)(6)

Plaintiff Commodity Futures Trading Commission ("the Commission") responds to the motions of Equity Financial Group, LLC ("Equity"), Robert W. Shimer and Vincent J. Firth ("the Equity Defendants") to dismiss the First Amended Complaint against them for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b) (1) or, in the alternative, under Fed. R. Civ. P 12(b) (6) for failure to state a claim upon which relief can be granted. The entire premise of this motion to dismiss appears to be the Equity Defendants' assertion that Shasta Capital Associates, LLC ("Shasta"), the investment vehicle that Equity operated as commodity pool, (i.e., serving as a commodity pool operator ("CPO")), is not a commodity pool. As set out below, the well-pleaded facts of the First Amended Complaint establish that Shasta was a commodity pool and that the rambling arguments Defendants raise in their 92 page submission to the contrary are entirely without merit.

I. FACTS

As the Commission alleges, Tech Traders, through its president Coyt Murray,[1] ran a multi-million dollar commodity fraud involving a master pool of one or more commodity pools. First Amended Complaint at ¶ 2. Neither Tech Traders not Murray have ever been registered with the Commission. Id. Tech Traders and Murray falsely represented to investors that Tech Traders enjoyed extraordinary success trading in selected financial futures contracts using a confidential, proprietary "portfolio" trading system, and in addition engaged Defendant

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[1] The Tech Traders Common Enterprise Defendants consist of Tech Traders, Inc., a Delaware corporation, Tech Traders, Ltd., a foreign corporation organized under the laws of the Bahamas, Magnum Investments, Ltd., formerly a South Carolina corporation and Magnum Capital Investments, Ltd., another foreign corporation organized under the laws of the Bahamas. *See* First Amended Complaint For Injunctive and Other Equitable Relief and Civil Monetary Penalties Under the Commodity Exchange Act ("First Amended Complaint") at ¶ 1c. They are referred to collectively, throughout the First Amended Complaint, and here, as "Tech Traders."

J. Vernon Abernethy as an allegedly independent CPA to provide a monthly and quarterly performance number based on "reviewed" and "verified" trading results. Id. During the relevant time period, Tech Traders solicited and received upwards of $47 million from others, including Equity and its pool, Shasta. Although Tech Traders, Murray and Abernethy reported consistent, high monthly performance numbers to participants, Tech Traders actually lost, misappropriated and dissipated millions of dollars, leaving a shortfall in excess of $20 million. Id.

The First Amended Complaint further alleges that the Shasta commodity pool was a feeder fund to the Tech Traders' "super fund" master pool and one of the principal sources of funds received by Tech Traders. First Amended Complaint at ¶ 4. From June 2001 through March 2004, defendants Equity, Firth and Shimer solicited approximately $15 million of onshore and offshore investments via several investment vehicles, including the Shasta pool, for trading by Tech Traders in commodity futures contracts. Id. None of them were registered with the Commission while doing so. First Amended Complaint at ¶¶ 29-31. The solicitations included distribution of a Private Placement Memorandum ("PPM") that was drafted by Shimer and reviewed and approved by Firth.[2] First Amended Complaint at ¶ 29. According to the PPM, ninety-nine percent of the proceeds from this offering were supposed to be invested by the pool operator for the benefit of Shasta. Id. Equity, Firth and Shimer touted the "astonishing" performance of the Shasta commodity pool, claiming that the pool had earned trading profits of approximately 100% per annum since inception. First Amended Complaint at ¶ 4. Equity, Firth and Shimer also represented to actual and prospective participants that all the commodity futures trading underlying these results was reviewed and verified by an independent CPA, *i.e.*,

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[2] The Equity Defendants have admitted in their Answer to the First Amended Complaint that Shimer drafted the PPM and Firth reviewed and approved it. *See* Equity Defendants' Answer ("Answer") at ¶29. [Docket 79.]

Abernethy, in order to provide participants with "reasonable assurance" that the performance information reported by Shasta was accurate. Id. Further, Equity, Firth and Shimer hired another CPA to purportedly receive the results from Abernethy, affirm the results to inquiring participants and potential participants, and vouch for the legitimacy of the investment and the persons involved. In reality, the Commission alleges, Firth and Shimer merely instructed this second CPA to parrot the information Abernethy had supplied. This CPA did not perform an independent review and Firth and Shimer knew that she did not do so. Therefore, Equity, Firth and Shimer had no reasonable basis upon which to believe that the performance information supplied to actual and prospective participants had been verified. Id.

Based on these well-pleaded facts, the Commission alleges that the Equity Defendants have violated Sections 4b(a)(2)(i)-(iii) (Count I) and 4*o*(1)(Count II) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 1 *et seq.* (2002) by misrepresenting and failing to disclose material information about their expertise and qualifications, recklessly misrepresenting the performance of the Shasta commodity pool and the role of the independent CPA, and accepting disbursements to which they were not entitled, that Firth and Shimer are liable for Equity's violations as control persons under Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2002) and that Equity is liable for Shimer's and Firth's violations under Section 2(a)(1)(B), 7 U.S.C. § 2a(1)(B) (2002). First Amended Complaint at ¶¶ 57, 59, 72-76. The Commission also alleges that a) Equity violated Section 4m(1) by failing to register with the Commission as a CPO (Count III), and that Firth and Shimer are liable for those violations as control persons pursuant to Section 13(b) of the Act (*Id*. at 79-80); b) Firth and Shimer violated Section 4k(2)(Count IV) of the Act by failing to register as associated persons ("APs") of Equity and that Equity is liable for those violations pursuant to Section 2(a)(1)(B) of the Act (*Id*. at ¶ 86-87) and

c) Shimer violated Section 4m(1) and Regulation 4.30, 17 C.F.R. §4.30 (2005) by aiding and abetting Equity's failure to register and Tech Trader's holding of pool participant funds in its own name (Id. at ¶81, 104) .

II. ARGUMENT

A. The Court has Subject Matter Jurisdiction Over the Claims Against the Equity Defendants.

The Equity Defendants have moved under Fed.R.Civ P. 12(b) (1) to dismiss the claims against them in the First Amended Complaint for lack of subject matter jurisdiction, claiming that each of the counts against the Equity Defendants is dependent on a finding that Shasta was a commodity pool. *See* Firth Motion to Dismiss for Lack of Subject Matter Jurisdiction [Docket No. 159], Shimer Motion to Dismiss for Lack of Subject Matter Jurisdiction [Docket No. 160].[3] As set out below in the discussion concerning the Equity Defendants' motion to dismiss for failure to state a claim, the Equity Defendants are incorrect in claiming that each of the counts against them is dependent on a finding that Shasta was a commodity pool. Some of the provisions of the Act and the Regulations are unique to commodity pools and require a finding that a commodity pool exists; others are not. Moreover, whether or not a plaintiff has met one of the elements of its claim is properly challenged through a motion to dismiss for failure to state a claim upon which relief can be granted, not a challenge to the court's jurisdiction. Each of the counts of the First Amended Complaint allege violations of the Act or Regulations and have been brought by the Commodity Futures Trading Commission, the independent federal regulatory agency that is charged with responsibility for administering and enforcing the provisions of the Act. The Equity Defendants have not disputed that this case involves

[3] Equity filed a motion to dismiss on the same bases as Firth and Shimer and joins in their arguments for dismissal. *See* Notice of Motion For Dismissal Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6).[Docket 167].

commodity futures trading. Because the Commission's claims arise under the laws of the United States and are neither "immaterial and made solely for the purpose of obtaining jurisdiction" nor "wholly insubstantial and frivolous" *Bell v. Hood,* 327 U.S. 678, 682-83 (1946) this Court has federal question jurisdiction under 28 U.S.C. § 1331 and Section 6c of the Act, 7 U.S.C. § 13a-1(2002).

In determining whether a court has subject matter jurisdiction, an important distinction must be made between the lack of subject matter jurisdiction and the failure to state a claim upon which relief can be granted. In *Bell v. Hood*, the Supreme Court ruled that a claim alleged to arise under federal law should not be dismissed for lack of subject matter jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." 327 U.S. at 685. The Third Circuit expounded on *Bell* in *Growth Horizons, Inc. v. Delaware County,* 983 F.2d 1277 (3rd Cir. 1993). The district court in that case had dismissed a claim under the Fair Housing Act for lack of subject matter jurisdiction. The Fair Housing Act makes it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). The district court found that the defendant did not "make unavailable or deny" housing to the plaintiff and that the Fair Housing Act was therefore not implicated. The Third Circuit reversed, holding that "[a] district court has federal question jurisdiction in any case where a plaintiff with standing makes a non-frivolous allegation that he or she is entitled to relief because the defendant's conduct violated a federal statute." 983 F.2d at 1281. The court further explained that "[d]ismissal for lack of jurisdiction is not appropriate merely because the legal theory alleged is probably false, but only because the right claimed is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to not involve a federal controversy.'" *Id.* at 1280-81 (citing *Kulick v. Pocono Downs Racing Ass'n,* 816 F.2d 895, 899 (3d Cir. 1987)(quoting *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 666 (1974)); *see also* 2 Moore's Federal Practice § 12,30[1] at 12-36 (3d ed. 2000)("Subject matter jurisdiction in federal question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as a predicate for relief – a merits-related determination.").

The Equity Defendants have confused a determination about whether the Commission has properly alleged all the elements of its claims – a merit-based determination – with whether this Court has jurisdiction over this case brought under a federal statute. Even if Shasta's status as a commodity pool were an element of every one of the Commission's claims, this Court would have jurisdiction because the Commission has alleged that the Equity Defendants violated the Commodity Exchange Act by soliciting Shasta participants to invest in a feeder fund to Tech Traders without being registered, misrepresenting the performance of Shasta, and in Shimer's case, aiding and abetting Tech Traders' failure to disclose that he was trading other people's money in his own name. These claims are neither implausible nor without merit. This Court therefore has subject matter jurisdiction over the case.

B. The Well-Pleaded Allegations of the Complaint State Claims Upon Which Relief Can Be Granted.

The Equity Defendants have also filed motions to dismiss the claims against them under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The basis of these motions appears to be the Defendants' assertions that Shasta cannot be a commodity pool as matter of law. *See* Shimer Motion to Dismiss For Failure to State a Claim Upon Which Relief Can Be Granted, Firth Motion to Dismiss For Failure to State a Claim Upon Which Relief

Can Be Granted, Brief of Defendant Robert W. Shimer in Support of Motions Filed Pro Se on Behalf of Himself and Motions Filed Separately by Vincent J. Firth Pro Se Pursuant to Federal Rules 56(b), 12(b)1 and 12(b)(6) for Summary Judgment and Dismissal ("Shimer's Brief") at 47-64.

A motion to dismiss for failure to state a claim must be denied if "under any reasonable reading of the pleadings, plaintiff may be entitled to relief." *Holder v. City of Allentown,* 987 F.2d 188 (3d Cir. 1993). The court "must accept as true all well-pleaded allegations in the complaint and construe all reasonable inferences that can be drawn from the alleged facts in the light most favorable to [the plaintiff]. [The court] may affirm the dismissal only if it appears certain that no relief could be granted under any set of facts that could have been proved." *Blaw Knox Retirement Plan v. White Consol. Ind.*, 998 F.2d 1185, 1188 (3d Cir. 1993), *cert. denied by White Consol. Ind. v. Pension Ben. Guar. Corp.* 510 U.S. 1042 (1994), citing *Ditri v. Coldwell Banker Residential Affiliates, Inc.,* 954 F.2d 869, 871 (3d Cir. 1992); *see also* 5A C. Wright & A. Miller, *Federal Practice and Procedure* §1356, at 294 (2d ed. 1990).

The well-pleaded allegations of the First Amended Complaint set out substantial claims against each of the Equity Defendants. Two of these claims would be sustainable here even if Shasta was not a commodity pool, and thus cannot be defeated on any alleged assertion that it is not. As for the Commission's other claims against the Defendants, the well-pleaded allegations of the First Amended Complaint amply demonstrate that Shasta is a commodity pool. Therefore, the Equity Defendants' motion to dismiss should be denied.

1. Count I for Violations of Section 4b(a)(2)(i)-(iii) and Count V for Aiding and Abetting A Violation of Regulation 4.30 Do Not Require A Finding that Shasta was a Commodity Pool.

In Count I of the First Amended Complaint, the Commission has alleged that each of the Equity Defendants violated Section 4b(a)(2)(i)-(iii) of the Act. Section 4b[4] of the Act prohibits cheating and defrauding or attempting to cheat or defraud or willfully deceiving or attempting to deceive other persons in connection with commodity futures trading for or on behalf of such persons. A violation of Section 4b of the Act exists when the Commission demonstrates: (1) a misrepresentation on the part of the defendant; (2) that is material; and (3) made with scienter. *CFTC v. R.J. Fitzgerald,* 310 F.3d 1321, 1328 (11th Cir. 2002); *Slusser v. CFTC*, 210 F.3d 783, 786 (7th Cir. 2000), *cert. denied,* 125 S.Ct. 808 (2004); *JCC, Inc. v. CFTC*, 63 F.3d 1557 (11th Cir. 1995); *CFTC v. Commonwealth Financial Group, Inc.*, 874 F. Supp. 1345, 1354-55 (S.D. Fla. 1994); *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC Mar. 1, 1990) Thus, in order to make out a violation of Section 4b, the Commission must prove that the Equity Defendants knowingly made material misrepresentations to others in connection with commodity futures. The fact that Shasta was a commodity pool is not an element of this claim.

Count V of the First Amended Complaint charges Tech Traders with violations of Regulations 4.20, 4.21, 4.22 and 4.30, 17 C.F.R. Sections 4.20, 4.21, 4.22 and 4.30 (2005). Shimer is charged with aiding and abetting only Tech Traders' Section 4.30 violation. *See* First Amended Complaint at ¶¶ 101-104. Regulation 4.30 prohibits any **commodity trading advisor**

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[4] Section 4b of the Act, 7 U.S.C. § 6b(a)(2)(i) (2002), provides in pertinent part that "[i]t shall be unlawful...for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made or to be made, for or on behalf of any other person ... (i) to cheat or defraud such other person..."

("CTA") from soliciting, accepting or receiving from an existing or prospective client funds, securities or other property in the trading advisor's name to purchase, margin, guarantee or secure any commodity interest of the client. *Id*. at ¶ 101; 17 C.F.R. Section 4.30 (2005). The Commission alleges that Tech Traders was the CTA for Shasta and others and as a CTA it violated Regulation 4.30 by accepting investor funds and trading them in its accounts at futures commission merchants ("FCMs") under its own name. ID. at ¶¶ 102, 103. Shimer is alleged to have aided and abetted Tech Trader's violation of Regulation 4.30 pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a) (2002), by drafting an investment agreement between Shasta and Tech Traders that provided that Shasta's funds would be held in the name of Tech Traders. As he admits, Shimer also drafted the PPM that also sets out that Shasta's funds will be held in the name of the trading company.[5] Thus, Shimer is charged with assisting Tech Traders in conduct from which **CTAs** are prohibited in engaging. No element of this violation requires a finding that Shasta was a commodity pool either.[6]

Thus, as to Counts I and V of the First Amended Complaint, the Equity Defendants' argument that Shasta was not a commodity pool is wholly irrelevant. The well-pleaded allegations squarely allege claims upon which relief can be granted.

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[5] *See* Answer at ¶29.

