U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
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In the Matter of GLOBAL LINK MIAMI CORPORATION, LEUNG KA SHUNG a/k/k/ STEVEN LEUNG a/k/a STEPHEN LIANG, GRANT LAWTON, KING KEUNG CHAN a/k/a EDDY CHAN a/k/a KING CHAN, Respondents.	*	CFTC Docket No. 98-1

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ORDER DENYING MOTION FOR DEFAULT ORDER AND DISMISSING COMPLAINT

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Before: Bruce C. Levine, Administrative Law Judge

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Overview

> "[T]he Commission must ensure that neither it nor its staff oversteps the bounds of the Commission's jurisdiction."[1]

In an effort to test the limits of the Commission's jurisdiction, the Division of Enforcement ("Division") brought a complaint against a dealer in foreign currency contracts. In doing so, it directly implicated a provision of the Commodity Exchange Act ("Act") known as the Treasury Amendment. The respondents' default in this proceeding raises a second threshold issue: one that regards the role of the Court in a default judgment proceeding.

The Division argues that, in a default proceeding, the Court primarily serves a ministerial role. According to its argument, the Court must adopt the legal conclusions asserted in a complaint. It cannot independently consider issues of jurisdiction or whether those acts alleged in a complaint

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[1] Stucki v. American Options Corp., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,559 at 22,286 n.19 (CFTC Feb. 13, 1978).

actually amount to violations of the Act or Commission regulations.

The Court disagrees. Certainly, a respondent in default is deemed to admit the well-pled allegations of fact in the complaint. The Court, however, retains the obligation to determine whether those allegations amount to a prima facie violation of the Act or regulations. In this case, the Court finds that the Division's allegations describe transactions beyond the jurisdiction of the Court to sanction. For the reasons set out below, the complaint is **DISMISSED**.

Factual Background[2]

Global Link's Formation

This case involves a company that "conducted a foreign currency trading operation"[3] that never quite got off the ground. In the Spring of 1996, Leung Ka Shung ("Leung"),[4] King Keung Chan

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[2] As discussed below, the respondents are in default for failure to file timely answers to the Commission's complaint. Defaulted parties are "deprived of an opportunity to contest factual issues." In re Flynn, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,271 at 35,201 (CFTC June 20, 1988); In re Van Den Broeke, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,712 at 26,794 (CFTC Apr. 4, 1983). Accordingly, the Court takes the complaint's well-pled allegations of fact, supplemented by the record, as true. Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975); Van Den Broeke, ¶21,712 at 26,794. Allegations are not well-pled merely because they are intelligible. Allegations that are not well-pled would include: (1) allegations made indefinite by other allegations in the same complaint, (2) allegations that are made erroneous by the same complaint, (3) allegations that are contrary to facts of which the Court will take judicial notice, (4) alleged facts that are not susceptible of proof by legitimate evidence, or (5) alleged facts that are contrary to the uncontroverted material in the file of the case. Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 63 (2d Cir. 1971).

[3] Division of Enforcement's Memorandum in Support of Motion for Entry of Default Order, Findings of Fact and Conclusions of Law and Imposition of Sanctions Against Respondents ("Memorandum"), dated February 13, 1998, at 5.

[4] Leung Ka Shung is also known as Stephen Leung, Stephen Laing and Stephen Liang. Complaint and Notice of Hearing Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as Amended

(continued...)

("Chan"),[5] Terry Tsang ("Tsang") and Grant Lawton ("Lawton") came south from Canada.[6] In Canada, they had been involved with a number of unregistered firms that ostensibly engaged in foreign currency spot trading.[7] Once in Florida, they established what

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(...continued)

("Complaint"), dated October 22, 1997, at ¶3. He is most commonly referred to in the record as Stephen Leung.

[5] King Keung Chan is also known as Eddy Chan and King Chan. Complaint at ¶4. He is most commonly referred to in the record as Eddy Chan.

[6] Memorandum Attachment ("Att.") C, Transcript ("Tr.") at 29.

[7] Tsang, Leung, and Chan opened Nilins International in Canada during the Winter of 1995. Att. B, Tr. at 16; Att. C, Tr. at 13-14. Nilins was unregistered with Canadian authorities. Att. B, Tr. at 16-17; Att. C, Tr. at 16. The operation was short-lived. Five months after opening, the Commission des valeurs mobilieres du Quebec closed it down. Att. B, Tr. at 18; Att. C, Tr. at 16. Shortly thereafter, Leung financed another unregistered operation, Trans-Pacific, providing facilities for retail customer trading in foreign currency spot markets. Att. C, Tr. at 16. The record does not indicate how long this firm operated or if it is still in business. See Att. C, Tr. at 16-21. Leung, Chan, and Tsang were the owners of a third unregistered, Canadian firm that permitted customers to speculate on foreign currency spot prices, Profit-Link. Att. B, Tr. at 18; Att. C, Tr. at 21-22. Profit-Link ceased operations in the Fall of 1996, again with the encouragement of Commission des valeurs mobilieres du Quebec. Att. C, Tr. at 24; Att. D, Tr. at 24.

would become Global Link Miami Corporation ("Global Link").[8] Lawton filed Global Link's amended articles of incorporation on May 20, 1996 and found office space for Chan, Leung and himself.[9] Global Link then began to operate without registering with the Commission.[10] As one of the first orders of business, it began soliciting prospective "account executives."

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[8] Global Link incorporated as Global Link Investments, Incorporated on May 13, 1996 before changing its name to Global Link Miami Corporation. Complaint at ¶7.

[9] Att. C, Tr. at 29; Att. I.

[10] Proposed Findings of Fact ("Division's Findings of Fact"), filed February 13, 1998, at ¶1; Complaint at ¶2.

Neither before Global Link's operations began nor since, have Global Link, Leung, Chan or Lawton ever registered with the Commission in any capacity. Division's Findings of Fact at ¶¶1-4; Complaint at ¶¶2-5.

Leung, Chan, Tsang and Lawton were Global Link's shareholders. Division's Findings of Fact at ¶¶2-4; Complaint at ¶¶3-5; Att. D, Tr. at 32. Lawton owned five percent of the shares, while Leung, Chan and Tsang split the remaining 95 percent evenly. Att. D, Tr. at 32. Leung and Lawton administered Global Link's general operations, while Chan managed the trading desk. Division's Findings of Fact at ¶¶26-28; Complaint at ¶¶41-43. Tsang appears to have had no day-to-day role in Global Link's operations.

Global Link's Fraudulent Solicitation of "Account Executives"

Global Link solicited prospective "account executives" through newspaper advertising that referred to employment and investment opportunities.[11] It represented that "account executives" could earn from $100,000 to $150,000 per year.[12] This representation was baseless. Not only did no "account executive" receive close to that amount in compensation (and investment earnings) on an annualized basis,[13] the Global Link shareholders' experience in Canada provided no reason to believe it would happen.[14]

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[11] Division's Findings of Fact at ¶21; Complaint at ¶8; Att. Y, Tr. at 17, 28; Att. Z, Cheng Tr. at 17-20.

[12] Division's Findings of Fact at ¶46; Complaint at ¶25.

[13] Division's Findings of Fact at ¶46; Complaint at ¶25; Att. Q at 4.

[14] In describing the experience of "account executives" at Profit-Link, one of the Canadian firms operated and financed by the Global Link principals, Lawton explained,

> "But these chaps are very clever. They know that when you hire someone, [as an account executive,] the chances of them making a gain are very slim.
>
> . . . .

