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11 COMMODITY FUTURES TRADING COMMISSION

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT CALIFORNIA

14 Commodity Futures Trading
Commission,

15 Plaintiff,

16 vs.

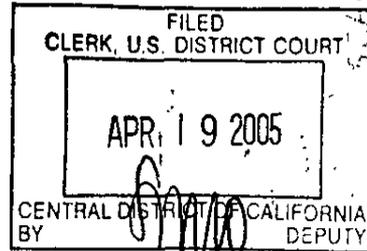
17 Emerald Worldwide Holdings, Inc.,)
City Trust and Investment Co.)
18 Ltd., Hao Jan Lu and Jian Zhuang,)
19)
20)

21 Defendants,

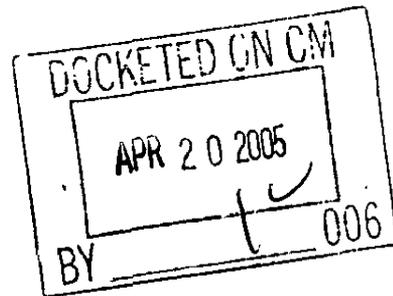
22 and)

23 Lynnwood Jen, Esther Pranolo, ACE)
Capital Advisory Group, Inc., and)
ACE Emerald W. Holding, Inc.,)
24)

25 Relief Defendants.)
26)



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U.S. DISTRICT COURT
CENTRAL DISTRICT OF
LOS ANGELES

1 This matter is before the Court on Plaintiff Commodity Futures
2 Trading Commission's ("CFTC's") uncontested Application for Entry of
3 Judgment By Default ("Application") against Defendant City Trust and
4 Investment Co. Ltd. ("CTI"). After consideration of the Application,
5 supporting memorandum and other documents filed in this matter and for
6 the reasons set forth below, the Court GRANTS the CFTC's Application.

7 I.

8 **PROCEDURAL BACKGROUND**

9 On May 10, 2004, the CFTC filed a four-count First Amended
10 Complaint charging defendant CTI with joint and several liability with
11 defendant Emerald Worldwide Holdings, Inc. ("Emerald") for soliciting,
12 or accepting any order for, or otherwise dealing in, illegal off-
13 exchange futures contracts in violation of Section 4(a) of the
14 Commodity Exchange Act ("Act"), 7 U.S.C. § 6(a) (2001);
15 misrepresenting Emerald as a registered entity, in violation of
16 Section 4h of the Act, 7 U.S.C. §§ 6h (2001); and misrepresenting
17 Emerald's affiliation with persons and entities that are actually
18 registered with the CFTC and its trading of customer funds, in
19 violation of Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C.
20 §§ 6b(a)(2)(i) and (iii) (2001), and CFTC Regulation 1.1(b)(1) and
21 (3), 17 C.F.R. §§ 1.1(b)(1) and (3) (2002). CTI is also charged with
22 liability, pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. §
23 2(a)(1)(B) (2001), for defendant Jian Zhuang's ("Zhuang")
24 misappropriation of customer funds, in violation of Section
25 4b(a)(2)(i) and (iii) of the Act and Regulation 1.1(b)(1) and (3).
26

1 The Court previously found that CTI was properly served with the
2 Summons and First Amended Complaint on May 17, 2004. See Order of
3 Preliminary Injunction (June 3, 2004); Civil Minutes (September 14,
4 2004). Under Federal Rule of Civil Procedure 12(a)(1)(A)
5 ("F.R.Civ.P."), CTI had 20 days to respond to the First Amended
6 Complaint. At the request of the CFTC and pursuant to F.R.Civ.P.
7 55(a), the Clerk of the Court entered default against CTI on September
8 14, 2004, for failure to answer or otherwise plead. On or about
9 January 26, 2005, CTI was served with copies of the CFTC's
10 Application, pursuant to F.R.Civ.P. 55(b)(2), along with notice of a
11 hearing scheduled for February 28, 2005.¹ On February 22, 2005, the
12 CFTC filed a request to continue the hearing to March 7, 2005, which
13 the Court granted.² Under Local Rule 7-9, CTI was required to file
14 opposition to the Application by February 21, 2005. A hearing on
15 Plaintiff's Application was held on March 7, 2005. To date, CTI has
16 not appeared, filed an answer or otherwise pleaded in this matter.

17 II.

18 FACTUAL BACKGROUND

19 After the clerk has entered default, the Court takes as true the
20 well-pleaded factual allegations of the complaint, except those as to
21

22 ¹ In December 2004, Plaintiff was contacted by counsel newly hired to
23 represent CTI in this matter. Declaration of Christine M. Ryall (Mar.
24 4, 2005) ¶12. Plaintiff's Application was served on CTI via counsel.
Ryall Decl. (Mar. 4, 2005) ¶13. However, CTI's counsel has never
filed a notice of appearance or other document with the Court.

25 ² Plaintiff served a copy of the request for extension on counsel for
26 CTI. See Certificate of Service to Plaintiff's Application to
Continue Hearing on Application for Default Judgment, filed on or
about February 22, 2005.

1 damages. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th
2 Cir. 1987); *Discovery Communications, Inc. v. Animal Planet, Inc.*, 172
3 F. Supp. 2d 1282, 1288 (C.D. Cal. 2001). Under this standard, the
4 facts of the case, as to defendant CTI, are as follows.

5 **A. Relevant Parties**

6 Plaintiff CFTC is an independent federal regulatory agency that
7 is charged with responsibility for administering and enforcing the
8 provisions of the Act, 7 U.S.C. §§ 1 et seq. (2001), and the
9 Regulations promulgated thereunder, 17 C.F.R. §§ 1 et seq. (2002).

10 Defendant CTI is a Japanese corporation with its primary place of
11 business located at 4F Kyobashi Daikyu Nagaoka Bldg., Chuo-ku
12 Hachobori 2-21- 2, Tokyo, Japan. CTI has ever been registered with
13 the CFTC in any capacity.

14 **B. Offering or Dealing in Illegal Off-Exchange Futures Contracts and
15 Misappropriation of Funds**

16 From at least March 2002 to the present, defendants CTI and
17 Emerald, operating together as a common enterprise, have solicited
18 approximately \$5 million from more than 300 customers, purportedly to
19 be used for trading foreign currency futures contracts through or with
20 Emerald in the United States. CTI, holding itself out as Emerald's
21 agent, has solicited customers to deposit funds into Emerald's United
22 States bank accounts. CTI has five to ten offices in Japan and China.
23 CTI hires "financial consultants" (FCs) to solicit new customers in
24 Japan and China and manage customer accounts. CTI, through its
25 agents, trains its FCs how to solicit customers to invest with Emerald
26 and provides FCs with promotional materials and account opening
documents to disseminate to prospective customers. CTI, through its

1 agents, has solicited approximately 300 investors in Japan and China
2 to deposit investment funds in Emerald's bank accounts in the United
3 States. CTI did not solicit investors to trade through any firm other
4 than Emerald.