[6] Instead of seeking to amend his motion under Local Rule 7.1, Shimer improperly sent a letter to this Court on May 13, 2005 in which he requested that the Equity Defendants' arguments in support of his motions to dismiss under Rules 12(b)(1) and 12(b)(6) with respect to Counts I-IV be considered with respect to Count V. (It appears, however, that Shimer's motions do encompass all five counts, though Firth's do not.) Since, as stated above, the Equity Defendants' arguments are easily defeated , the Commission will not object to the improper method be which Shimer attempted to amend his, or Firth's, motion.

2. Shasta Was a Commodity Pool and the Commission's Claims Under Counts II through IV of the First Amended Complaint Are Well-Pled and Should be Accepted as True.

The Equity Defendants engage in a painstaking, and erroneous, analysis of the case *Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880 (9th Cir. 1986) in a strained attempt to prove that Shasta was not a commodity pool. Under both the definition of a pool set forth in Commission Regulations, and the *Lopez* case, Shasta is a commodity pool.

Regulation 4.10(d)(1) defines a pool as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." Shasta was definitely operated to trade commodity interests. As alleged in the First Amended Complaint, the Equity Defendants solicited approximately $15 million from June 2001 through March 2004 via Shasta and other investment vehicles for trading by Tech Traders in commodity futures contracts. First Amended Complaint at ¶ 4.[7] The Equity Defendants concede as much in their Statements of Uncontested Facts filed with their Motions to Dismiss. *See* Shimer and Firth Statements of Uncontested Facts at ¶ 10 [Docket No. 159 and 160]: "That banking records at Citibank clearly reflect that all funds received into defendant Shimer's attorney escrow account for the benefit of Shasta were indeed forwarded to Tech for the benefit of Shasta exactly in accordance with the requirements of Shasta's PPM." Thus, under the definition adopted by the Commission in its Regulations, Shasta was a commodity pool.

The *Lopez* decision does not lead to a contrary result. The *Lopez* court found that Dean Witter's Commodity Guided Account Program ("CGAP") was not a commodity pool because it did not have the necessary characteristics to constitute a pool.[8] 805 F.2d at 883. The CGAP was

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[7] The Equity Defendants admit this fact in their Answer. *See* Answer at ¶ 4.

[8] Those characteristics are 1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity

a program in which eighty percent of a customer's deposit was placed in U.S. Treasury bills to accrue interest while the remaining twenty percent was placed in an account, along with the funds from other participants in the CGAP. It was from these combined funds that commodities futures contracts were bought and sold. However, each investor had separate accounts to which individual account numbers were assigned, and an individual's ability to engage in any purchases or trades of a particular commodity was dependent upon the minimum equity level in that individual's account. _Id._ at 882 n.2. The *Lopez* court found that there was a disparity in investment in the individual accounts and because of the equity level required to engage in certain purchases and trades, not all accounts traded the same contracts. Therefore, not all accounts shared pro rata in profits and losses. _Id._ at 884.

In contrast, the Shasta pool meets all the characteristics of a commodity pool outlined by the *Lopez* court. No Shasta investor had an individual account. The funds of all the Shasta investors were combined, or pooled, by the Equity Defendants before they were transmitted to Tech Traders for trading. First Amended Complaint at ¶ 40. All the combined Shasta funds, less any fees take out by the Equity Defendants, were transmitted to Tech Traders and treated as one pooled investment. Id at ¶ 29. Tech Traders then combined Shasta's funds with the funds of other individuals and investment groups in one "super fund" account from which it executed transactions on behalf of the entire account. *Id.* at ¶¶ 2, 4, and 5. Shasta investors all received

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futures contracts; 2) common funds used to execute transactions on behalf of the *entire* account, 3) participants share pro rata in accrued profits or losses from the commodity futures trading; 4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor. 805 F.2d at 884.

the same supposed rate of return on their investment. *Id.* at ¶ 44. And the Shasta funds were not traded in the individual investor names (or even in Shasta's name), but in the name of Tech Traders.[9]

The Equity Defendants expend many pages of their Brief trying to establish that Shasta was not a commodity pool. *See* Shimer's Brief at 51 – 60. The essence of their argument appears to be that Shasta cannot be a commodity pool because Equity itself did not conduct the trading and the trading was not conducted in the name of Shasta. *See* Shimer's Brief at 51 ("...Shasta member funds were first 'pooled' in Shimer's attorney escrow account at Citibank before they were transmitted to the bank account of defendant Tech but clearly there was no 'commodity futures contract' trading being conducted from Shimer's attorney escrow account."); Id. at 52 ("[t]here is no 'account' owned or controlled by either Shasta or by Equity from which any commodity futures related 'transactions' could be 'executed'.); Id. at 54("The 'transactions' of the pool (meaning the trading of commodity futures interests) must be effected by the pool's operator! Just when did the purported 'operator' of the Shasta pool (defendant Equity) ever trade any commodity interest for the benefit of anyone?")

The fact that Equity pooled Shasta's funds and sent them to another CPO to be traded is a distinction without a difference. The essential elements of a commodity pool – collective funds treated as a single investment from which investors share in profits and losses on a *pro rata* basis – are present in Shasta.

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[9] This is alleged to be a violation by Tech Traders because, as a CTA, it is prohibited from trading investor funds in its own name. *See* First Amended Complaint at ¶¶ 101-103, 17 C.F.R. § 4.30 (2005) As the CPO of the super fund, Tech Traders was also prohibited from trading pool funds in its own name. *See* 17 C.F.R. § 4.20(a)(1) "...a commodity pool operator must operate its pool as an entity separate from that of the pool operator."

The Equity Defendants make much of the fact that Shasta's funds were not traded in the name of the Shasta pool and point to its alleged failure to meet the fourth factor in *Lopez*[10] as evidence that Shasta was not a pool. Shimer's Brief at 53. However, in a case cited favorably by the Equity Defendants, the defendant was found to be a CPO. *See In re Slusser,* 1999 WL 507574, *8 (CFTC), *aff'd in relevant part, sub nom. Slusser v. CFTC,* 210 F.3d 783 (7th Cir. 2000)[11] (attached as Exhibit A hereto). In *Slusser,* the administrative law judge who proceeded over the hearing found that the essence of this fourth factor of *Lopez* is that the funds were not traded in the name of any individual investor, not that they were not traded in the name of the pool. *See In re Slusser*, 1998 WL 537342 (CFTC) at n.36. ("The pools were not traded in the name of the pool, which is the basis of a separate violation discussed *infra*, Part III.D. The key to the fourth factor is that the funds were not traded in the name of any individual investor, as was the case with the pools at issue here."). Shasta meets this key element of the fourth *Lopez* factor-- none of the funds were held in the name of any of the individual investors of Shasta.

The Equity Defendants also assert that because they did not trade the pool's money, it cannot be a pool. *See* Shimer's Brief at 51-52. But this is also not a necessary prerequisite to a finding that Shasta was a pool. In stating its four indicia of a pool, the *Lopez* court cited as support for its definition *CFTC v. Heritage Capital Advisory Services, Ltd.,* Comm. Fut. L. Rep. (CCH) ¶21,627, at26,384 (N.D. Ill. 1982). In that case, the Commission brought an action against Heritage Capital Advisory Services and two of its principals, alleging that the defendants operated as CPOs without benefit of registration. The Commission had previously filed a civil injunctive action against Financial Partners Brokerage, Ltd.("FPB") and Robert B. Serhant,

[10] The transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor. 805 F.2d at 884

[11] *See* Shimer's Brief at 57.

alleging that they had cheated and defrauded customers in connection with the purchase and sale of investment contracts, including futures trading accounts, in violation of Section 4b of the Act, 7 U.S.C. §6b (2002). Heritage and its principals had solicited investors for FPB, combined the investors' funds and forwarded them to FPB for investment. Id. at 26,380. The court found that Heritage was a commodity pool:

> Based on all the evidence adduced herein...the Court finds and concludes as a matter of fact that the defendants operated a commodity pool. They solicited, accepted and received funds from the public, deposited those funds into two separate entities in which the funds of various individual investors were commingled, and they gave those funds to Robert Serhant, at least in part, for the purpose of investing in the futures market. The defendants received commissions from those activities and had in excess of 15 investors. The defendants' investors expected to profit or lose on a pro rata basis according to the amounts of money they initially invested with defendants.
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> Id. at 26,384.

Similarly to the Equity Defendants, the *Heritage* defendants argued that they were not commodity pool operators because they had no control over the investment decisions made by Serhant. The *Heritage* court found this argument unpersuasive:

> [D]efendants' lack of control over the ultimate investment decisions does not mean that they were not commodity pool operators. As the expert testimony at the hearing established, in a *traditional* commodity pool the operator usually exercises complete control over the investment decisions. The investment arrangement in the present case was therefore somewhat unique, in that the entity which solicited and pooled funds had no control over the ultimate investment decisions. In a sense, the defendants served as a conduit between the investors and FPB, who ultimately made the investment decisions.

> The definition of a commodity pool set forth in *Meredith, supra,*[12] it should be noted, does not require the operator to have ultimate control of the investment decision. The operator need only have sufficient control to pool the funds into a single account for investment. This much control the defendants had, and for this reason, they were commodity pool operators.
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> Comm. Fut. L. Rep. (CCH) ¶21,627 at 26,387.

Thus, the cases *Lopez* cites to in support of its definition of a commodity pool do not support the Equity Defendants' claim that Shasta does not meet the criteria of a commodity pool. To the contrary, the Shasta pool looks very similar to what the *Heritage* court found to be a pool. The Equity Defendants collected the funds of approximately 74 investors, commingled those funds in Shimer's escrow account and forwarded them to Tech Traders for trading. *See* First Amended Complaint ¶¶ 29 -32, 40. Those investors shared *pro rata* in the supposed profits of Shasta and Tech Traders.[13]

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[12] *Meredith v. ContiCommodity Service, Inc.,* Comm. Fut. L. Rep. (CCH) ¶21,107, at 24,462 (D.D.C. 1980), also cited by the *Lopez* court in support of its definition of a commodity pool.

[13] The Equity Defendants argue that the Shasta investors did not share *pro rata* because "there clearly were a number of other entities that invested with Tech under similar but slightly different profit sharing arrangements with Tech" and then references two exhibits marked in Vernon Abernethy's deposition, but not submitted with their motion. Shimer's Brief at 53. On a motion to dismiss, courts normally consider only the allegations of the complaint, exhibits attached to the complaint and matters of public record. *Pension Benefit Guaranty Corp. v. White Cons. Ind.,* 998 1192, 1196 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994). The Third Circuit will also consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document. *Id*. However, the Equity Defendants have not attached the referenced exhibits to their motion and the Commission's First Amended Complaint does not depend on them. To the contrary, the First Amended Complaint alleges that the Shasta investors all received the same supposed rate of return that Vernon Abernethy "verified" for all Tech Trader investors. *See* First Amended Complaint at ¶22, 44. The Equity Defendants' reference to these unattached and unauthenticated documents should be disregarded. Moreover, even if there were similar but slightly different profit sharing agreements among different Tech Trader investors, this does not mean a) that the Shasta investors did not all receive the same rate of return and b) that, on the Tech Trader level, the investors did not all share in the same alleged profits and losses in some manner. The key difference between a group of individual accounts and a pooled account still holds -- the investors shared in the collective results of trading with their pooled investments and did not receive "profits" based on individually traded accounts.

The Equity Defendants' final argument that Shasta is not a commodity pool appears to be some kind of impossibility defense. Shimer Brief at 60-64. They argue that Shasta cannot be a pool because Equity could not issue account statements that complied with 17 C.F.R. §4.22(a)(2005). Of course, Equity did issue account statements to its investors. Their complaints that they could not properly comply with account statement requirements does not mean that they were not running a commodity pool. The fact that the commodity pool was being improperly run does not make it any less a commodity pool. If the statements Equity issued did not have all the information required by §4.22(a) that is because the Equity Defendants did not ask Tech Traders for that information, just as they did not make a lot of other inquiries of Tech Traders required by the Act and Regulations. The defendants also complain that they could not comply with the record keeping requirements of 17 C.F.R. § 4.23 (2005), specifically the requirement to keep an itemized daily record of each commodity interest transaction of the pool, because the terms of their agreement with Tech Traders prohibited them from receiving that kind of information. Shimer Brief at 62. Again, their failure to follow the Act and Regulations is the reason they are defendants in this case. Just because they deliberately agreed to restrict their access to material information does not relieve them of their duties as CPO and APs of the CPO. [14]

III. CONCLUSION

This Court has subject matter jurisdiction over this case brought under a federal statute – the Commodity Exchange Act. The Commission's claims of commodity fraud and other

[14] The defendants also have a curious section of their brief devoted to a criticism of the Commission's original complaint, which, of course, has been superseded by the First Amended Complaint. Shimer's Brief at 64-67. Even were it not, a motion to dismiss is not the proper vehicle for arguing over the facts. *See* 5B C. Wright & A. Miller, *Federal Practice and Procedure*; §1356(3d ed. 2004) and cases cited therein.

violations are substantial and well-founded. Moreover, the First Amended Complaint amply alleges facts that Shasta was a commodity pool and that the Equity Defendants were CPO and APs of a CPO. The Equity Defendants' strained reading of *Lopez* does support a contrary interpretation. Their motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted should therefore be denied.

Date: June 2, 2005

Respectfully submitted,

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EXHIBIT
A

Westlaw.

***1** In the Matter of Jerry W. Slusser, First Republic Financial Corporation, First Republic Trading Corporation, Hans J. Brinks, Edward T. Hamlet, and Cantor Fitzgerald & Co., Respondents.
CFTC Docket No. 94-14
August 24, 1998

Appearances:

Barbara A. Schmidt, Esq. and William Janulis, Esq. on behalf of the Commodity Futures Trading Commission, Division of Enforcement.

Frank L. Watson, Jr., Esq. and David J. Sneed, Esq. of Waring Cox, Memphis, Tennessee, on behalf of Respondents Jerry W. Slusser, First Republic Financial Corp. and First Republic Trading Corp.

Before:

Painter, ALJ

INITIAL DECISION

I. Procedural History

On May 26, 1994, the Commodity Futures Trading Commission ("Commission") filed a six-count complaint against Respondents Jerry W. Slusser ("Slusser"), First Republic Financial Corporation ("First Republic Financial"), First Republic Trading Corporation ("First Republic Trading"), Hans J. Brinks ("Brinks") [FN1], Edward T. Hamlet ("Hamlet") [FN2], and Cantor Fitzgerald & Company ("Cantor") [FN3].

Count one of the complaint alleges that Respondent First Republic Financial, formerly and at all times relevant to the complaint known as Vancorp Financial Services ("VFS"), and Slusser committed commodity pool fraud, in violation of Sections 4o(1)(A) and (B) of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 6o(1)(A) and (B) (1994) [FN4]. This count further seeks to hold Slusser liable, as a controlling person of VFS, for VFS' violations, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (1994). Count one also alleges that Respondent First Republic Trading willfully aided and abetted VFS and Slusser in violating Section 4o(1)(B) of the Act, 7 U.S.C. § 6o(1)(B) (1994).

Count two alleges that Slusser and VFS cheated and defrauded customers, in violation of Section 4b(a)(i) of the Act, 7 U.S.C. § 6b(a)(i) (1994).

Count three alleges that, from at least May 26, 1989 through at least November 1989, VFS acted as a commodity pool operator without being registered, in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (1994). Count three further alleges that Slusser is liable, as a controlling person of VFS, for VFS' failure to register, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (1994).