(continued...)

Global Link's "account executive" operation appears to have been a gimmick for attracting customers. Not only did Global Link solicit them by emphasizing the personal investment opportunities available,[15] these "account executives" were currency professionals in name only. Global Link did not seek out those with experience in the securities or derivatives trading and, in general, they did not stumble upon them.[16]

(...continued)

> He would hire a lot of . . . people who unfortunately weren't the brightest people in the world. They seemed to have endless money and they would bring it in. They'd lose it and God, they'd come back and they'd bring more money and they would lose it."

Att. C, Tr. at 22.

As discussed below, Global Link also claimed a vast network of affiliations that did not exist. See infra text accompanying notes 25-26.

[15] Att. Y, Tr. at 30-31. "Account executives" had the opportunity to open an account and trade for themselves. Division's Findings of Fact at ¶22; Att. Z, Chen Tr. at 15-16.

[16] Id.; Att. B, Tr. at 71; Att. Z, Rodriguez Tr. at 16-17 (describing the advertisement and his reaction by stating "They need account executives; you can make a large amount of money; no experience; so I called."); Att. Z., Chen Tr. at 13 ("The newspaper also said, you know, if you don't know anything about it they will train you, you know. You can get kind of a free training opportunity.").

(continued...)

In preparation for dealing with customers and trading their own accounts, prospective "account executives" received a ten-day training course, an opportunity to hypothetically trade until they felt sufficiently comfortable to trade their own money or solicit customers, and promotional materials.[17] The responsibilities of an "account executive" included soliciting potential customers, leading the customer through the execution of documents necessary to open an account, communicating with customers and trading discretionary customer accounts.[18] Global Link compensated its "account executives" on a commission basis.[19]

It appears that Global Link was more successful at attracting would be "account executives" than keeping them. The number of "account executive" trainees was relatively high, but Global Link

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The one "account executive" with trading experience never opened a customer account with Global Link. Division's Findings of Fact at ¶22.

[17] Division's Findings of Fact at ¶22; Complaint at ¶9; Att. Z, Chen Tr. at 15, 45; Att. Z, Cheng Tr. at 20.

[18] Division's Findings of Fact at ¶23; Complaint at ¶10.

[19] Global Link charged an $80 commission on each round turn transaction. Division's Findings of Fact at ¶23; Complaint at ¶10. Account executives received $25 to $35 of that $80 as compensation. Division's Findings of Fact at ¶23; Complaint at ¶10.

retained only about six of them.[20] The firm was equally inept at soliciting customers. In its history, Global Link opened a total of only eight customer accounts.[21] "Account executives" owned three of them.[22] The other five were generally owned by friends, relatives and acquaintances of the "account executives."[23]

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[20] Leung, in a deposition, stated that Global Link had a total of six account executives. Att. B, Tr. at 70. When, in a different deposition, a former "account executive" was asked how many people Global Link trained and how many eventually became traders, he responded as follows.

> "You've got to realize, now, you're talking back from June. I would estimate there's been 30 to 40 people. Not all at one time, now, okay. A couple of people would come in every week, you know, four or five new people a week, they would eventually leave. They would be replaced.
>
> Insofar as how many people actually ended up opening accounts and traded there, very few. Jerry Rodriguez opened up an account, Bin Cheng opened up an account, Fitz Ogleby and I think that's it."

Att. Y, Tr. at 55.

[21] Division's Findings of Fact at ¶22.

[22] Id.

[23] Id.; Complaint at ¶8.

Global Link's Fraudulent Solicitation of Customers

Between June 1996 and October of the same year, Global Link solicited and accepted funds for the purchase and sale of contracts and supervised its "account executives" who did the same.[24] Not only did Global Link fail to distribute written risk disclosure statements, it conducted a solicitation campaign based on misrepresentations. Global Link claimed affiliations with the following firms in its promotional brochure: (1) Profit-Link International, Canada; (2) Nilins International Investments, Canada; (3) A & A Group, Hong Kong; (4) Nilins International Investments Limited, Hong Kong; (5) Wuhan Rong Li International Future Trading Services Company, Limited, People's Republic of China; (6) Golden Eagle Future Trading Company, Limited, People's Republic of China; (7) International Exchange Corporation, United States; (8) Power Broker Group Company, Limited, Cambodia; (9) Forex-Link Investment Service Limited, Columbia; (10) Nilins International Investments Limited, India; (11) Tokyo Investments Services Limited, Japan; (12) Commodities Trading Company, Limited, Philippines; and (13) Keyline Investments Limited,

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[24] Division's Findings of Fact at ¶64-65; Complaint at ¶91.

Taiwan.[25] As it turns out, Global Link had no relationship with most of these companies and at least one had dissolved before Global Link opened.[26]

Global Link also told potential customers that the maximum risk of loss on a transaction would not exceed five percent of the total equity for each open position and that customers could expect annual returns of 25 to 40 percent on their investments.[27] In fact, most of Global Link customers, like the Canadian customers Leung, Chan and Tsang had previously dealt with,[28] lost money on their investments as a whole.[29] In making these statements to its "account executives" and customers, Global Link knew them to be false or to lack a basis in fact.[30]

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[25] Division's Findings of Fact at ¶¶46, 66; Complaint at ¶¶11, 25; Att. C, Ex. 14.

[26] Division's Findings of Fact at ¶46; Complaint at ¶25.

[27] Division's Findings of Fact at ¶46; Complaint at ¶25.

[28] Att. C., Tr. at 22.

[29] As a whole, Global Link customers lost about 80 percent of their investments. Att. C., Tr. at 113-14.

[30] Division's Findings of Fact at ¶46; Complaint at ¶25.

The Contracts at Issue

Taking pages (literally in some instances) from the book of Frankwell Bullion Limited[31] and following a pattern already

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[31] Tsang was a former employee of Frankwell Bullion. Att. U, Tr. at GL 00424-25. Prior to Global Link's incorporation, Frankwell Bullion sold standardized contracts in foreign currency, based on the Hong Kong spot market. The contracts dealt with standardized lots that were each worth approximately $100,000. The initial margin for a Frankwell Bullion contract was $1,000. Although delivery was possible, neither Frankwell Bullion nor its customers expected contract holders to take delivery and customers could hold positions indefinitely. CFTC v. Frankwell Bullion Ltd., 99 F.3d 299, 300 (9th Cir. 1996). Not only did Global Link offer a contract that was substantially similar to Frankwell's, it used the same customer account agreement. Att. C, Trans. at 116-17.

Near the end of Tsang's tenure with Frankwell Bullion, a United States District Court denied the Commission's request for an injunction of the company on the basis that their contracts did not fall under the jurisdiction of the Act. CFTC v. Frankwell Bullion Ltd., No. C-94-2166 DLJ, 1994 WL 449071 at *3-4 (N.D. Ca. Aug. 12, 1994), aff'd, 99 F.3d 299 (9th Cir. 1996); Att. U, Tr. at GL00425.

Leung and Chan had a long-standing association with Tsang that may have made them aware of this regulatory hole in derivatives trading. In addition to their business relationship, Leung and Chan shared a residence with Tsang in Miami while Global Link was in business. Att. U, Tr. at GL00421; see supra note 7. Tsang supplied some of the promotional material that the Division alleges Global Link used to solicit customers. Att. C, Tr. 97-98; Ex. 14. It is clear that Tsang was intimately involved in Global Link's formation, even though he was not charged in the Division's complaint.