5 When soliciting investors to deposit funds, CTI's FCs represent
6 that Emerald granted CTI exclusive authorization to solicit customers
7 in Japan and China to trade through Emerald. FCs tell prospective
8 customers that Emerald is a branch of "ACE Financial Group" and that
9 ACE Financial Group is one of the biggest foreign currency exchange
10 trading companies in the United States. FCs tell potential customers
11 that their investments will be protected because Emerald is regulated
12 in the United States by the CFTC, the National Futures Association
13 (NFA), the National Association of Securities Dealers (NASD), and the
14 Securities Investor Protection Corporation (SIPC) and that, as a
15 result of regulation by these entities, customers' investment funds
16 are protected even if Emerald ceases operating. CTI, through its
17 agents, also disseminates to potential customers Emerald's promotional
18 brochure, which makes the same representations.

19 CTI, through its agents, advises customers that foreign currency
20 trades placed by FCs or customers at a CTI dealing room are made
21 through Emerald in City of Industry, California. Emerald's website,
22 www.emeraldforex.com, stated that customers could place trade orders
23 directly by calling Emerald in California and that customers had
24 access "24-hours a day from Sunday evening 5:00PM WST (California
25 Time) to Friday afternoon at 12:00pm WST" to the "dealing desk" via
26 Emerald's main telephone number. From approximately March 2002

1 through November 2003, Emerald employed several part-time operators to
2 answer calls nearly 24 hours a day in Emerald's California office. 5031111
3 Emerald customers receive account statements, printed on Emerald
4 letterhead and bearing an Emerald seal, that show trading activity in
5 the customer's account. CTI distributes the Emerald account
6 statements to Emerald customers in Japan and China.

7 The customer account statements, in an attempt to characterize
8 the transactions as a spot or forward trades, indicate that foreign
9 currency contracts are bought and sold at a spot rate. However, the
10 foreign currency contracts that defendants offer and purport to sell
11 are actually contracts for future delivery of foreign currencies that
12 are cash settled ("futures contracts"). Emerald's promotional
13 materials and CTI's solicitations offer an opportunity to profit based
14 upon the fluctuations in the relative values of foreign currencies.
15 The prices or pricing formulas are established at the time the
16 contracts are initiated and the contracts may be settled through
17 offset, cancellation, cash settlement or other means to avoid
18 delivery. These contracts are offered to the general public and are
19 not individually negotiated. They are leveraged positions that can
20 and do remain open for indefinite periods of time.

21 Additionally, investors do not anticipate taking - and do not
22 take - delivery of the foreign currencies as a consequence of these
23 investments. The customers who invest with Emerald have no commercial
24 need for foreign currency. Emerald does not require its customers to
25 set up banking relationships to facilitate delivery of foreign
26 currencies. Instead, investors enter into these purported

1 transactions to speculate and profit from anticipated price
2 fluctuations in the markets for these currencies. Based on the
3 representations that have been made to investors by Emerald's agents,
4 investors expect that, once the market moves in a favorable direction,
5 Emerald will liquidate their investment by authorizing the sale of the
6 contract and that the investors will take profits. These are all
7 characteristics of futures contracts, not spot or forward contracts.³

8 While the transactions offered and purportedly sold by Emerald
9 and CTI are foreign currency futures contracts, Emerald customers are
10 not eligible contract participants and Emerald does not serve as a
11 proper counterparty to the purported contracts under the Commodity
12 Exchange Act. Moreover, the transactions are not conducted on or
13 subject to the rules of a board of trade that has been designated or
14 registered by the CFTC as a contract market or derivatives transaction
15 execution facility for such commodity, and such contracts are not
16 executed or consummated by or through such a contract market. They
17 are therefore illegal off-exchange futures contracts.

18 **C. Misrepresentations About the Trading of Customer Funds and**
19 **Misappropriation of Customer Funds**

20 Emerald's promotional brochure, which is disseminated by CTI FCs,
21 represents that all "investors' margin deposits are separately secured
22 in [major American Banks such as Bank of America, Citibank and Chase
23 Manhattan Bank] and are protected by FDIC." However, rather than

24 _____
25 ³ The Court has previously found that the foreign currency
26 transactions offered by CTI and Emerald are futures contracts. See
Order of Preliminary Injunction Against Defendant CTI and Relief
Defendants (June 3, 2004); Order Granting In Part and Denying In Part
Plaintiff's Motion for Civil Contempt (July 29, 2004).

1 being secured in separate accounts, prior to November 17, 2003,
2 customer funds were deposited into one of two accounts in Emerald's
3 name at a California branch of Citibank.

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4 Other than wire transfers between them, the only deposits into
5 the two Emerald Citibank accounts were from customers, directly or
6 through Otomo FX International or CTI, totaling approximately \$5
7 million. The Citibank accounts received no distributions from a bank,
8 clearinghouse, designated contract facility or any other entity that
9 would be consistent with trading. The funds collected from
10 Emerald/CTI customers were not traded on the customers' behalf.

11 Rather, approximately \$2.1 million in customer funds was wired to
12 offshore bank accounts in the name of CTI, \$82,000 to other entities,
13 \$37,000 to Zhuang, and \$507,000 to other Emerald bank accounts at
14 either Wells Fargo, Bank of America, or Citibank. Approximately \$1.9
15 million in customer funds was transferred back to customers for the
16 purported liquidation of some or all of their trading accounts. Since
17 no funds were transferred into either of the Emerald Citibank accounts
18 from any bank, clearinghouse, or other designated contract facility
19 that might indicate the existence of trading, customers who received
20 funds from Emerald's accounts were not being paid from returns on
21 their investments. Rather, they were being paid with other customers'
22 funds.

23 To uphold the appearance of trading, Emerald and/or CTI
24 manufacture customer account statements, printed on Emerald letterhead
25 and bearing an Emerald seal, detailing purported trading results for
26 any given day. These statements identify the account balance, margin

1 requirements, commissions, and profits/losses, as well as specific
2 contracts purportedly bought or sold. They are sent to customers
3 regularly and serve to maintain the appearance of trading and enable
4 CTI's scheme to continue. CTI distributes the false account
5 statements to customers in Japan and China.

6 From March through August 2002, Zhuang participated, along with
7 defendant Hao Jan Lu ("Lu"), in the business operations of Emerald.
8 In August 2002, Zhuang purchased all shares of Emerald. From August
9 2002 to present, Zhuang has controlled the business operations of
10 Emerald. Zhuang, who is also known as "Ken So" or "Ken Sho," has also
11 been a shareholder and director or officer of CTI and has exercised
12 control over business operations of CTI. Zhuang, a signatory on one
13 or more accounts into which investor funds were deposited, knowingly
14 misappropriated and failed to trade investor funds. CTI is liable for
15 Zhuang's actions because Zhuang was acting as an agent of CTI.

16 **D. Misrepresentations About Emerald's Registration Status and**
17 **Affiliation With Registered Entities**

18 As Emerald's exclusive agent, CTI distributes Emerald's
19 promotional material to prospective customers. In an attempt to
20 establish itself as a legitimate operation, Emerald represents in its
21 promotional brochure and Internet website that it is affiliated with
22 entities and individuals that are registered with the Commission.
23 These materials identify Emerald as a registered broker or dealer in
24 foreign currency exchange investments and in futures and commodities
25 trading and as "one of the largest and most experienced Futures
26 Commission Merchants ["FCM"] that focuses solely on the currency

1 market." However, Emerald is not and never has been registered with
2 the Commission in any capacity.