Count four alleges that, from at least May 26, 1989 through at least November 1989, Slusser acted as an associated person of VFS, itself an unregistered commodity pool operator, without being registered, in violation of Section 4k(2) of the Act, 7 U.S.C. § 6k(2) (1994).

Count five of the complaint alleges that, from at least May 26, 1989 through at least November 1989, VFS failed to operate its commodity pools as legal entities separate from itself, failed to receive funds from the participants in the names of the pools, and commingled the property of the pools with that of others, in violation of Regulation 4.20(a), 17 C.F.R. § 4.20(a) (1994), Regulation 4.20(b), 17 C.F.R. § 4.20(b) (1994), and Regulation 4.20(c), 17 C.F.R. § 4.20(c) (1994), respectively. Count five further alleges that Slusser is liable, as a controlling person of VFS, for VFS' violations, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (1994).

*2 Finally, count six of the complaint alleges that, from at least May 26, 1989 through at least July 1989, VFS solicited, received and accepted funds from participants in commodity pools that it operated without first delivering to those persons the disclosure documents required by the Commission, in violation of Regulation 4.21(a), 17 C.F.R. § 4.21(a) (1994). Count six further alleges that VFS failed to file with the Commission disclosure documents for the commodity pools, as required by Regulation 4.21(g), 17 C.F.R. 4.21(g) (1994). The final allegation of count six is that Slusser is liable, as a controlling person of VFS, for VFS' violations, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (1994).

The allegations in the complaint are centered on the Respondents' involvement in at least two investment funds. The funds were previously managed by International Participation Corporation ("IPC"), which was a California corporation. The complaint alleges that between 1987 and 1989, IPC raised approximately $50 million from at least 5,000 investors, apparently for investment in at least two commodity pools. Most of the investors were residents of Germany, with other investors from various other European countries.

Pursuant to at least two agreements with IPC, VFS obtained control of the IPC funds, and agreed to take over management and investment of the funds on behalf of the IPC investors. Between February 1989 and July 1989, VFS received approximately $29 million for investment according to its agreements with IPC. For various reasons, many of which are the subject of this action, VFS was later compelled to return what was left of the IPC money. To that end, approximately $16.6 million was wired to a trust fund in Germany in late 1989, to be distributed back to the IPC investors.

An explanation for the disappearance of approximately $12 million that was under the control of VFS is at the heart of this matter. The Division of Enforcement ("Division") argues that the missing funds are explained by fraud and misappropriation at the hands of the Respondents, while Respondents seem to argue that the explanation can be found in a combination of trading losses, commissions, and fees.

A hearing in this matter was held in Chicago, Illinois from October 27, 1997 through October 30, 1997. The final post-hearing brief was filed on May 26, 1998, and this matter is now ready for decision.

II. Findings of Fact

A. Relevant Persons/Entities

1. Respondent Slusser was a resident of Indianapolis, Indiana at all times relevant to the complaint in this matter. (First Amended Answer of Jerry W. Slusser, First Republic Financial Corporation, and First Republic Trading Corporation ("Answer") ¶ 1.) He has been registered with the Commission as an associated person of Respondent First Republic Trading since September 9, 1990, but he was not registered in any capacity at the time of the alleged violations. (Id.) Slusser was the sole shareholder of an Indiana corporation named Vancorp. (Id.; Transcript ("Tr.") at 327.) Vancorp was the sole shareholder of Respondent First Republic Trading. (Id.) Vancorp was also the sole shareholder of a securities broker-dealer named First Republic Securities, Inc. ("First Republic Securities"). (Answer ¶ 1.) First Republic Securities was registered with the Securities Exchange Commission, and was acquired by Vancorp on June 9, 1989. [FN5] (Respondents' Exhibit ("RX") 20 at 6.)

*3 2. At all relevant times, Slusser was chairman of the board, and directed and controlled the operations of each of the above-named entities. (Answer ¶ 1; Tr. at 327-328.)

3. Respondent First Republic Financial was at all relevant times an Indiana corporation. (Answer ¶ 2.) First Republic Financial was known as Vancorp Financial Services until December 18, 1989, when it changed its name. (Id.) The name change did not come until after the period in which the allegations of the complaint took place. Therefore, the company will be referred to as VFS at all times herein. VFS has never been registered with the Commission in any capacity. (Id.)

4. Respondent First Republic Trading was at all relevant times an Indiana corporation. (Answer ¶ 3.) It was acquired by VFS as a wholly owned subsidiary on July 13, 1989. (Id.) VFS and First Republic Trading had no connection or relationship prior to July 1989. (Id.) Before being acquired by VFS, First Republic Trading was a Tennessee corporation known as CMW, Inc. (Id.) First Republic Trading has been registered with the Commission as an introducing broker since November 10, 1987. (Id.)

5. Respondent Brinks was a citizen of Germany, who resided in Indianapolis, Indiana. From at least January 1, 1989 through April 5, 1989, Brinks was chief operating officer of VFS. (Answer ¶ 4.) He was president of VFS from April 1989 until his resignation in 1990. (Id.) Brinks has never been registered with the Commission in any capacity. (Commission Records.)

6. Sterling International Bank, Ltd. ("Sterling"), not named as a respondent here, was eighty percent owned by Slusser, who was the chairman of Sterling, and who controlled the operations of Sterling. (Answer ¶ 1; Division Exhibit ("DX") 4 at 4-4.) Sterling was chartered under a category "B" license on November 6, 1987 on the island of Montserrat. (DX 4 at 4-6.) Montserrat revoked Sterling's banking license on or about April 4, 1989. (Id. at 4-10.)

B. The IPC Funds

7. IPC was a California corporation, whose purpose was the administration of capital investments, which was carried out in Germany. (DX 56 at 56-6; DX 71 at 71-4-71-5.) IPC offered at least seven different funds for investment, named Funds, I, II, III, IV and Funds M, S and V. (DX 56 at 56-8.) Only two of those funds, Funds III and IV, are involved in this matter. [FN6] (Complaint ¶ 10.) At about the same time that VFS became involved with IPC, IPC was being investigated by the German authorities for capital investment fraud. (DX 56 at 56-8; DX 71 at 71-5-71-6.)

8. The terms of IPC Fund III, a financial futures fund, required a minimum investment of 5,000 Deutsche marks, plus a premium of 10% of the subscribed amount. (DX 56 at 56-9-56-10; DX 57 at 57-2- 57-3; DX 17; DX 18.) [FN7] The 10% premium was to be retained by IPC to cover its costs in marketing, arranging and executing the investments. (Id.) The investment term was twelve months, and renewed automatically if the investor did not provide written termination. (Id.) The investor was to receive 65% of the gross income earned from financial futures trading, with the remaining 35% going to IPC. (Id.) IPC was to recover all administrative costs, beyond those covered by the 10% premium, out of its 35% share of the profits. (Id.)

***4** 9. The terms of IPC Fund IV, also a financial futures fund, were similar to those of Fund III. The minimum investment, however, was 5,000 U.S. dollars, plus a premium of 10% of the subscribed amount, to be retained by IPC. (DX 56 at 56-10; DX 57 at 57-2-57-3; DX 18.) As with Fund III, the investment term was twelve months with automatic renewal for another twelve months. (Id.) The profit structure was the same as for Fund III, with 65% going to the investors and 35% going to IPC. (Id.) IPC was to recover all of its costs, above those covered by the 10% premium, out of its 35% share of the profits. (Id.) Unlike Fund III, Fund IV had a limit on losses such that they were not to exceed 35% of the investment sum. [FN8] (Id.)

10. IPC raised approximately $50 million for investment in its funds from approximately 5,000 individuals. (DX 56 at 56-14.) Most of the investors involved

were German citizens, while others were citizens of other European countries. (DX 71 at 71-4.)

11. At all times relevant to this matter, Dr. Rainer Hieber ("Dr. Hieber") possessed unlimited authority to sign all documents relating to the business of IPC. (DX 56 at 56-8.) Based on that power, Dr. Hieber appointed Mr. Reinhold Mucke ("Mr. Mucke") as representative of IPC in all matters over which Dr. Hieber had authority. (Id.) At some point during the course of events that led to the filing of the complaint in this matter, Dr. Hieber and Mr. Mucke were arrested in Germany for "substantial violations of German securities laws." (DX 71 at 71-7.)

C. The IPC/VFS Agreements

12. On February 13, 1989, Slusser and Brinks, on behalf of VFS, entered into an agreement ("the February agreement") with Dr. Hieber and Mr. Mucke, on behalf of Eurocalcorp Limited ("Eurocal"). [FN9] The February agreement contemplated several transactions whereby VFS would invest large sums of money, which were ostensibly to be provided by Eurocal. (DX 36.)

13. Under the February agreement, VFS was only to be compensated according to a share of the profits, and there was no provision for commissions, fees or expenses. (DX 36.)

14. On May 31, 1989, Slusser and Brinks, on behalf of VFS, entered into a second agreement ("the May agreement") with Dr. Hieber and Mr. Mucke, this time on behalf of IPC. (DX 51.) The May agreement was much broader than the February agreement, and resulted in VFS accepting, inter alia, all "rights, title and interest in management and investment" of all funds managed by IPC at that time. (DX 51 at 51-1.) Under the May agreement, VFS essentially stepped into the shoes of IPC, accepting all rights and responsibilities associated with those funds. (DX 51; DX 56 at 56-8.)

D. The Source of Funds Pursuant to the February Agreement

15. While there can be no doubt under the May agreement that the funds provided to VFS came from IPC investors, [FN10] Slusser argues that the funds VFS got pursuant to the February agreement were not from IPC investors, or at least that he did not know those funds came from IPC investors. (Tr. at 344, 355, 357, 359-360.) The Division has, however, through documentary evidence and witness testimony detailed below, established by a preponderance of the evidence that all funds received by VFS pursuant to both agreements came from IPC investors, and that Respondents knew the origin of those funds.

*5 16. The February agreement, printed on VFS letterhead, states, in part, that "<a>ny and all funds which are being made available through Eurocalcorp or it's <sic> affiliates or assignees are in custodianship and are to be dealt with accordingly." (DX 36 at 36-2.)

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(Cite as: 1998 WL 537342 (C.F.T.C.))

17. The February agreement further states, in part, that "<VFS> also acknowledge<s> your internal arrangements with I.P.C. (International Participation Corporation of San Francisco, California, U.S.A.) and will anticipate your further instructions regarding the role of I.P.C. relative to this agreement." (Id.)

18. On February 27, 1989, just 14 days after the parties signed the February agreement, Slusser wrote a letter to Dr. Hieber, in which he stated, in part, "<w>e realize that our first criteria will be to meet the obligations of your custodial agreement with your depositors." (emphasis added) (DX 38.)

19. On or about March 14, 1989, just a month after entering into the February agreement, Slusser and Brinks received a fax from Dr. Hieber requesting that they send a letter to Ms. B.J. Valene at IPC in San Francisco. (DX 42; Tr. at 346-347.) In his fax, Dr. Hieber requested that the letter to Ms. Valene state, in part, "that Sterling International Bank, Ltd., through its trading entity Vancorp Financial Services, Inc., is <to> carry out the trading for the account of IPC clients." (emphasis added) (DX 42.)

20. On or about March 14, 1989, a letter was prepared on Sterling's letterhead addressed to Ms. Valene at IPC in San Francisco. (DX 1.) That letter contained precisely the language found in the aforementioned March 14, 1989 fax to Slusser and Brinks from Dr. Hieber. [FN11] (Id.)

21. At least as early as March 7, 1989, less than a month after the February agreement was signed, VFS began receiving wire advices from various banks confirming that funds had been deposited in VFS accounts. (DX 39 at 39-59.) At least two of those wire advices show that the wire of funds was ordered by IPC. [FN12] (DX 39 at 39-59, 39-60.)

22. Beginning on or about April 16, 1989, IPC investors began depositing funds directly into an account held by Sterling at Commerzbank in Germany. (DX 39 at 39-2; DX 94 [FN13] at 94-1; DX 7, DX 6.) Slusser knew that the Sterling account was receiving thousands of Deutsche marks on a daily basis from many people. (Tr. at 349.) Slusser knew that the money was coming from IPC or Eurocal. (Tr. at 350.) Slusser directed that Howell maintain lists of the investors who made deposits into the Sterling account at Commerzbank. (Tr. at 348.)

23. Howell testified that Slusser told him, in late February 1989, that there was a "potential relationship with IPC." (Tr. at 26.) Howell testified that Slusser told him at that time that IPC was a "group in Europe ... selling investments to individual German nationals on a weekly or daily ... basis." (Id.) Howell testified that he was made aware that approximately 7,000 investors were involved. (Tr. at 27.)

***6** 24. Despite the plain evidence detailed above, when asked whether he knew that the money VFS had been receiving pursuant to the February agreement was in custodianship, Slusser replied, "No, ma'am, I had nothing to prove that at that time." (Tr. at 338-339.)

25. In addition to the above facts, the record contains many other pieces of evidence (to be discussed in other contexts throughout this Initial Decision) which establish, and the Court so finds, that Slusser and VFS knew, at the time the February agreement was signed, that the money they would be receiving pursuant to that agreement was money from IPC and IPC investors.

26. Slusser's testimony that he was not aware of the origins of the money is not believable. His statements are internally inconsistent, [FN14] his assertions run contrary to the documentary evidence, and his demeanor gave rise to suspicion. Slusser was not forthright with his answers, [FN15] and his attitude was one of smug irreproachability. The Court finds that Slusser is not a credible witness on this point, and, for the reasons just stated, that his testimony on the whole is neither credible nor reliable.

E. The IPC Prospectus

27. The IPC prospectus set the terms by which the IPC Funds were to be traded. (DX 17.)

28. Under the May agreement, VFS and Slusser bound themselves to the terms of the IPC prospectus, since under that agreement VFS agreed, inter alia, "to accept all management and investing contracts responsibilities and rights" and to accept "sole responsibility . . . to protect, invest and account for the assets transferred and assigned" under that agreement. (DX 51 at 51-1.) VFS further agreed to file "any and all reports required by governing and regulating authorities." (Id. at 51-2.)

29. Slusser testified that he is not sure that he was ever aware of the terms of the IPC prospectus. (Tr. at 410.) His testimony is contradicted by the documentary evidence. In his handwritten notes, dated June 1, 1989, just one day after the May agreement was signed, Slusser wrote, "65% of profit to clients <sic> accts. on all acct's. 35% of profits to IPC on all Funds." (emphasis in original) (DX 52; Tr. at 385.) Slusser's notes demonstrate that he had a clear understanding of the most crucial terms of the prospectus by at least June 1, 1989.

30. Heather Banner ("Banner"), an employee of VFS in 1989, prepared a written translation of the terms of the IPC Prospectus. (DX 18 at 18-2-18-7; Tr. at 121.) Banner testified that she did so at the direction of either Howell or Slusser. (Tr. at 121-122.) The Court finds Banner's testimony to be credible and reliable.

31. Banner testified that a copy of the IPC Prospectus was kept at the VFS office and on the trading floor at VFS when VFS "had guests." (Tr. at 118-119.)

32. In addition to the translation prepared by Banner, Respondents were in possession of at least one additional translation of the IPC prospectus by the end of July. (DX 57.) Respondent Brinks sent a copy of that translation of the Terms and Conditions of Funds III and IV to counsel for Respondents on or about July 21, 1989. (Id.)