Given Tsang's apparent knowledge of Frankwell Bullion's activity and his association with Chen and Leung, it is quite

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established in Canada,[32] Global Link offered and sold foreign currency contracts. Employing standardized terms, each contract involved the sale or purchase of lots of British Pound Sterling, Japanese Yen, Swiss Francs or German Deutsche Marks.[33] The amount of currency of each type of contract equated to approximately $100,000.[34] Global Link permitted its customers to leverage their trades, requiring the deposit of an original margin of $1,000 in order to control one contract.[35]

Although, Global Link appears to have purportedly dealt in spot and forward as well as futures contracts,[36] its customers did not intend to make or take delivery of the lots of foreign currency, they lacked the capacity to make or take delivery, and

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possible that Global Link intended to copy the Frankwell Bullion product so as to avoid Commission jurisdiction.

[32] See supra note 7.

[33] Division's Findings of Fact at ¶39; Complaint at ¶19.

[34] Division's Findings of Fact at ¶39.

[35] Id. at ¶36; Complaint at ¶16.

[36] See Att. C, Tr. at 144; Att. C, Ex. 14 at 7-8; Att. Z, Cheng Tr. at 20.

delivery never occurred.[37] Most customer trades were offset by an equal and opposite trade on the same day or the next business day.[38] However, customers were permitted to leave positions open indefinitely without having to close and reestablish them.[39] When customers left positions open, Global Link required the payment of "additional" or "variation margin" when the account's purported equity fell below certain levels.[40]

Global Link's Fraudulent Dealings and Misappropriation of Customer Funds

Global Link told its eight customers that their orders would be executed by Addwealth International Limited, a corporation located in New Zealand.[41] Account executives, when they wanted to make a trade for one of the accounts they controlled, would go to the trading desk and tell Chan what trade they desired.[42] Chan

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[37] Division's Findings of Fact at ¶33; Complaint at ¶¶13-14.

[38] See Att. C, customer account reports, ostensibly from Addwealth International Ltd.

[39] Id.; Division's Findings of Fact at ¶35; Complaint at ¶15.

[40] Division's Findings of Fact at ¶38; Complaint at ¶18.

[41] Division's Findings of Fact at ¶41; Complaint at ¶21.

[42] Division's Findings of Fact at ¶42; Complaint at ¶22.

would then place a phone call, purportedly to Addwealth,[43] provide what was supposed to be Addwealth's bid and offer prices and ask

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[43] The Division makes definite allegations as to Global Link's representations to customers regarding the role of Addwealth. However, the allegations regarding Addwealth's role in fact are vague and contradictory. The Division alleges that Addwealth aided Global Link in providing "a trading facility which enabled the account executives to trade for their own accounts or the accounts of other customers" in some unspecified manner. Complaint at ¶21-22. In the alternative, it alleges that Global Link acted alone, implying no role on the part of Addwealth. Id. The Division also alleges that Addwealth provided some unspecified assistance in bucketing orders. Id. at ¶27. Alternatively, it alleges that Addwealth played no role in bucketing customer orders. Id. Furthermore, the Division alleges that Addwealth acted with Global Link in some unspecified way so as to comprise a board of trade. Id. at ¶104. In the same paragraph, the Division also alleges that Global Link was itself a board of trade, without Addwealth. Id. Finally, the Division suggests, without actually alleging, that Addwealth may also have combined with Global Link in some undescribed manner as to comprise a foreign board of trade. Id. at ¶102. Of course, like virtually every other allegation regarding Addwealth, the Division also asserts that, in the alternative, Addwealth had no role. Id.

In addition, the record contains evidence that Addwealth ceased operations before Global Link began operating. Att. X, Tr. at 8; see Division's Findings of Fact at ¶69.

Taken as a whole, the allegations of affirmative acts on the part of Addwealth regarding an association with Global Link are indefinite, couched more in terms of legal conclusions than specific fact. Moreover, the allegations are contradicted by other assertions of fact and the record. Accordingly, the Division's allegations regarding an association between Addwealth and Global Link are not well-pled and, therefore, are not taken as true for the purposes of this default proceeding. See supra note 3.

the "account executive" if he wanted to place the trade.[44] If the "account executive" ordered the trade, Global Link would provide a written confirmation statement that appeared to come from Addwealth.[45] The Global Link contracts were not executed on or subject to the rules of a Commission-designated contract market.[46]

While Global Link's representations and actions led customers to believe that their orders would be executed through a competitive, if lightly regulated market, this is not what happened.[47] As it turns out, Chan's activity at the trading desk and the faxed confirmations were merely theater, intended to mislead the customers. Chan did not place customers orders with a dealer in foreign currency and no dealer actually executed the

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[44] Division's Findings of Fact at ¶42; Complaint at ¶22.

[45] Division's Findings of Fact at ¶42; Complaint at ¶22.

[46] Division's Findings of Fact at ¶43; Complaint at ¶24.

The Division also alleges that the contracts were not exempt from the requirement that "their offer or sale be conducted on or subject to the rules of a properly designated contract market." Division's Findings of Fact at ¶44; Complaint at ¶50. That is a legal conclusion and, for reasons set out below, the Court does not automatically adopt it.

[47] Division's Findings of Fact at ¶51; Complaint at ¶26.

orders.[48] Accordingly, there were no express counter parties to these trades.[49]

Not only did Global Link mislead its customers, it improperly handled the small amount of funds it received from customers. Global Link's eight customers deposited a total of $64,045.[50] Of that, only $56,545 found its way into Global Link's bank account.[51] From July 1996 until September 1996 and in November 1996, it kept customer and operating funds in the same account.[52] In addition to commingling, Global Link converted customer funds. Lawton wrote checks to Leung from the Global Link accounts. The drafts included $19,191.04 in customer funds that Leung used for personal expenses.

In the Fall of 1996, Global Link's customers stopped trading and it ceased operations.[53] By that time, customer accounts had a total of $10,990.00 in equity, but Global Link had only $7,556,

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[48] Division's Findings of Fact at ¶51; Complaint at ¶26.

[49] Division's Findings of Fact at ¶52; Complaint at ¶27.

[50] Division's Findings of Fact at ¶55; Complaint at ¶28.

[51] Division's Findings of Fact at ¶55; Complaint at ¶28.

[52] Division's Findings of Fact at ¶¶56-58; Complaint at ¶¶29-31.

[53] Att. E, Tr. at 15-16.

funds that Lawton eventually removed from Global Link's bank account.[54] As a result, the equity of the customers remaining when Global Link ceased trading was also fraudulently converted.[55]

The Procedural History: Respondents' Default

On October 22, 1997, about one year after Global Link ceased operations, the Commission issued a nine-count complaint against respondents Global Link, Leung, Lawton and Chan.[56] The complaint charges the respondents with violations of Sections 4a, 4b(a)(i), 4b(a)(iv), 4d(1), 4d(2), 4k(1) and 9(a)(1) of the Act and Commission Regulations 1.20, 1.55, 3.23(a), 30.3(a), 30.4(a), 30.6, 30.7, 30.9(a) and 30.9(b).[57] The Commission served the complaint in the normal manner, by first-class mail sent to each of the respondents' last known address. By this time, however, the individual respondents had fled the country and, as of

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[54] Division's Findings of Fact at ¶¶60-62; Complaint at ¶¶33, 35.

[55] Division's Findings of Fact at ¶61; Complaint at ¶34.

[56] Complaint.