3 In Emerald's promotional brochure and Internet website, Emerald
4 represents that it is a subsidiary of ACE Financial Group ("ACE"), a
5 registered FCM. The brochure goes on to say that ACE is "a member of
6 the U.S.A. Commodity Futures Trading Commission [CFTC], the U.S.A.
7 Futures Commission Merchant [FCM], the U.S.A. National Futures
8 Association [NFA], the U.S.A. National Association Securities
9 Association [NASD], and the U.S.A. Securities Investor Protection
10 Corporation [SIPC]," and proud to have been "one of the first
11 registered FCM following the passage of the Commodity Modernization
12 Act of August 1998." Although ACE is registered with the CFTC as a
13 notice broker or dealer and introducing broker, and is a member of the
14 National Futures Association,⁴ ACE is has never been registered as a
15 FCM and it does not engage in foreign currency trading on behalf of
16 clients. Furthermore, ACE has no affiliation or dealings with Emerald
17 or CTI.

18 ACE Financial Group is the name under which another entity,
19 Anthony John Columbo Inc. ("Columbo Inc."), conducts business.
20 Emerald also claims that it is affiliated with Columbo Inc. and that
21 Columbo Inc. is a subsidiary of ACE. Emerald's brochure and website
22 state that Anthony John, presumably Anthony John Columbo ("Columbo"),
23

24 ⁴ The NFA is a not-for-profit membership corporation formed in 1976 to
25 become a futures industry's self-regulatory organization under Section
26 17 of the Commodity Exchange Act. Section 17 was added to the
Commodity Exchange Act by Title III of the Commodity Futures Trading
Commission Act of 1974 and provides for the registration and CFTC
oversight of self-regulatory associations of futures professionals.

1 President of Columbo Inc., is the Vice President & Chief of Spot
2 Trading at Emerald. Although Columbo is registered with the
3 Commission, he does not actually have any relationship with Emerald or
4 CTI.

5 Emerald, in its promotional brochure and Internet website,
6 identifies William Ahdout ("Ahdout") as the Head of Option Trading and
7 provides a biography of Ahdout. Ahdout has never maintained any
8 business affiliation, commercial or otherwise, with Emerald or ACE and
9 has never engaged in foreign currency trading through his employer,
10 Forex Capital, a registered FCM with the Commission. According to
11 Ahdout, his biography and other statements on Emerald's website were
12 taken directly from Forex Capital's website.

13 In Emerald's promotional brochure and Internet website, Emerald
14 identifies David Sakhai as the Chief Operating Officer of Emerald.
15 David Sakhai is the Principal of Forex Capital. Sakhai has never
16 maintained any business affiliation, commercial or otherwise,
17 individually or through Forex Capital, with Emerald or ACE. Sakhai
18 has stated that all representations regarding him and Forex Capital in
19 Emerald's website and brochure were made without his knowledge and
20 against his will.

21 In addition, CTI incorporates many of the same misrepresentations
22 into its own company brochures that are also distributed to
23 prospective customers. CTI's brochures and employee business cards
24 state that Emerald is part of ACE Financial Group, and that ACE
25 Financial Group is a registered FCM and member of the CFTC, NFA, NASD,
26 and SIPC. Zhuang and other CTI managers use these brochures to train

1 CTI FCs. CTI FCs use this information to solicit customers and lure
2 them into depositing funds with Emerald, by making customers believe
3 to that Emerald is a legitimate foreign currency contract trading
4 company registered and regulated in the U.S.

5 **E. Diversion of Funds to Relief Defendants**

6 Prior to December 1, 2003, CTI FCs gave customers the option of
7 depositing their investment funds directly into one of two Emerald
8 Citibank accounts in the United States, depositing their funds into a
9 CTI account in Japan for forwarding to Emerald, or making a cash
10 deposit at a CTI branch office for forwarding to Emerald. Prior to
11 November 17, 2003, most Emerald customers wired their investment funds
12 directly to one of Emerald's Citibank accounts in the United States.
13 Since on or about December 1, 2003, Emerald and/or CTI, through their
14 agents, have directed Emerald customers to wire investment deposits to
15 other bank accounts in California. One account, at Citibank, is in
16 the name of relief defendant ACE Capital Advisory Group, Inc. ("ACE
17 Capital"). The second account, at Bank of America, is in the name of
18 relief defendant ACE Emerald W. Holding, Inc. ("ACE Emerald"). Since
19 at least December 1, 2003, several customers solicited by CTI to trade
20 through Emerald have deposited investment funds into these bank
21 accounts in the United States.

22 **III.**

23 **ANALYSIS**

24 **A. Jurisdiction**

25 The Court has jurisdiction pursuant to Section 6c of the Act, 7
26 U.S.C. § 13a-1 (2001), which authorizes the CFTC to seek injunctive

1 relief against any person whenever it shall appear that such person,
2 has engaged, is engaging or is about to engage in any act or practice
3 constituting a violation of any provision of the Act or any rule,
4 regulation or order thereunder. The Court has previously held that,
5 based on the allegations in the First Amended Complaint and the
6 exhibits filed in support thereof, the foreign currency transactions
7 offered by CTI and Emerald are futures contracts and that under
8 Section 2(c)(2)(B)(i)-(ii) of the Act, 7 U.S.C. § 2(c)(2)(B)(i)-(ii)
9 (2001), the CFTC and the Court have jurisdiction over them. See Order
10 of Preliminary Injunction Against Defendant CTI and Relief Defendants
11 (June 3, 2004); Order Granting In Part and Denying In Part Plaintiff's
12 Motion for Civil Contempt (July 29, 2004). Venue properly lies with
13 this Court pursuant to Section 6c(e) of the Act, in that the acts and
14 practices in violation of the Act occurred within this district, among
15 other places.

16 **B. Standard for Default Judgment**

17 F.R.Civ.P. 55(b)(2) and Local Rule 55-1 require an application
18 for default judgment to be accompanied by a declaration that states:
19 (1) when and against which party default was entered; (2) the
20 identification of the pleadings to which default was entered; (3)
21 whether the defaulting party is an infant or incompetent person, and
22 if so, whether that person is adequately represented; (4) that the
23 Soldiers' and Sailors' Civil Relief Act of 1940 does not apply; and
24 (5) that notice of the application has been served on the defaulting
25 party, if required. The CFTC's application has met the procedural
26 requirements of Fed.R.Civ.P. 55 and Local Rule 55-1. A court may not

1 enter a default judgment against an unrepresented minor, an
2 incompetent person, or a person in military service. See Fed.R.Civ.P.
3 55(b)(2). As a corporation, these characteristics do not apply to
4 CTI.

5 Judgment by default may be entered by the Court when the party
6 entitled to a judgment by default applies to the Court for such
7 judgment. Fed. R. Civ. Pro. 55(b). The Court may consider the
8 following factors in determining whether to award a default judgment:
9 (1) the merits of plaintiff's claims; (2) the sufficiency of the
10 complaint; (3) the amount of money at stake; (4) the likelihood of
11 prejudice to plaintiff if judgment of default is denied; (5) the
12 possibility of dispute as to any material facts in the case; (6)
13 whether default resulted from excusable neglect; and (7) the policy of
14 the Federal Rules of Civil Procedure favoring decisions on the merits.
15 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Here, these
16 factors weigh in favor of granting the motion for entry of default
17 judgment.