*7 33. The Court finds that Slusser had knowledge of the profit splitting terms of the IPC Prospectus no later than June 1, 1989. The Court finds further that Respondents were fully aware of all terms of Funds III and IV no later than July 21, 1989.

34. Despite their clear obligation to do so, Respondents at no time made any effort to conform their handling of the IPC funds to the terms of the IPC Prospectus.

F. Where And How VFS Received Funds Pursuant To The Agreements

35. VFS began receiving funds pursuant to the February agreement on or about February 28, 1989. (DX 94 at 94-1; DX 39 at 39-2.) The first deposit was $5 million, which was wired from an IPC account at BFG Bank in Germany to the VFS account at Quatar National Bank in Paris. (DX 94 at 94-1; DX 39 at 39-2, 39- 58.)

36. On or about February 15, 1989, Slusser sent a letter to Bankers Trust Company to open an account in the name of "Vancorp Financial Services." (DX 40; Tr. at 354.) That account was opened and began receiving deposits by March 7, 1989. (DX 39 at 39-2, 39-59; DX 94 at 94-1; Division Request for Admissions at Exhibit MM; Response of Respondents to Requests for Admissions ("Respondents' Responses") at 17.)

37. On or about March 13, 1989, Slusser sent a letter to Gotz Knappertsbusch at Commerzbank in Germany to open an account in the name of "Vancorp," and one in the name of "Sterling International Bank." (DX 44; Tr. at 347-348.) Those accounts were opened shortly thereafter, and the Sterling Account began receiving deposits by April 16, 1989. (Tr. at 348; Tr. at 29; DX 39 at 39-2; DX 94 at 94-1; DX 7.)

38. The deposits into the Sterling account at Commerzbank were made directly by individual IPC investors. (DX 39 at 39-2; DX 94 at 94-1; Tr. at 349.) Since the subscription premium had not yet been taken for those funds, VFS paid IPC approximately $1.4 million for that premium, to which IPC was entitled under the prospectus. (DX 39 at 39-2; DX 94 at 94-3; DX 17.)

39. The Sterling account at Commerzbank generated $124,745.25 in fees, which VFS paid out of the IPC money. (DX 39 at 39-2.)

40. VFS maintained accounts at Merchants National Bank and Trust Company, which received some IPC funds between March 1989 and May 1989. (Division Requests for Admissions Nos. 71 and 72, Respondents' Responses at 18-19; DX 15; DX 94 at 94-4a.)

41. VFS maintained at least one account at Security Pacific National Bank, which received IPC funds on at least one occasion, on or about June 5, 1989. (Division Requests for Admissions No. 74, Respondents' Responses at 20; DX 39 at 39-2.)

42. VFS maintained at least one account at BNP in London, which received IPC funds on at least one occasion, on or about June 6, 1989. (DX 39 at 39-2.)

43. VFS deposited approximately $29,668,480.00, [FN16] the full amount received from IPC and IPC investors, into the above-referenced accounts between February 28, 1989 and July 14, 1989. (DX 39 at 39-2, 39-58, 39-59-39-62; DX 94 at 94-1; DX 6; DX 7; DX 8.) Those funds were either wired to VFS by order of IPC or were directly deposited into the Sterling account at Commerzbank by individual IPC investors. (Id.)

*8 44. All of the IPC money was deposited into accounts held in the names of VFS, Vancorp or Sterling. [FN17] (Id.)

45. Respondents made no effort to keep the investments for Funds III and IV separate.

G. The Trading Accounts

46. To trade the IPC funds, Slusser and VFS opened and maintained trading accounts at several different brokerage houses. On or about March 28, 1989, VFS opened a commodity futures account at Goldenberg, Hehmeyer & Co. ("Goldenberg"). (DX 62.) On or about May 11, 1989, VFS opened its first of two commodity futures accounts at Stotler and Company ("Stotler"). (DX 60.) On or about May 15, 1989, VFS opened its first of four commodity futures accounts at Argus Corporation ("Argus"). (DX 61.) On or about May 30, 1989, VFS opened a securities account at Cantor, Fitzgerald & Company, Inc. ("Cantor"). (DX 28.)

47. The account opening documents for the above accounts inquired as to whether any other person or entity had any financial interest the account being opened, and on each one respondents answered "no." (DX 60 at 60-1; DX 61 at 61- 3; DX 62 at 62-1; DX 28 at 28-3.)

48. Of the $29,668,480.00 received from IPC, approximately $25,460,779.11 was deposited into the above accounts for trading. (Respondents' Exhibit ("RX") 19 at 6.) It is not clear on this record precisely what happened to all of the other $4,207,700.00, although it appears that some of it went to various fees and payouts. (DX 39 at 39-2.)

49. All of the IPC money that was traded by VFS was done so in accounts held in the name of VFS. (DX 32; DX 64; DX 69; DX 75.)

50. The Goldenberg account was only open for approximately two months, until about May 24, 1989. (DX 64; RX 19; DX 96 at 19.) During that time, the account sustained losses of approximately $776,561.33. (RX 19 at 6; DX 94 at 94-9; DX 64.) [FN18]

51. The Cantor account was closed at the end of October 1989. (DX 32.) During the life of the account, it sustained net losses of approximately $3,031,574.54. (RX 19 at 6; DX 32.)

52. VFS had four commodity trading accounts at Argus between May 1989 and

November 1989. (DX 69.) The Argus accounts were all closed by the end of November 1989. (Id.) In that period, those accounts had a net loss of $3,986,455.94. (RX 19 at 6; DX 94 at 94-9; DX 69.)

53. VFS had two commodity trading accounts at Stotler between May 1989 and December 1989. (DX 75.) Both Stotler accounts were closed by the end of December 1989. (Id.) In that period, those accounts had a net profit of $1,208,474.97. (RX 19 at 6; DX 94 at 94-9; DX 75.)

54. In total, between March 1989 and December 1989, the VFS accounts trading IPC funds suffered net losses of $6,586,116.84. [FN19] (RX 19; DX 94 at 94-9; DX 32; DX 64; DX 69; DX 75.)

H. Commissions And Fees Generated From IPC Funds

55. Although the terms of the IPC prospectus did not provide for the payment of commissions, many such commissions and fees were taken from the IPC funds after those funds came under the control of VFS, as detailed below.

*9 (1) Commissions and fees from the Cantor account

56. On June 9, 1989, VFS purchased First Republic Securities, a fully disclosed securities introducing broker-dealer, from Donald Smeathers ("Smeathers"). (DX 26 at 26-1; Tr. at 78-81.) Smeathers' testimony was straightforward and was offered without hesitation. Smeathers has little to no interest in the outcome of this matter, and there is no reason for his testimony to be doubted. The Court finds Smeathers to be a totally credible and reliable witness.

57. After purchasing First Republic Securities, VFS kept Smeathers on as a principal of First Republic Securities to run the company until they could find somebody else. (Tr. at 81-82.) Smeathers came in only one day a week to check the mail and to see that everything was in compliance with NASD regulations. (Tr. at 83-84.)

58. When Smeathers owned it, First Republic Securities generated very little income, approximately only enough to cover the costs of doing business. (Tr. at 83.) After he sold it to VFS, Smeathers' review of the records disclosed that, in his words, "all of a sudden, there's many thousands of dollars there at the company." (Tr. at 84.) When he asked VFS personnel about all of the new money, he was told that it was commissions generated from the trades for the month of June 1989. (Id.)

59. On June 27, 1989, Slusser sent a fax to Thomas Woolsey ("Woolsey") at Cantor, requesting that "accumulated fees" be wired to the VFS account at BancOne. (DX 33.) Woolsey was the registered representative at Cantor for the VFS account. (Tr. at 311.) The Court finds Wolsey's testimony, to the extent referenced herein, to be credible and reliable.

60. Slusser told Woolsey to calculate the number of millions in volume of

trading, and multiply that by 1/64. (Tr. at 311-312.) That calculation yielded a dollar figure, which amount was to be wired to the VFS account at BancOne. (Tr. at 313.) Woolsey testified that the VFS account at Cantor was one of the largest accounts at Cantor in terms of volume and margin. (Tr. at 311.)

61. The funds that were wired out of Cantor were taken directly out of the VFS customer account, which had been funded with IPC investor money. (Tr. at 314; DX 32.) Stephen M. Rubenstein ("Rubenstein"), who was senior vice president, treasurer and chief financial officer of Cantor in 1989 (Tr. at 259.), testified that commission payments to a broker-dealer are not typically paid directly out of the customer account. (Tr. at 280.) The Court finds Rubenstein's testimony, to the extent referenced herein, to be credible and reliable.

62. At a meeting on July 15, 1989, Smeathers told Slusser that there were many requirements that must be met if First Republic Securities was to withstand an audit by NASD. (Tr. at 87; DX 21.) Smeathers informed Slusser that First Republic Securities must have a clearing agreement with Cantor in order to "legitimately get paid." (Tr. at 88-89; DX 21.)

***10** 63. Slusser's personal notes of the July 15 meeting indicate that he wanted to get a clearing agreement with Cantor, and that he wanted it "back dated to June 12, 1989." (DX 21 at 21-1.) Rubenstein testified that Slusser asked him, in August 1989, to sign a clearing agreement backdated to June 1989. (Tr. at 271.) Rubenstein refused to backdate the clearing agreement. (Id.)

64. On August 11, 1989, Rubenstein and Smeathers signed and correctly dated a clearing agreement between Cantor and First Republic Securities. (DX 31; Tr. at 271-272.)

65. Although the clearing agreement was signed, the Cantor account was never converted into an introduced account because First Republic Securities never provided Cantor with the proper documentation. (Tr. at 274-276.) The Cantor account had not been introduced by First Republic Securities. (Tr. at 314; DX 28.)

66. Despite the fact that there was never an effective clearing agreement, and that First Republic Securities had not introduced the Cantor account, it took approximately $947,499.00 out of the IPC money at Cantor as "accumulated fees." (DX 32; DX 33; DX 94 at 94-6; RX 19.)

67. First Republic Securities paid nearly all of its net income for 1989 to VFS in the form of dividends. (RX 20 at 4, 7.)

(2) Commissions and fees from the Argus and Stotler accounts

68. At the end of May 1989, Slusser was making plans to buy an introducing broker ("IB") named CMW, Inc. (DX 49; Tr. at 375.) On May 20 or 25, 1989, Slusser's personal notes of a meeting he had with Hamlet reflect that he had set as a "Top Priority" the purchase of CMW, Inc. by June 6, 1989. (DX 49; Tr. at 374-375.)

69. A few days earlier, on May 18, 1989, Slusser signed an agreement with McVean Trading Company, ("McVean"), a registered futures commission merchant. (DX 91; Tr. at 166.) That agreement specified that McVean would provide services to the IB Slusser planned to acquire, including office space and furniture rental, telephone lines and equipment, and trade "check-out." (DX 91 at 91-5.) The agreement further specified how McVean was to be compensated for the services provided, based on the volume of trading. (DX 91 at 91-6.)

70. Paul Plescher ("Plescher"), who was Financial Vice President at McVean when the agreement was signed (Tr. at 162), testified that the purpose of the agreement was to document McVean's responsibilities to VFS. (Tr. at 166.) Plescher stated that McVean was to be compensated by Stotler and Argus on a per trade basis. (Tr. at 167). The Court finds Plesher's testimony, to the extent referenced herein, to be credible and reliable.

71. McVean received at least $237,805.25 compensation pursuant to the May 18 agreement for services provided between May 18, 1989 and November 1989. (DX 94 at 94-7; DX 77 at 77-2.)

72. VFS purchased CMW, Inc. on or about July 12, 1989, and changed its name to First Republic Trading. (RX 21 at 7; DX 89; Answer ¶ 3.)

73. Prior to July 1989, CMW, Inc. had no relationship with VFS, and had done no trading for the VFS accounts. (RX 21 at 7; Answer ¶ 3.) Despite that fact, First Republic Trading received commissions from Stotler and Argus based on the trading of the IPC funds for the months of May, June and July. (DX 94 at 94-7; DX 77 at 77-2-- 77-13, 77-19--77-22; Tr. at 174--176.)

***11** 74. First Republic Trading continued to receive commissions from Argus and Stotler for the trading of the IPC funds up until those accounts were closed, although it had not introduced those accounts. (DX 94 at 94-7; DX 77 at 77-2--77-13, 77-19--77-22; RX 21 at 7.)

75. Even after VFS acquired its own IB, McVean continued to provide the same services it had provided before. (Tr. at 176.) The commissions generated by the trading of the IPC funds were split between McVean and First Republic Trading, but McVean's responsibilities under its May 18, 1989 service agreement with VFS did not change. (DX 94 at 94-7; DX 77 at 77-2; Tr. at 176.)

76. In total, First Republic Trading took approximately $2,333,013.50 in commissions based on the trading of the IPC funds at Stotler and Argus. (DX 94 at 94-7; DX 77 at 77-2--77-13, 77-19--77-22; RX 21 at 4.)

77. First Republic Trading paid nearly all of its net income for 1989 to VFS in the form of dividends. (RX 21 at 4, 8.)

(3) Other income to VFS generated from the IPC funds

78. Slusser's handwritten notes of June 1, 1989 indicate that he had come up

with "ideas" to invoice Eurocal for set-up fees, account fees, and other expenses. (DX 52.) Thereafter, VFS created "invoices" indicating large fees "owed" it by Eurocal. (DX 53 at 53-2--53-4).

79. Slusser acknowledged that, at the time the invoices were created, VFS was operating under an agreement that limited its income to a share of the profits, and that, at that time, there were no profits. (Tr. at 387-388.) Nonetheless, VFS invoiced Eurocal for fees totaling $1,299,000.00 (DX 53 at 53-1), although it did not collect that entire amount.

80. While the invoices purported to charge fees to Eurocal, VFS paid itself for those invoiced fees out of the IPC funds. (DX 39 at 39-2.)

81. In total, according to a summary prepared by Respondents, VFS withheld $1,038,000.00 from the IPC funds as "fees to VFS." (DX 39 at 39-2.)

82. In addition to the "invoices," VFS withheld other IPC money without even bothering to create a justification. VFS transferred approximately $1,039,499.88 of the IPC money into its Merchants National Bank accounts between March 7, 1989 and May 26, 1989. (DX 94 at 94-4a; Tr. at 212-215.) None of that money was ever traded for the benefit of the IPC investors, and none was returned to the IPC investors when the funds were liquidated. (Tr. 212- 215.)

83. VFS transferred approximately $3,400,000.00 of IPC money from its Bankers Trust account to an account at Security Pacific on or about May 22, 1989. (DX 94 at 94-5a; Tr. at 216.) Of that amount, $400,000.00 was never placed in any trading accounts for the benefit of the IPC investors. That money was kept in VFS bank accounts, and was not returned to the IPC investors when the funds were liquidated. (DX 94 at 94-5a; Tr. at 216-218.)

84. Finally, on June 5, 1989, VFS received a wire transfer of $180,619.59 of IPC money in its account at Security Pacific. (DX 39 at 39-2; DX 94 at 94-5a; Tr. at 216-218.) That money was never placed in trading accounts for the benefit of IPC investors, and was not returned to the IPC investors when the funds were liquidated. (Id.)