[57] Id.; 7 U.S.C. §§6a, 6b(a)(i), 6b(a)(iv), 6d(1), 6d(2), 6k(1), 13(a)(1); 17 C.F.R. §§1.20, 1.55, 3.12(a), 30.3(a), 30.4(a), 30.6, 30.7, 30.9(a), 30.9(b).

September 26, 1997, Global Link had formally dissolved.[58] Undaunted, the Division achieved personal service upon Lawton and Chan in Quebec, Canada and Hong Kong, respectively.[59] Likewise, the Division personally served Global Link's statutory agent in Miami, Florida.[60]

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[58] Att. I; Att. P. See Notice of Service and Address for Service for Respondent King Keung Chan ("Notice of Service on Chan"), dated February 5, 1998; Notice of Filing of Return of Service as to Respondent Global Link Miami Corporation ("Notice of Service on Global Link"), dated November 18, 1997; Notice of Filing of Affidavit as to Respondent Grant Lawton, dated November 18, 1997; Affidavit of Service ("Affidavit of Service on Lawton"), dated November 6, 1997.

[59] Notice of Service on Chan; Affidavit of Service on Lawton.

[60] Notice of Service on Global Link.

While the Division scoured the globe in search of the respondents, the Court reviewed the complaint and noted that it raised a jurisdictional issue regarding the reach of Section 2(a)(1)(A)(ii) of the Act ("Treasury Amendment"). The Supreme Court has stated that "[a] reasonable argument could be made that Congress intended to charge Treasury, rather than the Commission, with administering the dimensions of the aptly named Treasury Amendment, which was specifically enacted at the behest of Treasury to confine the CFTC's activities." Dunn v. CFTC, 519 U.S. 465, __ n.14, 117 S. Ct. 913, 920 n.14 (1997). Accordingly, the Court sought input from the Division as to whether and, if so, how Treasury might participate in this proceeding. The Division responded that "it does not believe there is an appropriate basis for seeking the Treasury Department's intervention" or participation. Division of Enforcement's Submission as to the Issue of the Department of Treasury's Participation, dated December 5, 1997. Having considered the matter further, the Court concludes that the jurisdictional issue

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On November 26, 1997, Lawton filed a short, hand-written note with the Court in which he denied, in a single sentence, the allegations contained in the "so called complaint."[61] The Court found Lawton's response to be untimely, insufficient and an improper ex parte communication.[62] The time in which to answer the complaint having passed, the Court found the respondents in default, under Rule 10.23(c), on December 9, 1997.[63]

One month after issuing its Order finding the respondents in default, the Court instituted procedures leading to this Order. On January 13, 1998, the Court set February 13, 1998 as the deadline

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is sufficiently developed in case law and legislative history, as to render Treasury's participation unnecessary.

[61] Lawton replied to the complaint by stating "I resent and certainly deny the allegations that are stated in the so called complaint." Letter from Grant Lawton to Jean A. Webb, dated November 18, 1997. There is no indication that Lawton served a copy of this letter upon the Division.

[62] Order, dated December 9, 1997.

[63] Id.; 17 C.F.R. §10.23(c).

In the Order of December 9, 1997, the Court advised Lawton that, if he wished the Court to vacate his outstanding default, he could file a motion for leave to file his answer out of time, accompanied by a more detailed answer, on or before December 23, 1997. Order, dated December 9, 1997, at 4. Lawton declined the opportunity and has filed no subsequent pleading in this proceeding.

for the Division to move for a default order.[64] The Court also directed the Division to accompany the motion with pleadings and evidentiary submissions in order to clarify certain factual allegations in the complaint and address legal issues that the complaint raised.[65] On February 13, 1998, the Division moved for a default judgment against the respondents.[66] The Court now turns to the Division's motion.

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[64] Order Establishing Procedural Deadlines, dated January 13, 1998, at 9.

[65] Id. at 7-9.

The Court, having performed a preliminary analysis of the complaint, had doubts as to whether the factual allegations, taken as true, established liability under a number of the counts of the complaint. Id. at 5-6, 7 n.15. Most notably, the Court had reason to believe that the activity described in the complaint may have occurred outside the jurisdiction of the Act. Id. at 5-7.

[66] Division of Enforcement's Motion for Entry of Default Order, Findings of Fact, Conclusions of Law and Sanctions Against Respondents, dated February 13, 1998; Division's Findings of Fact; Memorandum; Erratum to the Division of Enforcement's Memorandum in Support of Motion for Entry of Default Judgment, Findings of Fact and Conclusions of Law and Sanctions Against Respondents, dated February 17, 1998; Second Erratum to the Division of Enforcement's Motion for Entry of Default Judgment, Findings of Fact and Conclusions of Law and Sanctions Against Respondents, dated February 19, 1998; Division of Enforcement's Supplemental Filing to its Memorandum in Support of Motion for Entry of Default Order, Findings of Fact and Conclusions of Law and Imposition of Sanctions Against Respondents, dated April 2, 1998; Division of Enforcement's Supplemental Filing to its Memorandum in Support of Motion for Entry of Default Order,

(continued...)

The Division's Motion for a Default Order

Under the circumstances of this case, the Division's motion for a default order raises two threshold issues. First, the Court must consider the scope of what the respondents, by virtue of their default, are deemed to admit. Second, if the Court retains the authority to reach independent legal conclusions, the Court must also consider whether it can dismiss a complaint that fails to state a cause of action within Commission jurisdiction.

The Division takes the position that the complaint is binding on the Court, leaving only the appropriate mix of sanctions to be considered on default. To be more precise, the Division argues that the Court must adopt the legal conclusions alleged in the complaint and, that it cannot dismiss the complaint for failure to state a claim. Having considered the Division's arguments, the Court disagrees. For the reasons set out below, the Court holds that the Division must, by the complaint and supplemental pleadings, allege facts sufficient to establish both jurisdiction over the respondents and a prima facie violation in order to

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(...continued)

Findings of Fact and Conclusions of Law and Imposition of Sanctions Against Respondents ("Supplemental Memorandum"), dated June 8, 1998.

obtain a default judgment. The Court also finds that it has the authority, subject to review of course, to determine whether the Division meets that burden. Finally, Commission case law supports the conclusion that, in the event that the Division fails to meet its burden, the Court has the authority to grant appropriate relief. When the Division's allegations, taken as true, do not establish a violation and there is no indication that further fact-finding would change the outcome, then dismissal of the complaint is required.

A Respondent in Default is Deemed to Admit to the Division's Well-Pled Allegations of Fact, but Not its Ultimate Conclusions of Law

The Division's memorandum raises the issue of the scope of admissions that a respondent in default is deemed to have made. Only two real possibilities exist. Either the defaulting respondent is considered to have admitted the well-pled factual allegations, but not the legal conclusions, or it is deemed to have admitted the factual allegations and the ultimate allegations of liability. The Division urges the Court to adopt the latter alternative, explaining that the Court lacks any discretion in the matter, even lacking the authority to consider whether it has the

jurisdiction to rule on the proceeding.[67] This position lacks support in the structure of the Commission's regulations and in its case law.

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[67] Memorandum at 17.

The Division recognizes that "certain circuits [actually, virtually every circuit that has directly addressed the issue] contemplate[] a role for the judge in determining whether liability is appropriate in default situations." Id. at 18. However, the Division believes the Court to be differently situated because it lacks express authority analogous the Federal Rule of Civil Procedure 12(b)(6). Id. at 18-19. But, at best, the Division's argument is a non sequitur, since default proceedings are not Rule 12(b)(6) rulings but are, by their nature, evidentiary proceedings.