18 **1. Substantive Merits and Sufficiency of the Complaint**

19 The first two *Eitel* factors require that the factual allegations
20 in the First Amended Complaint "state a claim on which [the CFTC] may
21 recover." *Danning v. Levine*, 572 F.2d 1386, 1388 (9th Cir. 1978);
22 *PepsiCo, Inc. v. California Security Cans*, 238 F. Supp. 2d 1172, 1175
23 (C.D. Cal. 2002). As described below, the First Amended Complaint
24 alleges sufficient facts to make a prima facie case on each count
25 charged therein. This factor favors granting a default judgment.

26

1 a. **Fraudulent Misappropriation**

2 Count I of the First Amended Complaint charges that CTI is
3 vicariously liable for Emerald's and Zhuang's violations Sections
4 4b(a)(2)(i) and (iii) of the Act and Commission Regulations 1.1(b)(1)
5 and (3), pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. §
6 2(a)(1)(B) (2001). The First Amended Complaint charges that Zhuang,
7 as an agent of Emerald and CTI, violated these sections of the Act and
8 Regulations by fraudulently misappropriating investor funds. Sections
9 4b(a)(2)(i) and (iii) of the Act prohibit cheating or defrauding or
10 attempting to cheat or defraud other persons, and willfully deceiving
11 or attempting to deceive other persons in connection with commodity
12 futures trading. See *Saxe v. E.F. Hutton & Co. Inc.*, 789 F.2d 105,
13 111 (2d Cir. 1986) and *CFTC v. Skorupskas*, 605 F. Supp. 923 (E.D.
14 Mich. 1985). CFTC Regulation 1.1(b)(1) and (3) similarly prohibits
15 such conduct in connection with foreign currency futures contracts.
16 In support of Count I, the First Amended Complaint alleges that Zhuang
17 fraudulently misappropriated customer funds because he controlled the
18 Emerald bank accounts into which customers deposited investment funds,
19 but knowingly failed to send funds to any trading firm and instead
20 made transfers to CTI, himself and others; Zhuang was acting in his
21 capacity as agent of Emerald and CTI; Emerald and CTI operated as a
22 common enterprise; and CTI is liable for Zhuang's violations, pursuant
23 to Section 2(a)(1)(B) of the Act.

24 The facts alleged by the CFTC establish a prima facie case that
25 Zhuang violated Section 4b(a)(2)(i) and (iii) and Regulation 1.1(b)(1)
26 and (3). Soliciting or obtaining funds from investors for trading,

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1 then failing to trade the funds while using them for personal and
2 business expenses, is misappropriation. *Skorupskas*, 605 F. Supp. at
3 923 (defendant misappropriated customer funds entrusted to her by
4 soliciting investor funds for trading and then trading only a small
5 percentage of those funds, while disbursing the rest of the funds to
6 other investors, herself, and to her family); *CFTC v. Muller*, 570 F.2d
7 1296 (5th Cir.1978) (preliminary injunction affirmed where CFTC made a
8 prima facie showing that defendant had misappropriated customer funds
9 in violation of Act). Misappropriation of funds entrusted to a
10 defendant for trading purposes is "willful and blatant fraudulent
11 activity" that violates Section 4b(a) of the Act. *CFTC v. Weinberg*,
12 287 F. Supp. 2d 1100, 1106 (C.D. Cal. 2003). See also *CFTC v. Noble*
13 *Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d 676 (D. Md. 2000), aff'd
14 in part and vacated in part by, *CFTC v. Baragosh*, 278 F.3d 319 (4th
15 Cir. 2002) (defendants defrauded investors by diverting investor funds
16 for operating expenses and personal use); *CFTC v. Clothier*, 788 F.
17 Supp. 490 (D. Kan.1992) (a violation of Section 4o (1) of the Act
18 includes the fraudulent misappropriation of customers' funds entrusted
19 to broker for trading purposes); *In re Lincolnwood Commodities, Inc.*,
20 [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 at
21 28,255 (CFTC 1984) (CFTC affirmed holding that defendant violated
22 Section 4b when he "diverted to his own use funds entrusted to him by
23 or on behalf of his customers").

24 Under Section 2(a)(1)(B) of the Act the "act, omission, or
25 failure of any official, agent, or other person acting for any
26 individual, association, partnership, corporation, or trust within the

1 scope of his employment or office shall be deemed the act, omission,
2 or failure of such individual, association, partnership, corporation,
3 or trust, as well as of such official agent or other person." 7
4 U.S.C. § 2(a)(1)(B) (2001). Whether one person is an agent acting for
5 another turns . . . on an overall assessment of the totality of the
6 circumstances in each case." *Berisko v. Eastern Capital Corp.*, [1984-
7 1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,772 at 31,223 (CFTC
8 1985); accord *Bogard v. Abraham-Rietz & Co.*, [1984-1986 Transfer
9 Binder] Comm. Fut. L. Rep. (CCH) ¶22,273 (CFTC 1984). Here, the First
10 Amended Complaint alleges that Zhuang was shareholder and director or
11 officer of both Emerald and CTI. He has been a sole signatory to the
12 Emerald accounts holding customers' investment funds. Zhuang works
13 out of the Tokyo, Japan headquarters of CTI, holds himself out as
14 Administration Director and "head of business operations" of CTI and
15 personally works with large investors. Plaintiff has made a prima
16 facie showing that Zhuang was acting as an agent of Emerald and CTI
17 and that CTI is liable, pursuant to Section 2(a)(1)(B) of the Act, for
18 Zhuang's misappropriation of customer funds, in violation of Sections
19 4b(a)(2)(i) and (iii) of the Act and Regulations 1.1(b)(1) and (3).

20 **b. Fraudulent Misrepresentation**

21 Count II of the First Amended Complaint charges CTI with
22 violating Section 4b(a)(2)(i) and (iii) of the Act and CFTC
23 Regulations 1.1(b)(1) and (3), which prohibit acts, transactions, and
24 practices or courses of businesses that operate with fraud or deceit,
25 including misrepresentations and omissions of a material fact, in
26 connection with the offer, purchase or sale of commodity futures

1 contracts. The CFTC must show that the defendants made material
2 misrepresentations or omissions of material fact with the requisite
3 scienter. See *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut.
4 L. Rep. (CCH) ¶ 27,701 at 48,311 (CFTC July 9, 1999), aff'd and
5 remanded on other grounds sub nom., *Slusser v. CFTC*, 210 F.3d 783 (7th
6 Cir. 2000). A material fact is one that "it is substantially likely
7 that a reasonable investor would consider . . . important in making an
8 investment decision." *Sudol v. Shearson Loeb Rhodes, Inc.*, [1984-1986
9 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 at 31,119 (CFTC
10 Sep. 30, 1985). A showing of intentional conduct or reckless
11 disregard is sufficient to satisfy the scienter requirement. See
12 *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985); *CFTC v. Noble*
13 *Metals Int'l*, 67 F.3d 766 (9th Cir. 1995), cert. den., *Schulze v. CFTC*,
14 519 U.S. 815, 136 L. Ed. 2d 26, 117 S. Ct. 64 (1996); *In re Conti*
15 *Commodity Services, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L.
16 Rep. (CCH) ¶25,038 at 37,878 (CFTC Apr. 17, 1991). In general, all
17 manner of omissions and misrepresentations of material fact regarding
18 futures and options transactions violate the antifraud provisions of
19 the Act and Regulations, including omissions and misrepresentations
20 concerning the likelihood of profit, the risk of loss, and other
21 matters that a reasonable investor would consider material to his
22 investment decision. See e.g., *JCC, Inc., et al. v. CFTC*, 63 F.3d
23 1557, 1571 (11th Cir. 1995).