***12** 85. The total amount of IPC funds kept by VFS and its entities as either commissions, fees or money that was simply never traded for, or returned to, IPC investors is $5,938,631.97. [FN20]

I. VFS Communications To IPC Investors

86. VFS communicated with the IPC investors in July 1989 for the first time. That communication was in the form of a letter, addressed "Dear IPC Client." (DX 20 at 20-4.) At the hearing in this matter, Slusser denied that VFS had ever sent anything to any IPC investor. (Tr. at 401.) At a private deposition held in May 1994, however, Slusser testified as follows:

Q: Did you ever communicate directly with <the IPC> investors?
Slusser: Yes.
Q: Did you send them-all of those communications would be in the books and records of Vancorp?
Slusser: I don't know if they'd be in the books and records. They weren't official corporate documents, but there were communications that went out to them.
Q: I'm sorry, there were not?
Slusser: No, they weren't official corporate documents. There was a letter advising them that Vancorp was now involved with the account, that we would be responsible for accounting or for hiring accountants and basically explained to them the responsibilities we had just undertaken and introduced ourselves to the German clients.

(DX 97 at 113.)

87. Paul Plescher testified that Slusser had given him a copy of the letter to IPC clients in August 1989. (Tr. at 178.) In addition, Heather Banner testified that she probably typed the German version of that letter, and that the letter was placed in the "reading file" at the VFS office. (Tr. at 127.)

88. Finally, a letter from legal counsel in Germany to Slusser confirms that 5,000 Deutsche marks were provided "for mailing so that the Vancorp letter can be sent to the rest of IPC-clients." (DX 24 at 24-9.)

***13** 89. Once again, Slusser's testimony is directly contradicted by the documentary evidence, as well as by his own sworn testimony in a prior deposition. The Court finds that the Division has established by a preponderance of the evidence that the July 1989 letter was in fact sent to the IPC investors.

90. The July letter was the first time that VFS indicated to the IPC investors that it had taken some measure of control of the IPC funds. Even in that letter, though, VFS did not disclose to the investors the full extent of its control over the funds. The July 1989 letter to IPC investors stated that the May agreement did not create a legal relationship between VFS and the investors. (DX 20 at 20-4.) In fact, the May agreement did create a legal relationship between VFS and the IPC investors, as VFS clearly took over all management and control of the funds previously run by IPC. (DX 51; DX 56 at 56- 8.)

91. The July 1989 letter to IPC investors also stated that VFS was subject to regulatory oversight by both the National Futures Association and the Securities Exchange Commission. (DX 20 at 20-4.) The letter failed to inform the IPC investors that VFS was never registered with those regulatory organizations.

92. The July 1989 letter was, at best, misleading as to the "successful" handling of IPC funds by VFS, and as to the likelihood that "100 percent of the fund monies" would be returned to the investors by the beginning of September. (DX

20 at 20-5- 20-6.) Respondents knew by that time that the trading was resulting in heavy losses, and that it was very unlikely that all of the IPC money would be returned to the investors.

93. In addition to the communication of misinformation described above, the Division has shown that Respondents failed to provide further essential information to the IPC investors. The Division has made a prima facie showing that: 1) Respondents never disclosed to the IPC investors that Respondents were taking commissions, when the prospectus only entitles them to a share of profits; 2) Respondents never informed IPC investors that a portion of the money was being traded in securities, when the prospectus clearly states that it is to be traded in futures; 3) Respondents never informed the IPC investors that a portion of the money was simply retained by Respondents and was never invested for, or returned to, the investors; 4) Respondents never informed the IPC investors that a portion of the money was being withheld by Respondents as payment of various "fees," for which the prospectus did not provide; and, 5) Respondents never informed the IPC investors that the funds were not being traded, in general, according to the terms of the prospectus. Respondents have offered no evidence to rebut these showings by the Division, and the Court finds that the Division has proven these failures to disclose by a preponderance of the evidence.

J. Liquidation of the Funds

94. At some point, German regulatory officials began looking into the IPC funds. (DX 56 at 56-8.) At the end of May 1989, around the time that the May agreement was signed, Slusser and Brinks met with German officials in Germany regarding the German officials' concerns about the IPC Funds. (Answer ¶ 29; Tr. at 176.) Slusser knew that the German officials had serious concerns about the IPC funds. (Tr. at 176.)

***14** 95. At the meeting with the German officials, Slusser told them that VFS was contemplating assuming control of the IPC funds. (Tr. at 378.) Slusser told them that the yield on the funds could be as much as 18% to 20%. (Tr. at 380.) Slusser told the German officials that forced liquidation of the funds would generate losses. (Tr. at 380-381.)

96. Even after meeting with the German officials and learning that they were investigating serious violations by IPC relating to the funds, Respondents continued to solicit and accept funds directly into the Sterling account at Commerzbank until mid-July 1989. Approximately $3,000,000.00 was deposited into the Sterling account after May 31, 1989, which was after Slusser's meeting with the German regulators. (DX 56 at 56-29-56-31; DX 94 at 94-1.)

97. On July 13, 1989, the German authorities ordered IPC to repay the investors their investments in the IPC funds. (DX 72 at 72-1.) While this order was directed only to IPC and not VFS, apparently for jurisdictional reasons, VFS could not realistically ignore the order as long as it had millions of IPC investors' dollars under its control. (Id.)

98. On September 28, 1989, Slusser attended a meeting in New York regarding the liquidation of the IPC funds. (Tr. at 524, 525; DX 72 at 72-1.) By then, Slusser was well aware of the German liquidation order. [FN21] (DX 72 at 72-1; DX 20 at 20-5; DX 67 at 67-2.)

99. Respondents continued to vigorously trade the IPC money even after the September meeting, when there can be no doubt as to their knowledge of the German liquidation order. (DX 69; DX 75.) In October alone, First Republic Trading took approximately $318,789.00 in commissions on the IPC trading. (DX 94 at 94-7.)

100. The liquidation of the funds was effected by transferring the IPC money to a trust account in Germany, where it was distributed back to the IPC investors. (Tr. at 492-493; DX 67 at 67-2; RX 19.) The first transfer for liquidation was made on October 13, 1998, when $5,000,000.00 was taken out of the Cantor account to be transferred to the liquidation trust account. (RX 19 at 5.)

101. A total of $17,155,084.52 was taken out of the trading accounts for liquidation back to Germany. (RX 19 at 5.) Only $16,633,546.52, however, was actually returned to Germany to be distributed to the IPC investors. (Answer ¶ 51; DX 70 at 70-2; DX 94 at 94-8.)

102. On top of the millions of dollars that Respondents wrested out of the IPC funds while those funds were under their control, Respondents withheld an additional $521,538.00 at liquidation. (DX 70 at 70-2; DX 94 at 94-8.) That money purportedly was to satisfy charges for various accounting, legal and management fees. (Id.) The IPC prospectus did not contemplate those fees, and they were not disclosed to the IPC investors. (DX 17.)

103. The return to Germany of the IPC money, or what was left of it, was completed by the end of November 1989. (RX 19 at 6; DX 70 at 70-2; DX 94 at 94- 8.)

III. Discussion

A. Fraud

***15** Counts one and two of the complaint charge VFS and Slusser with primary violations of three of the Act's antifraud provisions, namely Sections 4b(a)(i), 4o(1)(A) and 4o(1)(B), 7 U.S.C. §§ 6b(a)(i), 6o(1)(A) and 6o(1)(B) (1994). The complaint further charges First Republic Trading with aider and abettor liability for the Section 4o(1)(B) violations. Each of these violations will be discussed in turn. [FN22]

(1) Section 4b(a)(i)

Section 4b is the broad antifraud provision of the Act, generally prohibiting deceitful conduct related to futures trading. Section 4b(a)(i), more specifically, makes it a violation of the Act for any person to cheat or defraud any other person in connection with the making of a commodity futures contract. [FN23]

The elements needed to prove a violation of Section 4b are derived from those used to establish fraud at common law. McAnally v. Gildersleeve, 16 F.3d 1493, 1497 (8 superth Cir. 1993); Puckett v. Rufenacht, Bromagen & Hertz, Inc., 903 F.2d 1014, 1018 (5 superth Cir. 1990); At common law, the basic elements of fraud are: (1) a material misrepresentation or omission of fact; (2) scienter; (3) reliance by the other party on the misrepresentation or omission; and (5) proximate injury suffered by the other party. McAnally, 16 F.3d at 1497; Commodity Futures Trading Commission v. American Metals Exchange Corp., 775 F.Supp. 767, 774 (D. N.J. 1991), aff'd in part, and remanded on other grounds, 991 F.2d 71 (3d Cir. 1993); Puckett, 903 F.2d at 1018.

The common law elements have been altered to some extent for the purposes of an administrative enforcement action. Most notably, in proving its case the Division need not show that any of the investors relied on the material misrepresentations or omissions. [FN24] In re Staryk, <Current Transfer Binder> Comm. Fut. L. Reporter (CCH) ¶ 27,206, at 45,812 (CFTC Dec. 18, 1997); In re GNP Commodities, Inc., <1990-1992 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 25,360, at 39,218 (CFTC Aug. 11, 1992), aff'd in part and modified sub nom., Monieson v. CFTC, 996 F.2d 852 (7 superth Cir. 1993). Logically following that exception to the common law proof scheme, the Division is also relieved of the obligation to prove actual damages suffered by the investors as a result of the material misrepresentations or omissions. [FN25] In re Ferragamo, <1990-1992 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 24,982, at 37,598 n.16 (CFTC Jan. 14, 1991). Therefore, to prevail on its charges of fraud, the Division need only prove that Respondents made, in connection with commodities transactions, material misrepresentations or omissions of fact, and that they did so with scienter.

(a) "In Connection With" Commodities Contracts

Respondents offer an interpretation of the statutory "in connection with" language that does not find support in the case law. In their post-hearing brief, Respondents assert that investors must be caused to "sell or liquidate their interests" in futures contracts for the "in connection with" requirement to be satisfied. Respondents' Brief at 31. This is a more narrow reading of that language than can be defended.

***16** In fact, the "in connection with" language has been given a very broad application. Hirk v. Agri-research Council, Inc., 561 F.2d 96, 103-04 (7 superth Cir. 1997). The Hirk court found that the legislative history of the Act, and the treatment by the Supreme Court of similar language in the Securities Exchange Act and SEC Rule 10b-5, cannot justify a "narrow interpretation of the broad 'in connection with' phrase." Hirk, 561 F.2d at 104. See also Saxe v. E.F. Hutton & Company, Inc., 789 F.2d 105, 110- 11 (2d Cir. 1986) (endorsing the Hirk analysis of the "in connection with" language). This Court agrees that the purpose behind the enactment of the antifraud provisions of the Act, protection of investors, requires a broad reading of the "in connection with" clause. [FN26]

There is no question that Respondents' conduct in the instant matter satisfies the "in connection with" requirement. Respondents knowingly took control of two huge commodity investment funds. They were trading millions of dollars of investors' money in the commodities markets. Respondents' statements, misstatements and withheld information were inseparably linked to their gaining control of the funds, receiving deposits directly from investors into the funds, and profiting from the trading of the funds. There is not much else that

Respondents could have done to make their activities any more "in connection with" commodity futures transactions.

(b) Material Misrepresentations and Omissions of Fact

While there were direct misrepresentations of fact made by the Respondents to the IPC investors, this case is primarily one concerning information that Respondents withheld from the investors. Prior to discussing those misrepresentations and omissions, however, it must be determined at what point Slusser and VFS owed a duty to the IPC investors. Consistent with their overall strategy in this affair, Respondents attempt to surround this issue with confusion and misinformation. Those efforts notwithstanding, it is a simple question with a simple answer. Respondents' duties to the IPC investors arose on May 31, 1989, with the execution of the May agreement.

Respondents would have the Court believe that under the May agreement, they were simply providing services to IPC, and that IPC retained control of the funds. Therefore, any duties owed to the investors were owed by IPC, not Respondents. The May agreement, however, shows the opposite to be true. It is unambiguous and lends itself to only one interpretation, namely that VFS took complete and absolute control of the IPC funds, and so assumed all duties owed to the IPC investors from that date forward. That said, an analysis of the misrepresentations and omissions by VFS and Slusser after May 31, 1989 can now be conducted.

The test for materiality is an objective one, and is met when "it is substantially likely that a reasonable investor would consider the <statement or omitted fact> important in making an investment decision." [FN27] Sudol v. Shearson Loeb Rhoades, Inc., <1984-1986 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 22,748, at 31,119 (CFTC Sep. 30, 1985). This requires a further inquiry into whether the reasonable investor "would regard the fact as significantly altering the total mix of information available." Id. These questions are left to the trier of fact, as he is "uniquely competent to make the materiality determination, requiring as it does 'delicate assessments of inferences a 'reasonable <investor>' would draw from a given set of facts and the significance of those inferences to him."' Id.

***17** In this case, the determination of materiality is not difficult. Most of the information Respondents withheld from the investors is required to be disclosed by Commission Regulations. [FN28] As such, it is per se material. See Lehoczky v. Gerald, Inc., <1994-1996 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 26,441, at 42,923-24 (CFTC June 12, 1995) (holding that failure to disclose the track record of an IB's customers is not a direct violation of the Regulations, and is not, by itself, a material omission of fact). Much of the rest of the information withheld clearly fits within Commission case law defining materiality.

As a general matter, once they gained control of the IPC funds, Respondents had a duty to disclose that they would not be handling those funds in the manner described in the IPC prospectus. In re Commodities Int'l Corp., < Current Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 26,943, at 44,563-64 (CFTC Jan. 14, 1997); In re Kolter, <1994-1996 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 26,262, at 42,199 (CFTC Nov. 8, 1994). Respondents may not be held liable for any misrepresentations and omissions made by IPC in its prospectus. It is also true, however, that Respondents took control of funds that were established on the basis of that IPC prospectus. Respondents were then left with the choice to either trade the funds according to the prospectus, or disclose to the investors any deviations from the prospectus. Respondents did neither, and they are being held liable for their own misrepresentations and omissions. [FN29]

A more specific violation than the general failure to either follow the prospectus or correct it was Respondents' failure to disclose that they would be taking commissions on the trading, rather than just taking a share of the profits, as disclosed in the prospectus. It is well-settled that the amount of commissions and fees a customer will be charged is material information, and failure to disclose such commissions and fees amounts to fraud. Lehoczky, ¶ 26,441 at 42,923; In re Rosenthal & Company, <1984-1986 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 22,221, at 29,177 (CFTC June 6, 1984). Respondents took over three million dollars as commissions and fees from the trading of the IPC money with no disclosure to the IPC investors. [FN30]

Respondents also failed to disclose to the investors that they were not registered with the Commission. VFS has never been registered with the Commission, and Slusser was not registered at the time the charged activity was taking place. Nonetheless, they solicited and handled customer funds. Such registration information is material, and must be disclosed. Stern v. G.H. Miller & Co., <1990-1992 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 25,338, at 39,104 (CFTC July 21, 1992).

Besides these and other material omissions, Respondents made material misrepresentations to the IPC investors. It has been established that Respondents sent a letter to the IPC investors in July 1989. That letter stated, among other things, that the May agreement created no legal relationship between VFS and the investors, that VFS was subject to regulatory oversight by the NFA and the SEC, and that VFS had handled the IPC funds successfully and was optimistic that all of the funds would be returned to the investors by September 1989. Each of those statements is, at the very least, misleading.