In addition to its failure to distinguish proceedings that are based on fact-finding and those that are not, the Division's argument suffers from another logical flaw. It assumes that the Court has (at most) two possible choices when considering a Division default motion: (1) grant it or (2) dismiss the complaint. This is wrong. Circumstances may exist where the complaint's well-pled facts are insufficient to state a cause of action, but additional proceedings could cure the complaint's deficiencies. For example, when a complaint contains alternative and contradictory allegations regarding a dispositive fact, those facts are not well-pled. The Division may, however, be able to establish one version of events or the other through further fact-finding proceedings, such as an oral hearing. Under those circumstances, a dismissal would not be required nor would it be appropriate. Simply stated, declining to award a default judgment does not necessitate dismissal of the complaint. Therefore, assuming the lack of dismissal authority does not inevitably lead to the conclusion that the Court has no choice but to grant a Division default motion.

The Court's analysis begins, as it must, with the plain terms of Rules 10.23 and 10.91.[68] Rule 10.23(c) describes the effect of a party failing to file an answer as:

> "A party who fails to file an answer within 20 days shall be in default and, pursuant to procedures set forth in §10.93 of these rules, the proceeding may be determined against him by the Administrative Law Judge upon his consideration of the complaint, the allegations of which shall then be deemed true."[69]

Use of the term "may" and the direction to place the complaint under "consideration" indicates that default judgment procedures

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[68] Reno v. NTSB, 45 F.3d 1375, 1379 (9th Cir. 1995) ("The language of a regulation is the starting point for its interpretation . . . [T]he plain meaning of language governs unless that meaning would lead to absurd results."); T.S. v. Board of Education, 10 F.3d 87, 89 (2d Cir. 1993) ("Plain meaning is ordinarily our guide to the meaning of a statutory or regulatory term."); Grandview Holding Corp. v. NFA, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,996 at 44,809 (CFTC Mar. 18, 1997) ("Applying the basic principles of rule construction, our starting point is the plain meaning of [the] . . . rule."). C.f., International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 558 (1979) ("The starting point in every case involving the construction of a statute is the language itself."); Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 975 (4th Cir. 1993), cited in, In re Collins, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,194 at 45,743 (CFTC Dec. 10, 1997); Zimmerman v. North American Signal Co., 704 F.2d 347, 353 (7th Cir. 1983).

[69] 17 C.F.R. §10.23(c) (emphasis added).

rest within the discretion of the Court and that the Court performs an adjudicative and not merely ministerial role.[70]

Rule 10.93 sets out the procedure for obtaining a default judgment.[71] Upon default, "the Division of Enforcement may move the Administrative Law Judge to enter findings and conclusions and a default order . . . based upon the matters set forth in the complaint, which shall be deemed to be true for purposes of this determination."[72] The question of what "matters" are deemed true

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[70] See Haig v. Agee, 435 U.S. 280, 294 n.26 (1981); Pro-Eco, Inc. v. Board of Comm'rs, 57 F.3d 505, 508 (7th Cir. 1995); O'Shea v. First Manhattan Co. Thrift Plan & Trust, 55 F.3d 109, 113 (2d Cir. 1995); Hill v. Winn-Dixie Stores, Inc., 934 F.2d 1518, 1525 n.19 (11th Cir. 1991); Dautermont v. Broadlawns Hosp., 827 F.2d 291, 299 (8th Cir. 1987); American Electric Power Svc. Corp. v. FERC, 675 F.2d 1226, 1241 (D.C. Cir. 1982) ("[I]n the absence of clear legislative intent to the contrary we decline to read 'may' to mean anything but 'may.'").

"Consideration" is defined as "DELIBERATION, ATTENTION . . . taking into account." Websters Third New International Dictionary 484 (1971) (capitalization in original). In Commission regulations, the term is generally used to denote a substantive evaluation. See 17 C.F.R. §§9.9(b)(3), 9.22(b)(2), 9.24(a)(1), 10.33(a), 10.67(e), 10.101(a). The Division has demonstrated no basis in the Rules of Practice to give "consideration" an unnatural meaning. In addition, giving the term its plain meaning does not create an absurd result, merely an inconvenient one for the Division. Accordingly, the Court reads "consideration" as denoting substantive review.

[71] 17 C.F.R. §10.93.

[72] Id.

is not solved by Rule 10.93's terms, especially when read in light of Rule 10.23(c).[73] Accordingly, the Court looks to apposite case law and, in doing so, finds Commission guidance.[74]

The Division refers to In re Van Den Broeke as an example of how a motion for default judgment should be resolved.[75] The Court agrees. Van Den Broeke involved the review of a default judgment. The Commission indicated the scope of the "matters" deemed admitted in a Rule 10.93 proceeding when it stated,

> "In sum, we conclude that by failing to answer or otherwise defend against the allegations, respondent is deemed to have admitted the facts found here as they

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[73] A statutory term is ambiguous when it has at least two possible meanings that would not create an absurd result. Vause v. Capital Poly Bag, Inc., 886 F.2d 794, 796 (6th Cir. 1989); United States v. Missouri Pacific R.R. Co., 250 F.2d 805, 808 (5th Cir. 1958); Wynn v. Scott, 449 F. Supp. 1302, 1313 (N.D. Ill. 1978); B.R. Anderson & Co. v. United States, 201 F. Supp. 319, 324 (Cust. Ct. 1961) ("ambiguity may appear from a consideration of the statutory language itself, as where, standing alone, a word or a term is susceptible of at least two meanings, neither of which may be ruled out as leading to absurd or unconscionable results"). In this case, "matters" may include matters of fact. In the alternative, it could include matters of fact and matters of law. Neither leads to a patently absurd result. Accordingly, "matters" is an ambiguous term.

[74] The Court has found no regulatory history defining the scope of the matters deemed admitted and the Division has not directed the Court to any.

[75] Memorandum at 18.

> incorporate the allegations of the complaint. Upon review and consideration of the record as a whole, then, we are of the view that the Administrative Law Judge properly found that those facts establish violations by respondent of the Act and the Commission's regulations."[76]

In addition to defining the scope of admissions as matters of fact, the Commission dispelled any doubt as to the proper scope by actually reviewing the court's legal conclusions in light of the facts set out in the complaint "in consideration of the record as a whole."[77] Although it was not express in doing so, Van Den Broeke adopted the prevailing federal rule regarding default judgment motions, a rule contrary to the Division's position.[78]

Federal Rule of Civil Procedure 55, the federal courts' default rule, does not prescribe what a defaulted defendant is

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[76] ¶21,712 at 26,794 (emphasis added).

[77] Id.

[78] The Commission often looks to analogous federal rules of procedure and related case law in applying its own rules. See In re Glass, CFTC Docket No. 93-4, 1998 WL 205134 at *13 (CFTC Apr. 27, 1998); In re Temple, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,097 at 41,628 (CFTC June 1, 1994); Oram v. National Monetary Fund, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,670 at 33,748 (CFTC May 28, 1987); Southerton v. Bache Halsey Stuart Shields, Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. ¶22,428 at 29,910 (CFTC Nov. 28, 1984); Reho v. Dean Witter Reynolds, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,993 at 28,373 (CFTC Mar. 31, 1983).

deemed to have admitted. The courts have, therefore, determined the scope of deemed admissions themselves. Under the prevailing rule, "the defendant, by his default, admits the plaintiff's well-pled allegations of fact,"[79] but "a defendant's default does not in itself warrant the court in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment [to be] entered."[80] However, even before considering whether the

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[79] Nishimatsu Constr., 515 F.2d at 1206.