24 The First Amended Complaint alleges that Emerald and CTI,
25 operating as a common enterprise, and their agents, made false and
26 deceptive representations and omissions of material fact, in Emerald's

1 promotional materials and CTI FCs' solicitations, regarding Emerald's
2 trading of foreign currency futures contracts on behalf of customers
3 Emerald's affiliations with unrelated individuals and entities
4 registered with the CFTC, including ACE Financial Group, Anthony John
5 Columbo, David Sakhai and William Ahdout; Emerald's registration
6 status with the CFTC; Emerald's status as a subsidiary of ACE
7 Financial Group; and ACE Financial Group's registration status with
8 the CFTC, NFA, NASD and SIPC. These facts are material. The First
9 Amended Complaint alleges that Emerald and CTI, and their agents,
10 willfully deceived or attempted to deceive Emerald customers through
11 these misrepresentations and omissions of fact.

12 The First Amended Complaint alleges sufficient facts to establish
13 that Emerald and CTI operated in a common enterprise. The two
14 companies had common control, did not operate separate from each other
15 or at arms length, and they commingled funds in Emerald's U.S. bank
16 accounts. See *FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176,
17 1202 (C.D. Cal. 2000); *Sunshine Art Studios v. FTC*, 481 F.2d 1171,
18 1173 (1st Cir. 1973); *CFTC v. Wall Street Underground Inc.*, 281 F.
19 Supp. 2d 1260, 1271 (D.C. Kan. 2003); *CFTC v. Comvest Trading Corp.*,
20 481 F. Supp. 438, 440 (D.C. Mass. 1979). CTI may therefore be held
21 liable for the deceptive acts and practices of the Emerald. *Sunshine*
22 *Art Studios*, 481 F.2d at 1175; *FTC v. Think Achievement Corp.*, 144 F.
23 Supp. 2d 993, 1011 (N.D. Ind. 2000). The CFTC has alleged all of the
24 prima facie elements for a violation of Sections 4b(a)(2)(i) and (iii)
25 of the Act and CFTC Regulations 1.1(b)(1) and (3).

26

1 c. **Misrepresentation As a Registered Entity**

2 Count III of the First Amended Complaint charges CTI, together
3 with Emerald, with violating Section 4h of the Act by falsely
4 representing that Emerald is registered with the Commission. Section
5 4h prohibits any person from falsely representing itself or its agents
6 or representatives as being registered with the Commission in its
7 solicitation of customers. Section 4h also makes it unlawful to
8 falsely represent that in connection with the handling of any order or
9 contract for the purchase or sale of any commodity, that order or
10 contract is being executed through a member that is registered.

11 The First Amended Complaint alleges that Emerald's brochure and
12 website misrepresent that Emerald is a registered FCM with the
13 Commission and that Emerald's parent company "ACE Financial Group" is
14 also registered as a FCM and notice broker or dealer with the
15 Commission. Emerald is not now, nor has it ever been, registered with
16 the Commission in any capacity. ACE, although it is a registered
17 broker dealer and introducing broker, has no affiliation with Emerald.
18 CTI is liable for Emerald's violations because they operate as a
19 common enterprise. The First Amended Complaint alleges sufficient
20 facts to establish that Emerald and CTI operated in a common
21 enterprise. See Section III.B.1.b., herein, above. The CFTC has
22 pleaded a prima facie violation of Section 4h.

23 d. **Offering or Dealing in Illegal Off-Exchange Futures**
24 **Contracts**

25 Count IV of the First Amended Complaint alleges that CTI violated
26 Section 4(a) of the Act by soliciting, or accepting orders for, or
otherwise dealing in, illegal off-exchange foreign currency futures

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1 contracts. Section 4(a) of the Act provides that unless exempted by
2 the Commission, it shall be unlawful for any person to offer to enter
3 into, execute, confirm the execution of, or conduct an office or
4 business in the United States for the purpose of soliciting, accepting
5 any order for, or otherwise dealing in transactions in, or in
6 connection with, a contract for the purchase or sale of a commodity
7 for future delivery when such transactions have not been conducted on
8 or subject to the rules of a board of trade which has been designated
9 or registered by the Commission as a contract market or derivatives
10 transaction execution facility for such commodity; and such contracts
11 have not been executed or consummated by or through such contract
12 market. Two elements must be established to show a Section 4(a)
13 violation: (1) the contract in question is a futures contract; and (2)
14 the contract was not traded on or subject to the rules of a designated
15 contract market.

16 The First Amended Complaint alleges that (1) CTI and Emerald,
17 operating as a common enterprise, offered and dealt in foreign
18 currency transactions, purportedly traded through Emerald in
19 California, and that the foreign currency transactions are futures
20 contracts and (2) the futures contracts offered by CTI and Emerald
21 have not been conducted on or subject to the rules of a board of trade
22 designated or registered by the Commission as a contract market or
23 derivatives transaction execution facility, nor executed or
24 consummated by or through a contract market.⁵ Thus, the CFTC has
25 pleaded a prima facie case of a Section 4(a) violation.

26 _____
⁵ See n.3, above.

1 2. Amount at Stake

2 This *Eitel* factor requires the Court to consider "the amount of
3 money at stake in relation to the seriousness of Defendant's conduct."
4 Cal. Sec. Cans., 238 F. Supp. 2d at 1176; see also *Eitel*, 782 F.2d at
5 1471-72. Here, in addition to a permanent injunction, Plaintiff seeks
6 from CTI restitution of \$3,242,106.37 and a civil monetary penalty of
7 \$9,000,000. The Court may order restitution, pursuant to its general
8 equity powers to afford complete relief, and courts regularly order
9 defendants to pay restitution in federal regulatory enforcement
10 actions. See *CFTC v. CoPetro Mrktg. Group Inc.*, 680 F.2d 573, 583-84
11 (9th Cir. 1982); *CFTC v. Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979);
12 *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1163 (S.D.N.Y.
13 1979); *SEC v. Manor Nursing Centers Inc.*, 458 F.2d 1082, 1104 (2d Cir.
14 1972) (upholding an order requiring return of investment proceeds to
15 investors in a public offering).

16 The appropriate amount of restitution is the total amount
17 invested by customers, less refunds made by the defendants to the
18 customers. *FTC v. Wolf*, 1996 U.S. Dist. LEXIS 1760 *27, 1996 WL
19 812940 *9 (S.D. Fla. 1996); *Porter v. Warner Holding Co.*, 328 U.S.
20 395, 402, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) (restitution restores
21 the *status quo* by returning to the purchaser the price of unlawfully
22 sold goods); *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1089
23 (D.N.J. 1996) (citing *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir.
24 1993)) (restitution is designed to restore victims to the position
25 that existed before the illegal or wrongful transaction occurred by
26 compensating them for loss caused by the conduct). Here, the CFTC

1 seeks restitution from CTI in an amount equal to the net customer
2 deposits into the U.S. bank accounts of Emerald, ACE Capital and ACE
3 Emerald from March 2002 through April 2004,⁶ the period of the
4 solicitation and fraud alleged in the First Amended Complaint. The
5 restitution sought by the CFTC is therefore reasonable under the
6 circumstances.