***18** The May agreement absolutely created a legal and fiduciary relationship between Respondents and the investors, as Respondents assumed total and complete control of the funds. In addition, Respondents should have been subject to oversight by the NFA and SEC, but they were not registered. Finally, Respondents' characterization of their successful handling of the funds and of the likelihood that they would be returned intact is simply false, as the accounts had lost millions of the investors' dollars. These statements are material misrepresentations, sufficient to establish independent violations of the Act. [FN31]

Respondents made further material misrepresentations and omissions of fact, but to discuss them at this point would be overkill. [FN32] Suffice is to say, Respondents' goal was to keep the IPC investors as much in the dark as possible while they mishandled and misappropriated their money.

(c) Misappropriation of Customer Funds

Respondents did not limit their fraud to taking commissions and fees to which they were not entitled. They also surreptitiously retained money in their own bank accounts that should have been traded on behalf of the IPC investors, or that should have been returned to them at liquidation. This misappropriation of customer funds constitutes a violation of Section 4b. See, e.g., Commodity Futures Trading Commission v. Morse, 762 F.2d 60 (8 superth Cir. 1985).

As one method of retaining customer funds, Respondents drew up "invoices" for various fees, none of which had been disclosed or approved. Those invoices were directed to Eurocal, and Slusser asserted that they were submitted and that Eurocal paid them. The truth, however, is that Respondents took the money out of the IPC funds as payment for the invoices. Nothing was submitted, and Eurocal never sent payment for the invoices. It was all simply done on paper, and Respondents withheld in excess of one million dollars of the investors' money to cover the bogus invoices.

Apparently wearied of taking the trouble to write invoices, Respondents kept additional investor money without even creating the pretext that they had earned it. Over $1.5 million of IPC investor money that was to be invested was retained by Respondents, over and above the money that had been kept pursuant to the "invoices." Respondents gained control of those funds and never invested them for trading, and never returned them at liquidation.

Finally, Respondents kept approximately $500,000.00 at the time of liquidation. As with the "invoiced" misappropriation, that money was for purported fees and expenses, which Respondents paid themselves out of the IPC investor funds. As with all of the other commissions, fees and expenses, these were never disclosed to the investors and were not contemplated in the IPC prospectus.

Each instance of taking undisclosed, unauthorized, unearned and illegitimate commissions and fees, and retention of customer funds constitutes a separate violation of the Act. Respondents owed statutory and fiduciary duties to the IPC investors immediately upon taking over the IPC funds. Their breaches of those duties enriched them by nearly six million dollars, obviously to the detriment of the investors.

***19** (d) Scienter

Having proved that Slusser and VFS made numerous material misrepresentations and omissions of fact, the Division must show that it was done with scienter in order to prevail on its charge of fraud in violation of Section 4b. Scienter is established by showing that Respondents' "wrongful acts were committed intentionally or with reckless disregard for their duties under the Act." Hammond v. Smith Barney, Harris Upham and Co., Inc., <1987- 1990 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 24,617, at 36,659 (CFTC March 1, 1990), applied to administrative enforcement actions in In re ContiCommodity Services, <1990-1992 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 25,038, at 37,878-79 (CFTC April 17, 1991). A finding of scienter can be made based on inferences drawn from circumstantial evidence. In re JCC, Inc., <1992-1994 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 26,080, at 41,579 (CFTC May 12, 1994).

The record in this case fully supports a finding of scienter. All of Respondents' actions in handling the IPC funds indicate that they were taken with the sole intention of generating as much income to Respondents as possible, for as long as they could get away with it. For instance, there is the manner in which the commissions were taken from the Cantor account. First Republic Securities did not introduce that account, there was no clearing agreement with Cantor, and there was no mechanism by which First Republic Securities could be compensated based on the IPC trading. Slusser even tried to get Cantor to sign a backdated clearing agreement so that he could legitimize more commissions. When all else failed, Respondents simply withdrew money directly out of the IPC customer funds at Cantor and called them "accumulated fees." Such activity is not undertaken without intent.

The commissions to First Republic Trading show the same intentional conduct. First Republic Trading was paid commissions on trading that had taken place months before it had any association with the IPC accounts. It continued to receive commissions until the accounts were closed, even though McVean was actually performing all of the back office functions for which an IB is normally compensated. Therefore, even if the commissions had been authorized by the prospectus, First Republic Trading did not do any work to earn the commissions. There can be little doubt that First Republic Securities and First Republic Trading existed solely to collect unearned and unauthorized commissions for the benefit of VFS.

Slusser hinges his argument of lack of scienter on the assertion that he was unaware of the IPC prospectus and that he didn't know investor money was involved. That argument cannot be taken seriously. Slusser's handwritten notes, numerous English interpretations of the IPC prospectus and various other documents in the record establish Slusser's knowledge of the terms of the prospectus. Slusser certainly is free to profess his ignorance, but the record amply establishes that he knew the crucial terms of the IPC prospectus, that he knew investor money was involved, and that he knew these facts early in his dealings with IPC.

***20** Respondents also try to dodge a finding of knowledge and intent by asserting that they received the funds in a confused state and that IPC kept terrible records. Respondents' argument seems to be that, since they didn't know what the terms of the prospectus were and they didn't know the names of the investors, they were free to trade those funds in any manner they chose, collect all the commissions they saw fit, take out any fees and charges they could think of, and do all of this with out making any effort to comply with the law. Such a preposterous argument is not worthy of comment.

Respondents may not rely on confusion and misinformation to avoid liability. Rather than attempting to sort out the "confusion" surrounding the funds, which funds they voluntarily took over from IPC, they used it to their advantage to keep the German officials at bay and to keep control of the IPC money for as long as possible. Their goal was never to straighten out the funds and do what was best for the investors. Rather, their goal was to trade the funds as aggressively as possible, keeping as much of the IPC money for themselves as they could, and only liquidating when forced to do so by the German authorities.

If any additional evidence of scienter were necessary, there is the matter of the "invoices," as well as the matter of the money that Respondents simply never traded and never returned. Slusser acknowledged that he knew, prospectus aside, that even under the February agreement he was only entitled to receive a portion of the profits. With that in mind, he created false invoices for substantial fees and charges, and then paid himself out of the IPC money. On top of that, Respondents kept additional money that they didn't bother to justify with phony invoices. Such activity simply does not take place absent intent. This conduct by Slusser and VFS, along with all of the other conduct detailed above, plainly establishes that all of the wrongful conduct perpetrated by Respondents in this matter was done so with scienter.

The Division has clearly established, by a preponderance of the evidence, that

Slusser and VFS violated Section 4b(a)(i), as charged in the complaint.

(2) Sections 4o(1)(A) and 4o(1)(B)

Section 4o is the provision of the Act which prohibits fraudulent conduct by commodity pool operators and commodity trading advisors. [FN33] The analysis undertaken to determine the existence of a violation of Section 4o is essentially the same as that to establish a violation of Section 4b. [FN34] The same conduct that violates Section 4b can be used to establish violations of Sections 4o(1)(A) and (B). In re GNP Commodities Inc., ¶ 25,360 at 39,218 (recognizing that the "same conduct may well violate more than one provision of the Act"). Accordingly, for all those reasons provided above, the Division has shown, by the great weight of the evidence, that Slusser and VFS violated sections 4o(1)(A) and (B) of the Act. [FN35]

***21** (3) Controlling Person Liability of Slusser

The complaint seeks to hold Slusser liable for the Section 4o(1)(A) and (B) violations of VFS according to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (1994). Section 13(b) provides that any person who controls another person that has been found to violate the Act or Regulations may be held liable to the same extent as the person that committed the violations. The controlling person must have acted in bad faith, or must have "knowingly induced, directly or indirectly, the act or acts constituting the violation." Id.

Control is "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." In re Speigel, <1987-1990 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 24,103, at 34,765 n. 4 (CFTC Jan. 12, 1988). Slusser controlled VFS in every sense. He was the sole shareholder of VFS and the chairman of its board of directors. He entered into contracts on behalf of VFS, personally signing both the February and May agreements. He was the signatory authority on most, if not all, the bank and trading accounts involved with the IPC fiasco, and he had direct and final authority over every other aspect of the day-to-day activities of VFS. Slusser was the sole controlling element behind the operations of VFS.

To establish knowing inducement of the violations, "the Division must show that the controlling person had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue." Id. at 34,767. Slusser not only knowingly induced the fraudulent acts of VFS, he personally conducted them. Slusser was the driving force behind all of the activity regarding the IPC funds. Slusser caused VFS to gain control over the IPC funds, personally negotiating and signing the contracts that closed the deal. Slusser personally opened the bank and trading accounts that were used to house and trade the IPC money. Slusser took it upon himself to go to Germany to discuss the IPC affair with the German officials. Slusser orchestrated the commissions, fees and misappropriations taken from the IPC investor accounts. This Court has no hesitation in finding Slusser liable as the controlling person of VFS.

(4) Aider and Abettor Liability of First Republic Trading

The Division has charged First Republic Trading with aiding and abetting the

Section 4o(1)(B) violations of VFS. To prevail on the aiding and abetting charge, the Division must show that First Republic Trading knew of the wrongdoing and intentionally assisted it. In re Buckwalter, <1990-1992 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 24,995, at 37,686 (CFTC Jan. 25, 1991); In re Western Financial Management, <1984-1986 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 22,814, at 31,401 (CFTC Nov. 14, 1985). Just as Slusser ran and controlled VFS, he also ran and controlled First Republic Trading. To argue, and Respondents wisely have not, that First Republic Trading did not have knowledge concerning everything about which Slusser had knowledge, would be absurd. First Republic Trading, through Slusser, had knowledge of every aspect of the IPC affair.

***22** With Slusser at the helm, First Republic Trading most assuredly assisted in the fraud perpetrated by Slusser and VFS, and did so intentionally. Nearly all of First Republic Trading's income came from the commissions it received from the IPC trading. This is despite the fact that it had not introduced any of those accounts and that it was not actually performing any of the duties normally assumed by and IB. First Republic Trading paid almost all of its net income to VFS as dividends, further evincing the fact that First Republic Trading existed solely for the purpose of collecting commissions from the IPC accounts for the benefit of VFS. Under these circumstances, it must be concluded that First Republic Trading is liable for aiding and abetting the Section 4o(1)(B) violations by VFS.

B. Failure To Register As Commodity Pool Operator

Count three of the complaint charges that VFS was acting as a commodity pool operator, and that its failure to register as such constitutes a violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (1994). Count three seeks to hold Slusser liable for this violation as a controlling person.

It must first be determined whether the IPC funds were commodity pools. The term "**commodity pool**" is not **defined** in the Act, but the term "pool" is **defined** in the Regulations as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 C.F.R. § 4.10(d) (1994). Very few courts have attempted to expand upon or clarify this **definition**, but the Ninth Circuit has identified four factors to be used in determining the existence of a pool:

(1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the entire account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a **commodity pool** operator in the name of the pool rather than in the name of any individual investor.

Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 884 (9th Cir. 1986). Applying those factors to the IPC funds taken over by VFS, it is apparent that they can only be characterized as commodity pools.

Although the funds were not consolidated into one trading account, each of the separate trading accounts meets all of the above requirements. Each account was made up of combined money for the purpose of trading commodity futures contracts. Each account used common funds to execute transactions on behalf of the entire account. Each account resulted in a pro rata share in profits and losses, and each was traded by a pool operator (although unregistered) and not in the name of any individual investor. [FN36] Therefore, whether viewed in the manner in which Respondents received them (as two large funds, Funds III and IV), or in the manner in which Respondents traded them (as several smaller funds), the investment funds managed and controlled by Respondents were commodity pools.

***23** A commodity pool operator is any person who "solicits, accepts, or receives from others, funds, securities, or property" for the purpose of trading in a commodity pool. [FN37] 7 U.S.C. § 1a(4). Having establish that the IPC funds were commodity pools, it is undeniable that VFS was acting as a commodity pool operator. It accepted investment funds from IPC, as well as directly from investors through the Sterling account at Commerzbank. All, or nearly all, of the trading accounts were in the name of VFS, and VFS had complete control over the management of the funds.

Respondents sole argument regarding their failure to register is that "foreign commodity pools, consisting exclusively of money solicited from foreign investors, are not required to be registered with the CFTC nor are they required to submit disclosure documents to their investors." Respondents' Brief at 34. Respondents base that argument on their reading of a series of published interpretive letters. Their reliance on those letters is flawed.

The Commission's interpretive letters have no binding effect on either the Commission or private parties, even when they are formally publicized. In re Antonacci, <1990-1992 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 24,835, at 36,932 (CFTC April 18, 1990). The interpretive letters are written to specific parties and are based on a specific set of facts. They do not carry the force of law, and they have no general applicability. A party that relies on the no-action status granted to some third party through an interpretive letter does so at his own peril. Such is the case for Respondents in the instant matter. [FN38]

Based on its handling of the IPC funds, VFS was required to register under Section 4m(1), and its failure to do so constitutes a violation of that provision of the Act. [FN39] Under the same principles of controlling person liability discussed in connection with the fraud violations, Slusser is liable here, too, as a controlling person of VFS.

C. Failure to Register as Associated Person

Count four of the complaint charges that Slusser acted as an associated person of a commodity pool operator without registering, in violation of Section 4k(2), 7 U.S.C. § 6k(2) (1994). That section prohibits any person from being "associated with a commodity pool operator as a partner, officer, employee, consultant, or agent . . . in any capacity that involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person or persons so engaged, unless such person is registered." 7 U.S.C. § 6k(2) (1994).

The facts that establish this violation have been discussed at length. Slusser undoubtedly engaged in conduct requiring him to be registered under this section, and his failure to do so is a clear violation.

D. Improper Operation of Pool and Failure to File Disclosures

Counts five and six of the complaint allege violations of various Commission Regulations regarding pool operations and disclosures. Regulations 4.20(a), 17 C.F.R. § 4.20(a) (1994) requires that every commodity pool be operated as its own legal entity, separate from that of the pool operator. Regulation 4.20(b), 17 C.F.R. § 4.20(b) (1994) requires that all funds received by a commodity pool operator for investment in the pool be received in the pool's name. Regulation 4.20(c), 17 C.F.R. § 4.20(c) (1994) forbids pool property from being commingled with the property of any other person. Regulation 4.21(a), 17 C.F.R. 4.21(a) (1994) forbids a commodity pool operator from soliciting or accepting funds from anyone unless such person has been provided with the required disclosure documents. Finally, Regulation 4.21(g), 17 C.F.R. 4.21(g) (1994) requires the commodity pool operator to file disclosure documents with the Commission for each pool that it operates.

***24** Finding the violations of these Regulations is, at this point, a mere formality. Respondents have offered amazingly little in the way of a credible explanation for their blatant disregard for Commission Regulations. Once again, they argue that they received the funds in a commingled and confused state, so they should not be held responsible for these violations. Even assuming the truth of that argument, it does not absolve them of liability. Respondents took no steps to conform their handling of the IPC funds to the mandates of the Act and Regulations. As before, Slusser was behind these violations, and is liable as a controlling person of VFS.

E. Brinks' Liability

Brinks made no appearance at the hearing, and did not file a notice of appearance thereafter. The Division filed a motion for default against Brinks on March 3, 1998, pursuant to Regulations 10.62(b) and 10.93, 17 C.F.R. §§ 10.62(b) and 10.93 (1997). The Division's motion is hereby granted. Brinks is in default, his answer to the complaint is stricken, and all of the allegations of the complaint are deemed true as to him.

Accordingly, this Court finds that Brinks willfully aided and abetted Slusser and VFS in their violations of Section 4o(1)(B), thereby himself violating Section 4o(1)(B) of the Act, 7 U.S.C. § 6o(1)(B) (1994). This Court finds further that Brinks committed fraud in connection with futures transactions, in violation of Section 4b(a)(i) of the Act, 7 U.S.C. § 6b(a)(i) (1994).