[80] Id. See Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1371 n.41 (11th Cir. 1997) ("a default judgment cannot stand on a complaint that fails to state a claim"); Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) ("When a default judgment is entered, facts alleged in the complaint may not be contested . . . . The entry of a default order does not, however, preclude a party from challenging the sufficiency of the complaint."); Quirindongo-Pacheco v. Rolon Morales, 953 F.2d 15, 16 (1st Cir. 1992) (per curium) ("After entry of default, a court may examine a plaintiff's complaint to determine whether it alleges a cause of action. In making that determination it must assume that all well pleaded factual allegations are true."); Bank One of Cleveland v. Abbe, 916 F.2d 1067, 1079-80 (6th Cir. 1990); Taylor v. City of Baldwin, 859 F.2d 1330, 1333 n.7 (8th Cir. 1988); Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981) ("a district court has discretion under Rule 55(b)(2) once a default is determined to require proof of necessary facts and need not agree that the alleged facts constitute a valid cause of action"); Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977); Weft Inc. v. G.C. Investment Assocs., 630 F. Supp. 1138, 1143 (E.D.N.C. 1986) ("a plaintiff is entitled to a determination of liability unless he has failed to state a legal basis for relief or it is clear from the face of the complaint that the allegations are not susceptible of proof."), aff'd, 822 F.2d 56 (4th Cir. 1987); Kelly v. Carr, 567 F. Supp. 831, 840 (W.D. Mich. 1983) ("Facts not established by the pleadings, or

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complaint states a cause of action, the Court must consider whether it has jurisdiction.[81]

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claims which are not well-pleaded, are not binding and cannot support a [default] judgment."); 10 Wright & Miller, Federal Practice and Procedure: Civil, §2688, pp. 447-48.

Thomson v. Wooster, 114 U.S. 104 (1885), has been described as a "venerable but still definitive case" on the issue. Trans World Airlines, 449 F.2d at 63. Thomson explained that a default judgment "is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true" and "is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it." 114 U.S. at 113.

[81] The Division argues that the Court not only can not evaluate matters of law alleged in a complaint, it can not consider whether it even has the authority to rule on the case. Memorandum at 18-19. The Seventh Circuit set out the more sensible rule when it held "[t]he judge could not enter a judgment for McGuinness when he lacked jurisdiction over McGuinness's complaint." McGuinness v. USPS, 744 F.2d 1318, 1323 (7th Cir. 1984). See McElveen v. Carib Inn Int'l, Inc., 71 F.R.D. 193, 194-95 (S.D. Tx. 1976).

This rule conforms to the Commission's respect for the limits of its jurisdiction. As the Commission has stated,

> "[W]e wish to note that the [Administrative Law Judge's] dismissal [of the complaint] in this case was predicated upon the Commission's jurisdiction, or lack thereof, as opposed to a failure of the complaint to state a cause of action . . . . That distinction compels a different result since the Commission must ensure that neither it nor its staff oversteps the bounds of the Commission's jurisdiction."

(continued...)

Accordingly, both Commission and federal precedent support the rule that, in Rule 10.93 procedures, the Court considers well-pled factual allegations in the complaint to be true. Under such a rule, the Court, based on those well-pled allegations and in light of the record as a whole, draws its own legal conclusions. This rule strikes a sensible balance between the policies underlying the default procedures and the Commission's interest in merit-based adjudications.[82] In addition, the rule does not impede the Court's fulfillment of its "responsibility to do justice," a responsibility that is not lessened by default.[83]

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Stucki, ¶20,559 at 22,286 n.19; see Motzek v. Monex Int'l Ltd., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,095 at 41,625 (CFTC June 1, 1994) ("The Commission, of course, cannot entertain claims outside its regulatory jurisdiction . . . ."). Under In re Trillion Japan Co., Ltd., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,082 at 41,589 (CFTC May 23, 1994), the Court would be remiss in overlooking this guidance.

[82] Bunch v. First Commodity Corp. of Boston, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,352 at 39,171 (CFTC Aug. 5, 1992) (West, Comm'r, dissenting) ("The Commission has always favored adjudication on the merits over the resolution of cases on procedural grounds."); Marlow v. Oppenheimer Rouse Futures, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,904 at 34,212 (CFTC Sept. 9, 1987) ("The Commission has often stated its preference for decisions on the merits.").

[83] American Cyanamid Co. v. Page, 66 F.R.D. 143, 145 (D.S.C. 1975).

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The Division alternatively argues that the complaint's legal conclusions possess the force of law and, as a consequence, nullify any authority the Court might otherwise have to substantively review complaints in default proceedings. Memorandum at 17-18. In other words, the Division maintains that a complaint is binding legal authority and, therefore, must be taken as setting out a prima facie case of liability. This line of arguments depend on a set of assumptions which are false in part and unverified in part.

The Division hypothesizes that the issuance of a complaint follows an "implicit[] . . . determination" that the facts alleged therein are sufficient to establish the legal conclusions proposed and that such implicit determinations should not be disturbed. Id. The Division's theory fails for want of its two necessary elements: (1) a decision maker acting in an adjudicatory capacity and (2) the dependence of the decision to issue a complaint upon a determination that the complaint sets out a prima facie case.

The Commission generates controlling legal authority by two methods: public (or policy) rulemaking, generating general rules, and adjudicatory rulemaking, generating fact specific rules on an ad hoc basis. First National Monetary Corp. v. CFTC, 677 F.2d 522, 526-27 (6th Cir. 1982); In re First National Monetary Corp., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,698 at 30,971 (CFTC Aug. 7, 1985). Adjudicatory rulemaking results from the actual litigation of a matter before an authority acting in a judicial capacity that makes legal determinations. Two fundamental aspects of such rulemaking are a decision maker acting in an adjudicatory capacity and a conclusive determination, resolving the issues. The issuance of a complaint involves neither.

The Division's effort to repackage a complaint as an adjudication overlooks the fact nobody involved in the issuance of a complaint acts in an adjudicatory role at the time a complaint is authorized or issued. The Division, in its prosecutorial role, advises the Commission, regarding the issuance of a complaint, ex parte. In re Grain Land Coop., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,144 at 45,377 (CFTC Sept. 12, 1997),

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teaches that the Commission does not serve a judicial function during the authorization or issuance of a complaint or even later stages of a proceeding. Not only does the issuance of a complaint lack an adjudicatory actor, it lacks the necessary legal determination as well.

In order to issue a complaint, the Commission must find "reason to believe" that a violation under the Act occurred. 7 U.S.C. §9. The Division argues that "[i]n doing so, the Commission implicitly makes a preliminary determination that the complaint states a cause of action within the Commission's jurisdiction." Memorandum at 18. What this argument lacks in supporting authority it can not make up in logic.