7 Section 6c of the Act together with CFTC Regulation 143.8(2)(ii),
8 17 C.F.R. § 143.8(2)(ii), permit civil monetary penalties of up to the
9 greater of \$120,000 per violation or triple a defendant's monetary
10 gain.⁷ The First Amended Complaint alleges that each act by the
11 defendants is a separate violation of law. See First Amended
12 Complaint ¶¶ 67, 71, 74 and 77. It also alleges that more than 300
13 customers were fraudulently solicited, were offered illegal off-
14 exchange futures contracts and were the victims of misappropriation.
15 Therefore, the civil monetary penalty against CTI could potentially be
16 as high as \$36 million (300 times \$120,000). See *Slusser*, 210 F.3d at
17 786 ("[T]he penalty ... is limited by the number of violations alleged
18 in the complaint times the maximum fine per violation").

19 Courts and the CFTC have found that a high CMP is warranted where
20 customers have been defrauded of a substantial amount. See *JCC, Inc.*,
21 63 F.3d at 1571 (quoting *In re Premex*, Comm. Fut. L. Rep. (CCH) ¶
22 24,165 at 34,890-91 (CFTC Feb. 17, 1988)) ("conduct that violates core

23 ⁶ See Brown Declaration ¶5.

24 ⁷ As authorized by the Federal Civil Penalties Inflation Adjustment
25 Act of 1990, Public Law 101-410; 104 Stat. 890, the Commission raised
26 the penalty per violation from \$100,000 to \$120,000 for each act
committed on or after October 23, 2000. 17 C.F.R. § 143.8(2)(ii).

1 provisions of the Act's regulatory system--such as manipulating prices
2 or defrauding customers--should be considered very serious"). The
3 CFTC has stated that "[c]ivil monetary penalties serve a number of
4 purposes. These penalties signify the importance of particular
5 provisions of the Act and the [CFTC]'s rules, and act to vindicate
6 these provisions in individual cases, particularly where the
7 respondent has committed the violations intentionally. Civil monetary
8 penalties are also exemplary; they remind both the recipient of the
9 penalty and other persons subject to the Act that noncompliance
10 carries a cost. To effect this exemplary purpose, that cost must not
11 be too low or potential violators may be encouraged to engage in
12 illegal conduct." *In re GNP Commodities, Inc.*, [1990-1992 Transfer
13 Binder] Com. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (CFTC 1992)
14 (citations omitted).

15 Here, the First Amended Complaint alleges that CTI, together with
16 Emerald, induced through misrepresentations about the use of their
17 investment funds and the registration status of Emerald and its
18 purported affiliates approximately three hundred customers to deposit
19 a net amount of \$3,242,106.37 into the U.S. bank accounts of defendant
20 Emerald and relief defendants ACE Capital and ACE Emerald. Rather
21 than trade the funds, as expected by customers, CTI and Emerald
22 misappropriated them. CTI received a majority of the misappropriated
23 funds, a total of \$2,733,909.79. Under these circumstances, the Court
24 finds that the CFTC's request for a civil monetary penalty of
25 \$9,000,000 is not unreasonable. This factor favors granting a default
26 judgment.

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1 **3. Possibility of Prejudice to Plaintiffs**

2 Another inquiry under *Eitel* is whether there is a significant
3 possibility of prejudice to Plaintiff should relief be denied. In
4 this case, if relief is denied, Plaintiff would be without other
5 recourse for recovery. Moreover, without default judgment CTI would
6 be free to continue to offer illegal U.S. futures contracts. This
7 factor favors granting a default judgment.

8 **4. Possibility of Dispute**

9 As to CTI, no dispute exists as to material facts. CTI has never
10 appeared in this action and default was entered by the clerk. Upon
11 entry of default, all well-pleaded facts in the complaint are taken as
12 true, except those relating to damages. *TeleVideo Sys., Inc.*, 826
13 F.2d at 917-18. The facts alleged in Plaintiff's well-pleaded First
14 Amended Complaint are now taken as true and, as described above, are
15 sufficient to establish Plaintiff's claims against CTI. No dispute
16 has been raised by CTI and it is unlikely that CTI will appear in the
17 future. This factor favors granting default judgment.

18 **5. Possibility of Excusable Neglect**

19 CTI's default did not result from excusable neglect. CTI has
20 been given notice reasonably calculated to apprise it of the pendency
21 of the action and was afforded an opportunity to present its
22 objections. See *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306,
23 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Defendant CTI was served with
24 copies of the Summons and the First Amended Complaint via FedEx on May
25 17, 2004. See Order of Preliminary Injunction entered June 3, 2004
26 (finding CTI validly served under Hague Convention); Civil Minutes

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1 filed September 14, 2004.⁸ Moreover, a shareholder and director of
 2 CTI, Jian Zhuang, is also a defendant in this matter and has
 3 participated in all proceedings. Nearly eleven months have passed
 4 since the CFTC filed and served its First Amended Complaint and seven
 5 months since the default was entered, yet CTI has not answered the
 6 First Amended Complaint or otherwise appeared. In light of the
 7 notifications CTI received of this lawsuit and the period of time that
 8 has passed, there is little if any possibility of excusable neglect.
 9 This factor favors granting a default judgment.

10 **6. Policy for Deciding on the Merits**

11 While there is a policy favoring a decision on the merits
 12 whenever possible, this factor is not alone dispositive. *Cal. Sec.*
 13 *Cans.*, 238 F. Supp. 2d at 1177. Under Fed.R.Civ.P. 55, termination of
 14 a case before hearing the merits is allowed whenever a defendant fails
 15 to defend an action. *Id.* CTI's failure to answer the First Amended
 16 Complaint makes a decision on the merits impractical, if not
 17 impossible. This factor favors granting a default judgment.

18 Because these factors weigh in favor of granting default
 19 judgment, the Court grants default judgment against CTI.

22 ⁸ Plaintiff also arranged service through Japanese authorities, as
 23 permitted by the Hague Convention. The Toyko Circuit Court mailed
 24 copies of the summons and First Amended Complaint, along with Japanese
 25 translations, to CTI. The package was received at CTI's Toyko address
 26 on July 9, 2004. See Ex. 1 to Plaintiff's Request to Enter Default
 Against CTI, filed on or about September 2, 2004. Plaintiff
 additionally sent copies of the First Amended Complaint and SRO to CTI
 by facsimile. See Declaration of Christine M. Ryall in Support of
 Plaintiff's Memorandum on Service of Process on CTI Under the Hague
 Service Convention (May 28, 2004), ¶10.

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1 **C. REMEDIES**

2 The CFTC seeks a permanent injunction, restitution and a civil
3 monetary penalty.

4 **1. Permanent Injunction**

5 Section 6c of the Act authorizes the Court to grant a permanent
6 injunction. See 7 U.S.C. § 13a-1. "As a general rule, a permanent
7 injunction will be granted when liability has been established and
8 there is a threat of continuing violations." *MAI Sys. Corp. v. Peak*
9 *Computer*, 991 F.2d 511, 520 (9th Cir. 1993). As a result of the entry
10 of default, the liability of CTI has been established. Moreover, due
11 to CTI's non-appearance and the effort to circumvent the Court
12 November 18, 2003 SRO by directing customer deposits to alternate bank
13 account, it is clear that there is a threat of continuing violations.
14 Thus, a permanent injunction is warranted.