IV. Conclusions of Law

Based on the above Findings of Fact and an analysis of the evidence and applicable law, the Court concludes that the Division has proven, by a preponderance of the evidence, that:

1. Respondent First Republic Financial Corporation (VFS) violated Sections 4b(a)(i), 4o(1)(A), 4o(1)(B) and 4m(1) of the Act, 7 U.S.C. §§ 6b(a)(i), 6o(1)(A), 6o(1)(B) and 6m(1) (1994) and Commission Regulations 4.20(a), 4.20(b), 4.20(c), 4.21(a) and 4.21(g), 17 C.F.R. 4.20(a), 4.20(b), 4.20(c), 4.21(a) and 4.21(g) (1994);

2. Respondent Slusser violated Sections 4b(a)(i), 4o(1)(B) and 4k(2) of the Act, 7 U.S.C. §§ 6b(a)(i), 6o(1)(A), 6o(1)(B) and 6k(2) (1994);

3. Respondent Slusser is liable, as a controlling person of VFS pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (1994), for VFS' violations of Sections 4o(1)(A), 4o(1)(B) and 4m(1) of the Act, 7 U.S.C. §§ 6o(1)(A), 6o(1)(B) and 6m(1)(1994) and Commission Regulations 4.20(a), 4.20(b), 4.20(c), 4.21(a) and 4.21(g), 17 C.F.R. 4.20(a), 4.20(b), 4.20(c), 4.21(a) and 4.21(g) (1994);

4. Respondent First Republic Trading Corporation is liable for willfully aiding and abetting Slusser's and VFS' violations of Section 4o(1)(B) of the Act, 7 U.S.C. § 6o(1)(B) (1994); and,

5. Respondent Brinks is liable for willfully aiding and abetting Slusser's and VFS' violations of Section 4o(1)(B) of the Act, 7 U.S.C. § 6o(1)(B)(1994), and that he violated Section 4b(a)(i) of the Act, 7 U.S.C. § 6b(a)(i)(1994).

V. Sanctions

A. Cease and Desist Orders

***25** The Division first seeks the entry of cease and desist orders against all Respondents. A cease and desist order is appropriate when there is "a reasonable likelihood that the conduct will be repeated." In re GNP Commodities Inc., ¶ 25,360 at 39,223. A future violation is more likely when there is a pattern of past conduct. Id.

Respondents' conduct in this episode demonstrates their complete lack of appreciation for the Act and Regulations. They engaged in consistent and blatant violations of some of the most significant provisions of the law governing commodity futures transactions. Their wrongful behavior spanned nearly a year, and resulted in significant harm to the investors. The facts of this case demonstrate that Respondents are prone to engage in such conduct again, indicating that the entry of cease and desist orders is appropriate.

B. Trading Prohibitions

The Division next asserts that Respondents should be prohibited from trading on or subject to the rules of any contract market. A trading ban should only be imposed when there exists a nexus between Respondents' violations and the integrity of the futures markets. In re Citadel Trading Co. of Chicago, Ltd., <

1986-1987 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 23,082, at 32,191 (CFTC May 12, 1986). The Commission has adopted a broad view of the nexus requirement, focusing on the "potential harm to the 'integrity of the market in the public eye."' In re Miller, <1994-1996 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 26,440, at 42,913-14 (CFTC June 16, 1995) (quoting with approval Monieson v. Commodity Futures Trading Commission, 996 F.2d 852, 863 (7 superth Cir. 1993)).

There is a clear nexus here between the fraud perpetrated by Respondents and the "potential harm to the integrity of the market in the public eye." Respondents pilfered millions of dollars from customers, using the commodities markets to carry out their scheme. Their conduct certainly is enough to skew "<p>ublic perception ... and confidence in our markets," warranting significant trading bans. In re Miller, ¶ 26,440 at 42,914.

The length of the trading ban must be commensurate with the gravity of the violations. Id. Without a doubt, fraud against customers "is considered to be among the most serious of violations for purposes of initially determining the severity of the sanctions to be imposed." In re Grossfeld, <Current Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 26,921, at 44,468 (CFTC Dec. 10, 1996). The fraud in this case is no exception. Respondents' wrongdoing was purposeful, and their scheme was multi-faceted and complex. Their violations have been found to be intentional, and their conduct was certainly egregious. Under these circumstances, the imposition of permanent trading bans, reserved for only the most serious violations, is warranted. See In re Miller, ¶ 26,440 at 42,914; In re GNP Commodities Inc., ¶ 25,360 at 39,222.

C. Registration Revocation

***26** Slusser and First Republic Trading are currently registered with the Commission. The findings of fraud herein raise the presumption that they are no longer fit for registration. In re Gordon, <1992-1994 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 25,667, at 40,181 (CFTC March 16, 1993). They may rebut this presumption by showing that their continued registration would not pose a substantial risk to the public. Id. Respondents have offered no evidence of rehabilitation or mitigation, and have given this Court no reason to believe that will not continue with their pattern of deception. Having failed to overcome the presumption of unfitness, it is proper for Respondents' registrations to be revoked.

D. Civil Monetary Penalty

Finally, the Division recommends the assessment of a $10,576,000 civil monetary penalty against Respondents, jointly and severally. [FN40] Since the violative conduct took place in 1989, the former Section 6(d) standards will be applied to determine the amount of the penalty. See In re Gordon, ¶ 25,667 at 40,182 n.5. Those standards require consideration of both the gravity of the violations and the net worth of Respondents. In re Grossfeld, ¶ 26,921 at 44,464 n.17. It is Respondents' burden to submit evidence relating to their net worth, and their failure to submit any such evidence constitutes a waiver of the opportunity to do so. Id. at 44,465-66. Respondents have provided no basis upon which to judge their net worth, requiring the civil penalty to be assessed without consideration of that factor.

There need be little discussion at this point concerning the gravity of the violations in this case. It has been repeated throughout this Decision that Respondents consistently and knowingly violated core provisions of the Act, resulting in significant harm to the investors. The difficult question, then, is not whether to impose a substantial civil monetary penalty, but is precisely what that penalty should be. A starting point is the Commission's practice of looking to the "financial benefit that accrued to the respondent and/or the loss suffered by customers as a result of the wrongdoing." Id. at 44,468. As simple as that may sound, it is particularly difficult in this case, where none of the dollar figures herein is exact.

The Commission has recognized that "<c>ivil monetary penalties cannot be calculated with precision," and has upheld penalties which are "rationally devised in accordance with the purposes" behind the use of civil penalties as a sanction. In re GNP Commodities Inc., ¶ 25,360 at 39,222. Taking all factors into consideration, the Court finds that the Commission's purposes behind the civil money sanction can best be served by assessing a penalty of $10,000,000.00 in this case. This figure represents all of the ill-gotten gains of Respondents, adding at least a portion of the trading losses suffered by the investors as a "premium to offset the benefit of engaging in" the intentional, egregious conduct at issue here. Id. at 39,223. This amount rationally reflects the purposes underlying the use of the civil money sanction, and is within the acceptable range supported by the record. [FN41]

VI. Order

***27** Having found Respondents liable for numerous violations of the Act and Regulations, as detailed above, the Court hereby enters the following Orders:

1. Respondent Jerry W. Slusser is hereby Ordered to cease and desist from further violations of the Act and Regulations, as detailed above. It is further Ordered that Respondent Slusser be, and hereby is, permanently banned from trading on or subject to the rules of any contract market. It is further Ordered that Respondent Slusser's registration as an associated person be, and hereby is, revoked. It is further Ordered that Respondent Slusser pay a civil monetary penalty of $10,000,000.00, assessed jointly and severally with Respondents First Republic Financial Corporation and First Republic Trading Corporation.

2. Respondent First Republic Financial Corporation is hereby Ordered to cease and desist from further violations of the Act, as detailed above. It is further Ordered that Respondent First Republic Financial be, and hereby is, permanently banned from trading on or subject to the rules of any contract market. It is further Ordered that Respondent First Republic Financial pay a civil monetary penalty of $10,000,000.00, assessed jointly and severally with Respondents Jerry W. Slusser and First Republic Trading Corporation.

3. Respondent First Republic Trading Corporation is hereby Ordered to cease and desist from further violations of the Act, as detailed above. It is further Ordered that Respondent First Republic Trading be, and hereby is, permanently banned from trading on or subject to the rules of any contract market. It is further Ordered that Respondent First Republic Trading's registration as an introducing broker be, and hereby is, revoked. It is further Ordered that Respondent First Republic Trading pay a civil monetary penalty of $10,000,000.00, assessed jointly and severally with Respondents Jerry W. Slusser and First Republic Financial Corporation.

4. Respondent Hans J. Brinks is hereby Ordered, based on the recommendations in the Division's Motion for Default, to cease and desist from further violations of the Act, as detailed above. It is further Ordered that Respondent Brinks be, and hereby is, permanently banned from trading on or subject to the rules of any contract market. It is further Ordered that Brinks pay a civil monetary penalty of $770,000.00.

George H. Painter

Administrative Law Judge

Dated this 24 superth day of August, 1998

FN1. Respondent Brinks was not present at the hearing in this matter, and to date has not filed a notice of appearance indicating his intent to continue to participate in this proceeding. On October 24, 1997, counsel for Brinks was permitted to withdraw after demonstrating that he did not know Brinks' whereabouts, that he had gone to great lengths in an effort to contact Brinks, and that Brinks had not initiated contact with counsel for a year and a half. See Ruling on Motion to Withdraw, October 24, 1997; Motion of Counsel to Hans J. Brinks for Leave to Withdraw, October 24, 1997. Based on Brinks' failure to appear, and his failure to file a notice of appearance, he is hereby found to be in default, in accordance with Commission Regulation 10.62(b)(2), 17 C.F.R. § 10.62(b)(2) (1997). His liability on all charges is discussed infra, Part III.E.

FN2. On October 28, 1997, the Commission and Hamlet entered into a settlement agreement, in which the Commission found, based solely on the offer of settlement, that Hamlet aided and abetted violations of Section 4o(1)(B) of the Act, 7 U.S.C. § 6o(1)(B) (1994). In the Matter of Jerry W. Slusser, CFTC Docket No. 94-14, Order Making Findings and Imposing Remedial Sanctions as to Respondent Edward T. Hamlet (CFTC October 28, 1997). Accordingly, Hamlet is no longer a party to this action, and will only be referred to when necessary in discussing the remaining respondents.

FN3. On January 28, 1997, the Commission and Cantor entered into a settlement agreement, in which the Commission found, based solely on the offer of settlement, that Cantor had aided and abetted violations of Sections 4m(1) and 4o(1)(B) of the Act, 7 U.S.C. §§ 6m(1) and 6o(1)(B) (1994). In the Matter of Jerry W. Slusser, CFTC Docket No. 94-14, Order Making Findings and Imposing Remedial Sanctions as to

Respondent Cantor Fitzgerald & Co. (CFTC January 28, 1997). Accordingly, Cantor is no longer a party to this action, and will only be referred to when necessary in discussing the remaining respondents.

FN4. The law applicable to this matter was substantially the same in 1994, when the complaint was filed, as it was in 1989, when the violations occurred. In fact, all applicable provisions are substantially the same now as they were at all times relevant to the complaint, other than the renumbering of certain sections. For simplicity and consistency, all citations, unless otherwise noted, shall be to the Act and Regulations that were in effect at the time the complaint was filed.

FN5. First Republic Securities is not named as a respondent in this matter, but it was involved to some degree in the events that led to the filing of the complaint.

FN6. At least two of the other funds, Funds I and II, had been previously found to be in violation of German securities laws. DX 71 at 71-5; DX 56 at 56-9. The German regulators ordered that the investors of those funds be repaid their investments immediately. Id. As will be discussed later, IPC Funds III and IV would suffer a similar fate at the hands of the German regulators, eventually leading to a liquidation of those funds.

FN7. Division Exhibit 17 is the IPC Prospectus written in German. The Division chose not to enter the English translation into evidence. The parties stipulated to the accuracy of the translation, attached as Exhibit 4 to the testimony of Norman Terrell, which was filed with the Division's Prehearing Memorandum on July 31, 1995. See Stipulations ¶ 14, filed March 5, 1998. Any reference to Division Exhibit 17 hereinafter assumes also a reference to the stipulated English translation.

FN8. In its post-hearing brief, filed March 3, 1998, the Division asserts that Fund III also had a limit on losses, set at 10% of the investment amount. Division of Enforcement's Brief In Support Of Proposed Findings Of Fact And Conclusions Of Law ("Division Brief") at 2. Of the authority to which the Division cites for this proposition, only Exhibit 71 seems to discuss a limitation of loss as to Fund III, but it states that "IPC was to minimize possible losses so that at least 10 percent of each investor's investment ... was preserved." DX 71 at 71-6. That statement leaves the impression that IPC could trade Fund III until 90% of the investment was gone, preserving only the last 10% of the original investment, which is precisely opposite to the Division's claim of a 10% loss limit. Of the other exhibits that address this question, most importantly the IPC prospectus, none makes mention of any loss limitation on Fund III. Therefore, it is concluded that only Fund IV contained a limitation on the amount of the original investment that was subject to loss.

FN9. Apparently, Eurocal was another of Dr. Hieber's companies.

FN10. Slusser acknowledged as much in his testimony, stating that he treated all money received after May 31, 1989 as IPC money. Tr. at 344-345, 410.

FN11. Charles W. Howell ("Howell") signed the letter of March 14, 1989. DX 1. Howell was the president of Sterling at the time. Tr. at 22. Howell testified that he did not write the letter of March 14, and that he did not have knowledge of pertinent facts to write such a letter. Tr. at 38, 39. Howell testified that either Slusser or Hamlet must have written the letter. Tr. at 39.

I find Howell's testimony to be generally credible. The Court takes note of the fact that Howell was convicted of conspiracy to launder money in early 1989. Tr. at 20-21. Nonetheless, and with that fact given due consideration, Howell's testimony is internally consistent, is consistent with the documentary evidence, and was offered without any hesitation. Howell exhibited no signs of trepidation, and his demeanor was one of calm confidence. I find no indicia of unreliability, and generally credit Howell's testimony as being worthy of belief.

FN12. The record contains a wire advice dated February 23, 1989, which shows that $5 million was wired into a VFS account by order of IPC on that date. DX 39 at 39-58. While it is not disputed that such a wire occurred, it is not clear whether this particular wire advice was sent to VFS. Therefore, it is not being considered for the purpose of determining Slusser's knowledge of the origin of funds received pursuant to the February agreement.

FN13. Division Exhibit 94 is a series of charts prepared by Michael Tallarico ("Tallarico"), who is a Supervisory Futures Trading Investigator with the Commission. Tr. at 202. Tallarico testified that he used several sources in the preparation of DX 94, including the Cleon Point audit, Peat Marwick audit, various account statements, and bank wires. Tr. at 209, 210, 213, 216, 218, 222, 224, 228. After a careful review, and mindful of Respondents' objections, the Court finds DX 94 to be an accurate and reliable portrayal of each subject it covers.