Existence of a "reason to believe" does not require finding that a complaint's factual allegations amount to a prima facie case. Reason to believe is a lesser finding. The finding of a "reason to believe" operates not as a determination of the issues but, rather, as an identification of material issues to be determined in an adjudication. FTC v. Standard Oil Co. of California, 449 U.S. 232, 241 (1980) ("By its terms . . . 'reason to believe' . . . is not a definitive statement of position. It represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings."). "Reason to believe" is roughly analogous to a finding of probable cause. See Smith v. Thornburg, 136 F.3d 1070, 1075 (6th Cir. 1998); United States v. $129,727.00, 129 F.3d 486, 489 (9th Cir. 1997); United States v. Magluta, 44 F.3d 1530, 1534-35 (11th Cir. 1995). Accordingly, on a scale of certainty, the conclusion "reason to believe" falls somewhere between an unsubstantiated suspicion to a determination that the facts presented amount to a prima facie case. See Smith, 136 F.3d 1074; $129,727.00, 129 F.3d at 489 ("Determination of probable cause . . . is based on a 'totality of the circumstances' . . . test . . . . While the Government need not have prima facie proof, its belief . . . must rise above mere suspicion."). Not only is there no requirement to make an actual determination that the information presented to the Commission or allegations contained in the complaint rise to a prima facie violation, the complaint, by its plain language, does not reflect legal determinations. See Complaint. Rather, it places issues before the Court.

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Under Those Circumstances Where the Division's Allegations Fail to Set Out a Prima Facie Violation and the Record Indicates that Subsequent Proceedings Will Not Cure the Complaint's Deficiencies, the Court May Dismiss the Complaint

Having concluded that the Court has the responsibility to evaluate complaints and draw its own conclusions, the Court must now consider the possibility that complaint in this case does not allege facts sufficient to make a prima facie case. If this possibility exists, the Court must determine how the case may and should proceed. The easier case occurs when a complaint is factually insufficient, but additional facts would cure the

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Because a complaint does not result from administrative rulemaking or adjudicatory rulemaking and because it does not require a determination regarding legal conclusions at issue in a complaint, there is no question that obtaining the mantle of legal authority for a Commission complaint is nothing more than a "pipe dream," albeit one that results from a seemingly resilient habit. See In re Collins, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,981 at 44,753 n.133 (ALJ Mar. 5, 1997), rev'd on other grounds, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,194 (CFTC Dec. 10, 1997). As the Supreme Court put it, "In sum, the . . . issuance of a complaint averring reason to believe that Socal[,the respondent,] was violating the [Federal Trade Commission] Act is not a definitive ruling or regulation. It had no legal force . . . ." Standard Oil, 449 U.S. at 243. Not only does a complaint lack legal force, it sometimes lacks even predictive value. See e.g., Trillion Japan, ¶26,082 at 41,589; In re Oliverio, CFTC Docket No. 90-1, 1994 WL 83877 at *1 (CFTC Mar. 11, 1994); In re Three Eight Corp., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,749 at 40,443-46 (CFTC June 16, 1993).

complaint's shortcomings. Under those circumstances, the Court could preside over further fact-finding such as an oral hearing, motion for summary disposition or shortened procedures. However, further fact-finding would not resolve the situation where the Court cannot find for the Division on the basis of the complaint and there is every indication that the Division could prove no additional, material facts in a hearing or other proceeding. In such a situation, the Division proposes that the Court can do nothing.[84] The Court disagrees and finds that, under appropriate circumstances, dismissal of the complaint is not only authorized, but proper.

The Division argues that the Court cannot provide the respondents relief in a default proceeding, because its lacks the express authority to do so.[85] This argument rests on the general principle that, unless the Court has specific, express authority

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[84] Memorandum at 17-18.

This set of circumstances presents the possibility of a catch-22 similar to the one Collins, ¶26,981 at 44753 n.133, detailed. Where the facts as alleged fail to state a cause of action, yet no additional, material facts can be adduced, lack of authority to dismiss the complaint would lead to an interminable proceeding. Interminable because, with no additional material facts to be placed before the Court, there would be no grounds upon which the Court might hold further proceedings. Id.

[85] Memorandum at 16-18.

to provide relief following dispositive procedures, it is powerless.[86] Even the most cursory review of Commission case law reveals the frailty of this position.

If the Division accurately summarizes Commission case law, then in no instance where the rules failed to expressly grant the authority to impose sanctions or relief would the Court be able to do so. Rule 10.84 prescribes the manner in which the Courts makes initial decisions after hearings and the effect of one.[87] Neither Rule 10.84 nor any other rule governing hearings contains an express grant of the authority to dismiss a Commission complaint upon finding that the Division failed to meet its burden of proof.[88] Likewise, there is no express authority to impose sanctions. However, the Division does not suggest that the Court lacks the authority to impose sanctions upon a finding of liability. When the courts of this agency have conducted hearings and found against the Division, they have exercised the authority

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[86] See id.

[87] 17 C.F.R. §10.84.

[88] See 17 C.F.R. §§10.61-10.84.

to dismiss the Commission's complaint.[89] The Court's implicit authority to dismiss complaints following a hearing, while subject to review on the merits, has gone undisturbed and, until now, unquestioned.

The implicit authority to grant relief does not appear to be limited to hearings. Disposition without a full hearing is permissible under Subpart G of the Commission's Rules of Practice in three circumstances: (1) shortened procedures under Rule 10.92, (2) summary disposition under Rule 10.91, and (3) default under Rule 10.93. Rule 10.91 contains no grant of express authority to dismiss a Commission complaint in the event that a respondent seeks and is entitled to summary disposition.[90] However, the rule contemplates that a respondent may prevail in

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[89] See e.g., In re Abrams, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,479 at 43,133 (CFTC July 31, 1995); In re New York Currency Research Corp., [Current Transfer Binder] Comm Fut. L. Rep. (CCH) ¶27,222 at 45,912 (ALJ Jan. 12, 1998), rev'd on other grounds, [Current Transfer Binder] Comm Fut. L. Rep. (CCH) ¶27, 223 (CFTC Feb. 6, 1998); In re Elliott, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,789 at 44,248 (ALJ Sept. 11, 1996), rev'd on other grounds, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,243 (CFTC Feb. 3, 1998).

[90] 17 C.F.R. §10.91.

this type of shortened proceeding.[91] Like disposition after a full hearing, when the Court grants summary disposition in favor of a respondent in an enforcement action, it has the authority to dismiss a Commission complaint.[92] Likewise, the Court has authority to grant summary disposition to the Division and impose sanctions, should it satisfy Rule 10.91, even though there is no express authority to do so.[93]

When examined in light of other dispositive procedures, the Division's argument is not that the Court lacks actual authority to provide relief in every case where there is no express grant. Rather, the Division argument is more accurately characterized as asserting that the Court has implicit authority to issue orders that favor the Division, but that this implicit authority is one-sided. The Court rejects this position as contrary to case law, fairness, and common sense.

In a last gasp, the Division argues that the Court should not concern itself with the merits in a default proceeding because a

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[91] Id.

[92] See e.g., Collins, ¶26,981 at 44,753 n.133.

[93] See e.g., In re Staryk, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,206 at 45,811-12 (CFTC Dec. 18, 1997); In re Kelly, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,289 at 46,304-08 (ALJ Feb. 24, 1998).

rubber-stamp default judgment would be subject to appellate review.[94] In other words, the Division argues that the Court serves the public interest when it does not concern itself with avoiding error and leaves the matter to an appellate tribunal.[95] While novel, this idea runs counter to basic concepts of jurisprudence.[96] Even though trial court decisions are subject to review, one fundamental objective of a trial court is to conduct the proceeding without error so that it need not be retried.[97] A defaulted litigant may lose the right to actively contest issues of fact, but that does not mean that person forfeits the right to a just resolution of the case.[98] Likewise, the Court does not

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[94] Memorandum at 18-19.

[95] If the Division were a private litigant, the Court would not find this argument puzzling. However, the Division is not just another litigant, but an agent of the sovereign. As such, its goal should be fairness, even at the cost of victory or economy of effort. Berger v. United States, 295 U.S. 78, 88 (1975).