15 **2. Restitution**

16 In determining damages, the Court can rely on declarations
17 submitted by the CFTC or order a full evidentiary hearing. *Elektra*
18 *Entertainment Group, Inc. v. Bryant*, 2004 U.S. Dist. LEXIS 26700, 2004
19 WL 783123 (C.D. Cal. 2003) (citing F.R.Civ.P. 55(b)(2)); *Philip Morris*
20 *USA, Inc. v. Castworld Products*, 219 F.R.D. 494, 498 (C.D. Cal. 2003)
21 (citing Fed.R.Civ.P. 55(b)(2)). As evidence of damages, the CFTC
22 filed the Declaration of Jamie Brown (January 25, 2005). The Court
23 finds the CFTC's documentary evidence sufficient and finds no reason
24 to hold an evidentiary hearing on damages.

25 The Brown Declaration, which summarizes voluminous bank records
26 for the U.S. bank accounts of Emerald, ACE Capital and ACE Emerald,

1 states that between March 2002 and April 2004, over 300 customers
2 deposited \$5,256,909.83 into those accounts. Brown Decl. ¶5. Of this
3 amount, \$2,014,803.46 was returned to customers and, therefore, the
4 net customer deposits are \$3,242,106.37. *Id.* The Court finds that
5 the appropriate amount of customer restitution is \$3,242,106.37. See
6 section III.B.2., herein.

7 **3. Civil Monetary Penalty**

8 The Brown Declaration states that a total of \$2,733,909.79 was
9 transferred from the U.S. bank accounts of Emerald and ACE Capital to
10 CTI in Japan. Brown Decl. ¶6. This includes \$2,153,904.79 in funds
11 transferred from the Emerald accounts before the November 18, 2003,
12 Statutory Restraining Order ("SRO") was issued against Emerald,
13 \$550,000 from Emerald's accounts after the SRO was issued, and \$30,000
14 from ACE Capital's account. As noted above, CTI's solicitations,
15 misrepresentations and misappropriation, as alleged in the First
16 Amended Complaint, were intentional, defrauded a substantial number of
17 victims out of a substantial amount of money and served to undermine
18 the integrity of the U.S. commodity futures market. See also section
19 III.B.2., herein. In these circumstances, the Court finds that a
20 civil monetary penalty of \$8,201,729.37, or triple CTI's monetary
21 gain, is appropriate.

22 **IV.**

23 **ORDER FOR PERMANENT INJUNCTION**

24 Pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, **IT IS HEREBY**
25 **ORDERED** that:

1 Defendant City Trust and Investment Co. Ltd ("CTI") is
2 permanently restrained, enjoined and prohibited from directly or
3 indirectly:

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4 a. (1) cheating or defrauding or attempting to cheat or
5 defraud any persons; and (2) deceiving or attempting to deceive any
6 person: in or in connection with orders to make, or the making of,
7 contracts of sale of commodities for future delivery, made, or to be
8 made, for or on behalf of other persons where such contracts for
9 future delivery were or may have been used for (1) hedging any
10 transaction in interstate commerce in such commodity, or the products
11 or byproducts thereof, or (2) determining the price basis of any
12 transaction in interstate commerce in such commodity, or
13 (3) delivering any such commodity sold, shipped, or received in
14 interstate commerce for the fulfillment thereof;

15 b. Offering to enter into, entering into, executing,
16 confirming the execution of, or conducting business for the purpose of
17 soliciting, accepting any order for, or otherwise dealing in any
18 transaction in, or in connection with, a contract for the purchase or
19 sale of a commodity for future delivery when: (1) such transactions
20 have not been conducted on or subject to the rules of a board of trade
21 which has been designated by the CFTC as a "contract market" for such
22 commodity; and (2) such contracts have not been executed or
23 consummated by or through a member of such contract market;

24 c. Soliciting, receiving, or accepting any funds in connection
25 with the purchase or sale of any commodity futures contract or any
26 option on a futures contract in the United States;

1 d. Controlling or directing the trading of any commodity
2 futures or commodity options account in the United States for or on
3 behalf of any person or entity, directly or indirectly, whether by
4 power of attorney or otherwise;

5 e. Acting in any capacity for which registration with the CFTC
6 is required under the Act;

7 f. Violating Sections 4(a) and 4b(a)(2)(i) and (iii) of the
8 Act, and CFTC Regulations 1.1(b)(1) and (3).

9 The provisions of this Order shall be binding upon CTI, upon any
10 person insofar as he or she is acting in the capacity of officer,
11 agent, servant or employee of CTI, and upon any person who receives
12 actual notice of this Consent Order, by personal service or otherwise,
13 insofar as he or she is acting in active concert or participation with
14 CTI.

15 V.

16 ORDER FOR ANCILLARY EQUITABLE RELIEF

17 IT IS FURTHER ORDERED that:

18 The CFTC is awarded judgment against CTI of restitution in the
19 amount of \$3,242,106.37 ("CTI Restitution Obligation"). Post-judgment
20 interest shall accrue on the CTI Restitution Obligation at the rate
21 provided in 28 U.S.C. § 1961.

22 IT IS FURTHER ORDERED that:

23 CTI shall pay the CTI Restitution Obligation to the CFTC by
24 electronic funds transfer to a U.S. bank account designated by the
25 National Futures Association or by U.S. postal money order, certified
26 check, bank cashier's check, or bank money order made payable to the

1 "the National Futures Association" and sent to the following address;
2 The National Futures Association, Attention: Daniel A. Driscoll, 200
3 W. Madison Street, Chicago, IL 60606. Simultaneously with the
4 payment(s), CTI shall transmit a letter to the National Futures
5 Association that identifies CTI, the name and docket number of this
6 proceeding and the payment(s). CTI shall simultaneously transmit a
7 copy of the letter and the form of payment to the Director, Division
8 of Enforcement, Commodity Futures Trading Commission, 1155 21st Street,
9 N.W., Washington, D.C. 20581;

10 **IT IS FURTHER ORDERED** that:

11 The National Futures Association is designated as the Monitor for
12 a period beginning with the date of entry of this Order and continuing
13 until final distribution of full amount of the CTI Restitution
14 Obligation plus post-judgment interest. The Monitor is authorized to
15 collect and distribute funds for purposes of restitution to
16 identifiable Emerald/CTI customers. The Monitor shall hold all funds
17 collected pursuant to this Order in an interest-bearing account;

18 Exhibit A to this Order, which is filed *in camera*, is a list of
19 Emerald/CTI customers currently identified by the CFTC as having
20 deposited funds into the bank accounts of defendant Emerald, relief
21 defendant ACE Capital and relief defendant ACE Emerald during the
22 period of March 2002 through April 2004, their last-known addresses,
23 and the estimated restitution owed by CTI to each of them. Exhibit A
24 may be incomplete for various reasons including that records have not
25 been provided to the CFTC or records are missing, are illegible, or
26 have been destroyed. The entry of this Order shall not limit the

1 ability of any Emerald/CTI customer not currently listed in Exhibit A
2 from offering proof to the Monitor and/or the CFTC that the customer
3 belongs on Exhibit A. The Monitor shall have discretion to amend
4 Exhibit A for the sole purpose of adding customers, based on such
5 documentation and proof as the Monitor in its sole discretion shall
6 deem sufficient, whose identity can be traced to funds deposited into
7 the U.S. accounts of Emerald, ACE Capital or ACE Emerald during the
8 period of March 2002 through April 2004, and whose funds are
9 accordingly included in the restitution amount awarded by this order,
10 but whose investment is not currently identified in Exhibit A;