FN14. For instance, Slusser testified that at least some of the funds transferred pursuant to the February agreement were treated differently at different times. Tr. at 344. Initially, $5 million deposited into a VFS account at Quatar National Bank on February 28, 1989 was treated as a "capital contribution" by Dr. Hieber. Tr. at 341. As such, Slusser stated that those funds "belonged" to VFS once they were transferred. Id. Later, according to Slusser, that money was treated as IPC money. Tr. at 344-345. There is no support for the contention that Dr. Hieber provided a $5 million capital contribution to VFS. In fact, the $5 million deposit was specifically contemplated in the February agreement. DX 36 at 36-3. Slusser's assertion that the money "belonged" to VFS at one point, but was treated as IPC money at another point is but one example of his efforts to confuse the facts and dodge the truth.

FN15. For example, when Slusser was asked whether there were any agreements between VFS and Eurocal between the February and the May agreements, the following exchange occurred:

Slusser: There were many agreements, many subsequent agreements.
Ms. Schmidt: None of those agreements were put in writing, were they?

Slusser:	There were many writings. I don't have copies of anything that was executed and there were several documents that reflected the transactions between the companies.
Ms. Schmidt:	There was no agreement in writing, was there?
Slusser:	I have none in front of me right now.
Ms. Schmidt:	You don't recall any, do you?
Slusser:	I've never been able to find one, no.
Ms. Schmidt:	But you don't recall any, do you?
Slusser:	No, I really don't.

Tr. at 335-336. Much of the rest of Slusser's testimony was similarly evasive, self-serving, and ultimately inconsistent.

FN16. The actual amount received from IPC and the IPC investors is not consistently reported throughout the record. Much of the funds were received in Deutsche marks, and the conversion to U.S. dollars may account for the differing figures at different times. Upon a careful review, the figure of $29,668,480.00 is an accurate representation of the total amount received from IPC and IPC investors.

FN17. In its Proposed Findings of Fact and Conclusions of Law ("Division Proposed Findings"), the Division provided the following chart, indicating where the IPC funds were deposited. This chart is helpful and accurate.

[Note: The following TABLE/FORM is too wide to be displayed on one screen. You must print it for a meaningful review of its contents. The table has been divided into multiple pieces with each piece containing information to help you assemble a printout of the table. The information for each piece includes: (1) a three line message preceding the tabular data showing by line # and character # the position of the upper left-hand corner of the piece and the position of the piece within the entire table; and (2) a numeric scale following the tabular data displaying the character positions.]

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******** This is piece 1. -- It begins at character 1 of table line 1. ********
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Date 1989	Funds Transferred from IPC to VFS and Related Accounts ($)	VFS Account at Quatar National Bank	VFS Account at Bankers Trust	VFS Account at Security Pacific	VFS and Vancorp Accounts at Merchants National Bank
2/28	(5,000,000.00)	5,000,000-.00			
3/7	(3,000,000.00)		3,000,00-0.00		
3/16	(2,670,000.00)		2,670,00-0.00		
4/7	(9,991.00)		9,991.00		
4/11	(90,690.00)		90,690.00		
4/11	(545,785.00)		545,785.-00		
5/9	(249,500.00)		249,500.-00		
6/5	(180,619.00)			180,619.00	
6/6	(310,337.00)				310,337.00
6/7	(1,678,596.00)				
3/7 to 5/26			(1,039,4-99.00)		1,039,499.-00
	Funds Deposited Directly by IPC Participants ($)				

4/16 to 7/14	(15,932,962.00)
Total	
	29,668,480.00

1...+...10....+...20....+...30....+...40....+...50....+...60....+...70.

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******* This is piece 2. -- It begins at character 72 of table line 1. ********
****

VFS Account at BNP, London	Sterling Account at Commerzbank
1,678,59-6.00	

15,932,962.00

72.....80....+...90....+.

FN18. The figures in RX 19 and DX 94 at 94-9, both of which state the profit and loss for each of the trading accounts, do not precisely agree. The calculations are within an acceptable range of each other, however, and the discrepancies are most likely a result of the conversion from Deutsche marks to U.S. dollars. In the interest of fairness, when possible, the Court will use the figures provided by Respondents in their exhibit RX 19.

FN19. In its complaint, and again in its post hearing submissions, the Division states that VFS caused the IPC funds to lose approximately $1.1 million in commodity trading. Complaint ¶ 52; Division Proposed Findings ¶ 109; Division Brief at 10. The Division's exhibit, however, prepared by its own investigator, shows the total loss for futures and options trading to be approximately $3.6 million. DX 94 at 94-9. That substantially agrees with Respondents' exhibit, which puts the futures and options losses at approximately $3.5 million. RX 19 at 6. The Division has not explained this discrepancy.

The record supports the finding that the total futures and options losses during the relevant period were $3,554,542.30. That figure, added to the undisputed securities losses of $3,031,574.54, puts the total trading losses at $6,586,116.84.

FN20. In its proposed findings, the Division asserts that VFS misappropriated an additional $310,000.00 of IPC money. Division Proposed Findings ¶ 121. The record will not support such a finding. The Division rests this finding the testimony of Michael Tallarico and Division Exhibit 94 at 94-4a. The funds in question were not wired to the VFS account until June 6, 1989 (DX 15), but the schedule at 94-4a only reflects activity up to May 26, 1989. DX 94 at 94-4a. Additionally, Tallarico did not specifically testify about the $310,000.00 transfer of June 6. Therefore, although the Division's figures concerning the other commissions and fees taken out by VFS and its entities are well-supported in the record, the Division has failed to prove by a preponderance of the evidence that the June 6, 1989 wire of $310,000.00 was misappropriated by Respondents.

FN21. Slusser seems to suggest that VFS came up with the idea, on its own, in early July 1989, that the IPC accounts needed to be liquidated. Tr. at 491. Slusser apparently would have the Court believe that it was just a coincidence that such a decision was made at precisely the same time that the German authorities ordered the liquidation. In the July letter sent to IPC investors, however, Respondents specifically address the liquidation in connection with the "German investigation authorities." DX 20 at 20-5. Also, Respondents stopped accepting money from investors in the Sterling account at Commerzbank on July 14, 1989, the very day after the German authorities issued their order. DX 39 at 39-2. Finally, an August 10, 1989 letter to Slusser from his German counsel, stated that counsel had "discussed the liquidation problem with BAK (Berlin) <the German regulatory authorities>." DX 67 at 67-2.

These events were not guided by coincidence. The evidence shows, and the Court so finds, that Slusser knew about the German order to return the IPC money, and that the liquidation of the IPC funds was prompted by that order, and not by an independent decision on the part of Respondents.

FN22. The Division bears the burden of proving all charges by a preponderance of the evidence. In re Citadel Trading Co. of Chicago, Ltd., <1986-1987 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 23,082, at 32,190 (CFTC May 12, 1986).

FN23. Section 4b(a)(i) provides, in relevant part, that:

(a) It shall be unlawful . . . (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person . . . (i) to cheat or defraud or attempt to cheat or defraud such other person.

7 U.S.C. § 6b(a)(i) (1994).

FN24. Respondents apparently have overlooked this crucial provision of Commission case law. In their post-hearing brief, Respondents correctly state the elements used to establish a fraud-based violation of the Act, but they fail to recognize that the proof scheme is somewhat different in the context of an administrative enforcement action. Respondents' Proposed Findings of Fact, Conclusions of Law and Memorandum of Law in Support ("Respondents' Brief") at 26, 29-30. Respondents' assertion that the Division needs to prove detrimental reliance by the investors is without legal support. Unfortunately for Respondents, a substantial portion of their post-hearing arguments is based on the reliance element.

FN25. The stated policy reason for not requiring the Division to prove reliance in administrative enforcement actions is that to do so would prevent the Commission from carrying out Congress' intended purpose for the antifraud provisions of the Act. In re GNP, ¶ 25,360, at 39218. That purpose, according to the Commission, is to "forbid attempts to deceive or to defraud," and any such attempts "by definition do not involve a completed act, and therefore reliance cannot be an element of a charge of attempted fraud." Id. The same reasoning can be used to explain the Commission's holding that the Division need not prove actual damages on the part of the investors in order to prevail.

FN26. The argument presented by Respondents is problematic in other respects, as well. As an initial matter, the cases cited in support of Respondents' position have few similarities to the matter at hand, and, as such, provide little or no guidance.

A more subtle problem with Respondents' argument is that it turns on reliance by the investors. Respondents assert that the "in connection with" requirement is met only when a customer actually enters into a commodities transaction, which assumes reliance on the alleged misrepresentation or omission. Respondents' Brief at 31. As noted above, however, the Division has no obligation to show reliance on the part of the investors. Any interpretation that would place such a burden on the Division is in direct conflict with Commission case law, and can be given no weight.

Finally, Respondents' argument that consummation of a commodities transaction is required overlooks the plain language of the statute, which prohibits fraud and attempted fraud. 7 U.S.C. § 6b (1994). Clearly, it was not contemplated that a completed futures transaction take place before liability can be established, since attempted fraud involves no such completed act.

FN27. In cases involving the omission of information, there arises a rebuttable presumption of materiality. In re Rosenthal & Company, <1984-1986 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶22,221, at 29,176 (CFTC June 6, 1984). As will be discussed in this Part, materiality in this case is clearly established, and the presumption does not even come into play. Even assuming the presumption to be operative, Respondents have offered no evidence that would rebut such a presumption.

FN28. Respondents' liability for violations of Commission Regulations is discussed infra, Part III.D.

FN29. Respondents have consistently argued that they were not bound by the IPC prospectus. To a certain extent, that is true. After gaining control of the funds under the May agreement, Respondents were free to handle them as they saw fit, subject, of course, to the mandates of the Act and the Regulations promulgated thereunder. Respondents in essence go it half right, in that they did handle the funds as they saw fit, but they did not handle them according to the mandates of the Act and Regulations. Their decision to deviate from the prospectus was one that required significant disclosures to the investors, which they never made.

FN30. Respondents assert that since they informed former officers of IPC, German authorities and independent auditors of the commissions and fees, there is no disclosure problem. Respondents' Brief at 15-17. The problem, of course, is that Respondents owed a duty to the investors, not the officers of IPC, not the German authorities, and not the independent auditors. Respondents could have informed the whole world that they were taking commissions and fees from the trading of the IPC money, but if they failed to inform the actual IPC investors, then they have violated the antifraud provisions of the Act.

FN31. At the very least, these statements required additional disclosures. The Commission has recognized that fraud can occur through the telling of "half-truths." Swickard v. A.G. Edwards & Sons, <1984-1986 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 22,522, at 30,275 (CFTC March 7, 1985). A party is not permitted to provide a customer with only part of the facts, when doing so would lead to a misrepresentation of the whole story. "<H>alf of the truth may obviously amount to a lie if it is understood to be the whole." Id. To say that the July letter contained even half of the truth is being generous, but whatever it contained, is was only enough to mislead the investors, and a substantial amount of additional information was necessary to correct it.

FN32. All of the material misrepresentations and omissions are specifically set out in the Findings of Fact, supra.

FN33. That section provides, in pertinent part that:

4o(1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator ...

(A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or

(B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

7 U.S.C. §§ 6o(1)(A) and 6o(1)(B) (1994).

FN34. There is, however, a distinction in the proof scheme when Section 4o(1)(B) is implicated. The Commission has consistently held that, "although scienter must be proved to establish a violation of Section 4b and Section 4o(1)(A), it is not necessary to establish a violation of Section 4o(1)(B)." In re Kolter, ¶ 26,262 at 42,198. Therefore, showing a violation of Section 4o(1)(B) is considerably less difficult than showing a violation of the other antifraud provisions of the Act. Having already established scienter for the Section 4b violation, the Division has surpassed its burden regarding the Section 4o(1)(B) violation.

FN35. The Division has built its argument in terms of a "scheme to defraud," based on the language in Section 4o(1)(A). A major component of that argument is the Division's assertion that Slusser set a goal to earn $2.25 million in commissions within ninety days from the IPC trading. See, e.g., Division Brief at 5. The Respondents have, naturally, taken issue with this assertion, claiming that it is not supported by the evidence. See, e.g., Respondents' Brief at 21-22. The Court agrees with Respondents, and finds that there is not enough evidence to hold that such a commission target existed. The memorandum from Hamlet on which the allegation rests is not enough, by itself, to establish that there was a specific goal to be reached within a specific time frame.

The Division's failure to prove the commission target is not fatal to its case. The evidence of fraud is so overwhelming that the existence, or nonexistence, of a specific commission target is irrelevant. The Division has clearly proven that there was a scheme to defraud, and has unquestionably established each of the required elements for a finding of fraud. Hence, although the parties make much of the commission target, it is an extraneous issue which ultimately has no bearing on the outcome of this case.

FN36. The pools were not traded in the name of the pool, which is the basis of a separate violation discussed infra, Part III.D. The key to the fourth factor is that the funds were not traded in the name of any individual investor, as was the case with the pools at issue here.

FN37. The specific statutory **definition** of **commodity pool** operator is:

any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market, except that the term does not include such persons not within the intent of the **definition** of the term as the Commission may specify by rule, regulation, or order. 7 U.S.C. § 1a(4)(1994).

FN38. Besides having no binding effect, the interpretive letters cited do not parallel the circumstances surrounding Respondents' registration requirement. Without providing a detailed rebuttal to each letter cited, it is enough to note that each one contained distinguishing elements, such that no analogy could be drawn to the Respondents' situation. Therefore, even if binding, the interpretive letters would provide Respondents no relief.

FN39. There are several exemptions and exceptions to the registration requirement, but none is applicable in this case. Respondents apparently agree, in that they do not claim any of those exemptions.

FN40. Respondents argue that a civil monetary penalty cannot be enforced due to statute of limitations problems. They assert that 28 U.S.C. § 2462 (1994) contains a general five-year statute of limitations, which cuts off the Division's claims for anything that occurred prior to May 26, 1989, five-years prior to the filing of the complaint on May 26, 1994. Respondents' Brief at 23- 25. Their argument fails for several reasons. First, it is unclear whether Section 2462 applies to administrative enforcement actions. In re Segal, <1990- 1992 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 25,162, at 38,418 n.6 (CFTC Nov. 5, 1991) (stating that the Commission "remain<s> unsure the statute governs even enforcement actions for monetary penalties under the Act"); In re Hunt, <1987-1990 Transfer Binder> Comm. Fut. L. Rep. (CCH) ¶ 24,009, at 34.534 (CFTC Nov. 6, 1987) (holding that the Commission is "not persuaded . . . that Section 2462 sets a five-year statute of limitations within which agencies must commence administrative actions to impose monetary sanctions").

Second, even assuming Section 2462 does apply, Respondents primary violations took place after May 31, 1989, within the five-year period. See supra Part III.A.(1)(b). Therefore, the statute does not even come into play.

Finally, again assuming applicability of Section 2462, Respondents violations were continuing in nature. As such, "a new claim accrues each day the violation is extant." Interamericas Investments, Ltd. v. Board of Governors of the Federal Reserve System, 111 F.3d 376, 382 (5 superth Cir. 1997). The ongoing nature of Respondents' violative conduct brings all of their actions within the scope of the Commission's authority under the continuing violation rule.

FN41. The record will support a penalty of anywhere between $6 million and $12 million, due to the serious nature of the violations and the large sums of money involved.

Commodity Futures Trading Commission (C.F.T.C.)

CFTC No. 94-14, 1998 WL 537342 (C.F.T.C.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

The undersigned, a non-attorney, does hereby certify that on June 2, 2005, she caused true and correct copies of the foregoing ***CFTC's RESPONSE TO THE EQUITY DEFENDANTS' MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) or 12(b)(6)*** to be served via electronic mail and first class U.S. mail:

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