11 Nothing herein shall be construed in any way to limit or abridge
12 the rights of any Emerald/CTI customer that exist under state or
13 common law. Moreover, pursuant to Fed.R.Civ.P. 71, each Emerald/CTI
14 customer identified in Exhibit A is explicitly deemed an intended third-
15 party beneficiary of this Order, such that each such Emerald/CTI
16 customer may seek to enforce any part of the CTI Restitution
17 Obligation, to ensure continued compliance with any provision of this
18 Order and to hold CTI in contempt for past violations of any provision
19 of this Order;

20 Upon receipt of any part of CTI Restitution Obligation, the
21 Monitor and/or the CFTC shall attempt to contact those Emerald/CTI
22 customers listed in Exhibit A. For each customer that the Monitor is
23 able to contact, the Monitor shall verify the customer's current
24 address and obtain from the customer documentation and/or a statement,
25 in a form acceptable to the Monitor, that confirms all deposits and
26 withdrawals by the customer and the resulting "net loss" for the

1 customer. The net loss shall be determined by the simple calculation
2 of deposits from March 1, 2002, through April 30, 2004, minus
3 subsequent withdrawals, without any adjustment for purported trading
4 results or other account activity;

5 Thereafter, if the amount of funds held by the Monitor is
6 sufficient to justify the expense of an immediate distribution, the
7 Monitor shall disburse the available funds among those Emerald/CTI
8 customers whom the Monitor was able to contact and who provided the
9 requested documentation and/or statement (hereafter referred to as
10 "identifiable customer(s)"), in proportion to each such identifiable
11 customer's share of the total losses of all identifiable customers
12 plus applicable interest;

13 Upon any subsequent payment of funds to the Monitor in an amount
14 sufficient to justify the expense of a distribution, the Monitor shall
15 make further distributions in the following manner:

16 a) The Monitor and/or the CFTC shall first make a renewed
17 effort to contact all customers listed in Exhibit A,
18 including customers who were not located previously;

19 b) For each customer that the Monitor is able to contact,
20 the Monitor shall verify the customer's current address and
21 obtain from the customer documentation and/or a statement,
22 in a form acceptable to the Monitor, that confirms all
23 deposits and withdrawals by the customer and the resulting
24 net loss for the customer;

25 c) The Monitor shall first pay restitution to those
26 identifiable customers located since the previous

1 distribution, so that all identifiable customers receive
2 restitution in an equal percentage of their net losses, or
3 as close thereto as possible, plus interest; and

4 d) The Monitor shall then make further proportionate
5 distributions to the remaining currently identifiable
6 customers;

7 The Monitor shall continue to make such distributions until the
8 total amount of the restitution judgment, plus applicable interest,
9 has been paid to identifiable customers. In the event that any
10 unclaimed funds remain following distribution of restitution to
11 customers, such funds shall be paid to the United States Treasury. Any
12 such unclaimed funds shall not be credited to CTI's obligation to pay a
13 civil monetary penalty; and

14 Contemporaneously with each distribution of funds, the Monitor
15 shall notify the CFTC of the names of the customers to whom funds were
16 distributed and the amounts distributed to each.

17 **IT IS FURTHER ORDERED** that:

18 The CFTC is awarded judgment against CTI of a civil monetary
19 penalty in the amount of \$8,201,729.37. CTI shall pay post-judgment
20 interest on the civil monetary penalty amount thereon from the date of
21 this Order until the civil monetary penalty amount is paid in full, at
22 the rate provided in 28 U.S.C. § 1961;

23 Payment of the civil monetary penalty shall be made to the
24 Commodity Futures Trading Commission, Division of Enforcement, 1155
25 21st Street, N.W., Washington, D.C. 20581 to the attention of Ms.
26 Dennese Posey. Payment must be made by electronic funds transfer,

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1 U.S. postal money order, certified check, bank cashier's check, or
2 bank money order, made payable to the Commodity Futures Trading
3 Commission. The payment(s) shall include a cover letter that
4 identifies CTI and the name and docket number of this proceeding. CTI
5 shall simultaneously transmit a copy of the cover letter and the form
6 of payment to the Director, Division of Enforcement, Commodity Futures
7 Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581.

8 **IT IS FURTHER ORDERED** that:

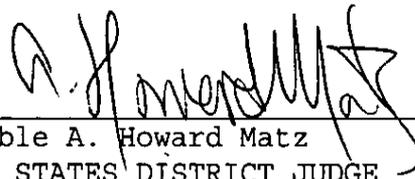
9 Upon the entry of this Order the provisions of the Court's May 11,
10 2004, Statutory Restraining Order entered against CTI, imposing a
11 freeze on its assets, shall no longer be in effect;

12 **IT IS FURTHER ORDERED** that:

13 CTI shall not transfer or cause others to transfer funds or other
14 property to the custody, possession or control of any other person for
15 the purpose of concealing such funds or property from the Court, the
16 CFTC, the Monitor, or any officer that may be appointed by the Court.

17 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction
18 of this case to assure compliance with this Order and for all other
19 purposes related to this action.

20
21 **SO ORDERED**, at Los Angeles, California on this 19th day of April,
22 2005.



Honorable A. Howard Matz
UNITED STATES DISTRICT JUDGE

SCANNED

1 Presented by:

Christine M Ryall

2 Jamie A. Brown (Pro Hac Vice)
3 Christine M. Ryall (Pro Hac Vice)
4 John Dunfee (Pro Hac Vice)
5 Kent Kawakami (CA Bar #149803)
6 Commodity Futures Trading Commission
7 Division of Enforcement
8 1155 21st Street NW
9 Washington, DC 20581
10 (202) 418-5317 (Brown)
11 (202) 418-5318 (Ryall)
12 (202) 418-5396 (Dunfee)
13 (202) 418-5520 (fax)

14 Attorneys for Plaintiff
15 COMMODITY FUTURES TRADING COMMISSION

16 CERTIFICATE OF SERVICE

17 I hereby certify that on April 6, 2005 a true and correct copy
18 of the (Proposed) Order of Judgment By Default Against Defendant City
19 Trust & Investment Co. Ltd. was served by U.S. Mail, pre-paid, on the
20 following persons:

21 Paul Cass
22 3055 Wilshire Blvd., Ste. 900
23 Los Angeles, CA 90010
24 Counsel for Defendant Thomas Hao
25 Jan Lu

26 David Wiechert
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Co-counsel for Defendants
Emerald Worldwide Holdings, Inc.
and Jian Zhuang

27 Thomas H. Bienert Jr.
28 Bienert & Krongold
29 107 Avenida Miramar #B
30 San Clemente, CA 92672
31 Counsel for Relief Defendants
32 Lynnwood Jen, Ester Pranolo and
33 ACE Capital Advisory Group Inc.

34 David Schindler
35 Latham & Watkins
36 633 West Fifth Street, Ste 4000
Los Angeles, CA 90071
Un-noticed counsel to Defendant
City Trust and Investment Co.
Ltd.

37 By:

Christine M Ryall

38 Christine M. Ryall