[96] See American Cyanamid, 66 F.R.D. at 145.

[97] United States v. Five Persons, 472 F. Supp. 64, 68 (D.N.J. 1979).

[98] American Cyanamid, 66 F.R.D. at 145 ("[T]he fact that the litigant sued did not respond does not vitiate the court's responsibility to do justice.").

waive its interest in judicial integrity merely because a party defaults.[99]

For the reasons set out above, the Court finds the Division's arguments on whether it can dismiss a complaint at the termination of a default proceeding unpersuasive. Where the Rules of Practice authorize the Court to conduct dispositive procedures, they also authorize the Court to grant appropriate relief. Where those procedures contemplate that the respondent may prevail, and the Division has not demonstrated that a hearing would result in the establishment of additional, material facts, the Court has implicit authority to dismiss the Commission's complaint, in whole or in part, as appropriate.[100] Having determined its role in this

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[99] See id.

[100] The Division draws the Court's attention to case law that purportedly denies the Court the authority to dismiss complaints for failure to state a cause in action. Memorandum at 16-17. Whatever the lessons of these cases, see Collins, ¶26,981 at 44753 n. 133, they do not address the question of what authority the Court has to provide appropriate relief after undertaking dispositive procedures provided for in the rules.

Each of the cases upon which the Division relies ultimately rests on the principles set forth in Antoniolli v. Clayton Brokerage Co., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,546 (CFTC Jan. 18, 1978). See Memorandum at 16-17; Trillion Japan, ¶26,082 at 41,588 n.3; Oliverio, 1994 WL 83877 at *1 n.3; In re Carretta, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,870 at 23,558 (CFTC Aug. 2, 1979); In re Hunt, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,650 at

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proceeding, the Court now turns to consideration of the Division's allegations.

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22,645 n.1 (CFTC July 20, 1978); In re Siegel Trading Co., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,637 at 22,601 (CFTC June 12, 1978). In Antoniolli, the Commission drew a distinction between dismissal for failure to state a cause of action and dismissal following dispositive procedures prescribed in the rules of practice. It held that once a case had been forwarded to an Administrative Law Judge by the Commission or its delegated staff, "a factual determination must be made by the Judge and the case disposed of in accordance with the Act and the Commission's Rules." Antoniolli, ¶20,546 at 22,249. The Commission listed the "mode[s] of fact finding" as including default procedures along with oral hearings and summary dispositions, stating,

> "Sections 12.26 and 12.66 of the Commission's Reparations Rules . . . specifically permit the Commission's Administrative Law Judges to treat as admitted or established certain facts, such as where a respondent defaults by not answering a complaint . . . . However, even there, the ultimate disposition of the case involves a fact finding process upon which legal conclusions are based."

Id. at 22,249 n.7 (emphasis added). Antoniolli, by grouping default proceedings with oral hearings and summary dispositions and drawing a distinction between default procedures and dismissal for failure to state a claim (following a procedure not then provided for in Commission rules), clearly implies that, in reparations, dismissal authority is implied by the express authority to conduct default procedures. As the Commission adopted these principles in the enforcement cases listed above and in light of Van Den Broeke, there is no reason to believe that dismissal following a default procedure in an enforcement proceeding would rest outside the Court's discretion.

The Complaint's Factual Allegations Describe Activity That Falls Under the Treasury Amendment and Beyond Commission Jurisdiction

As a threshold matter of substance, the Court must consider the question of whether the complaint's factual allegations describe activity that falls within the Commission's jurisdiction.[101] Specifically, the Court must determine whether the respondents' activity falls within the portion of Section 2(a)(1)(A) referred to as the Treasury Amendment. The Treasury Amendment excludes transactions in foreign currency not conducted on a "board of trade" from Commission jurisdiction. The Division does not dispute that Global Link contracts amounted to transactions in foreign currency. Rather, it argues that those transaction occurred on a board of trade. The Court finds, however, that the transactions were not conducted on a "board of trade" in the context of the Treasury Amendment and, therefore, fall beyond Commission authority. Accordingly, the Court must conclude that it lacks the authority to sanction respondents on the basis of the acts set forth in the complaint.

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[101] McGuinness, 744 F.2d at 1323. "[T]he Commission must ensure that neither it nor its staff oversteps the bounds of the Commission's jurisdiction." Stucki, ¶20,559 at 22,286 n.19.

Congress defined the Commission's jurisdiction in Section 2(a)(1)(A) of the Act and did so in terms of transactions. Section 2(a)(1)(A)(i) states that "[t]he Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements, . . . and transactions involving contracts of sale of a commodity for future delivery."[102] The Treasury Amendment limits this grant of jurisdiction, stating that "[n]othing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade."[103] The Division alleges that Global Link sold futures contracts in foreign currency. Under those circumstances, the Division bears the burden of proving that the Treasury Amendment does not preclude the Commission's jurisdiction over respondents. Accordingly, the Court must resolve two issues: (1) whether the transactions at issue in this complaint were transactions in foreign currency and, (2) if so, whether they were conducted on a board of trade.

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[102] 7 U.S.C. §2(i).

[103] 7 U.S.C. §2(ii).

Global Link Engaged in Transactions in Foreign Currency

The Division implicitly concedes that Global Link and its customers engaged in transactions in foreign currency.[104] The Court agrees. Dunn v. CFTC recently addressed the issue of what constituted transactions in foreign currency for purposes of the Treasury Amendment.[105] Dunn defined transactions in foreign currency, stating the following.

> "The more normal reading of the key phrase encompasses all transactions in which foreign currency is the fungible good whose fluctuating market price provides the motive for trading . . . . [T]he ordinary meaning of the key word 'in,' . . . is usually thought to be synonymous with the expressions 'in regard to,' 'respecting,' and 'with respect to.'"[106]

The Division alleges and, on the basis of its detailed allegations of fact, the Court agrees that Global Link engaged in the business of selling foreign currency futures contracts. Even though

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[104] The Division's seeming acquiescence on this issue marks an evolution in the Commission's position regarding the Treasury Amendment. As late as 1993, the Commission maintained that only spot and cash forward transactions in foreign currency fell under the Treasury Amendment. See Salomon Forex, 8 F.3d at 974.

[105] 519 U.S. 465, 117 S. Ct. 913 (1997).

[106] Dunn, 519 U.S. at ___, 117 S. Ct. at 916 (emphasis added, internal quotations, brackets and citations omitted).

customer orders were never executed in a market and even though neither Global Link nor its customers could ever take or make delivery of foreign currency, the customers purchased the contracts for the purpose of speculating on price changes of various foreign currencies. Thus, the purchase and sale of Global Link contracts meet Dunn's general definition of a transaction in foreign currency. Therefore, the Treasury Amendment excludes Global Link's contracts from Commission jurisdiction unless the amendment's proviso brings them back within Commission jurisdiction.

The Purchase and Sale of Global Link Contracts Did Not Occur on a Board of Trade as Contemplated in the Treasury Amendment

The Treasury Amendment does not exclude all transactions in foreign currency from Commission jurisdiction. The Commission retains jurisdiction over transactions in foreign currency that "involve the sale thereof for future delivery on a board of trade."[107] The Division argues that Global Link contracts were sold on a board of trade as contemplated by the Treasury Amendment asserting that Global Link itself constituted a board of trade.

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[107] 7 U.S.C. §2(ii).

The Court disagrees. The structure of the Treasury Amendment specifically, the Treasury Amendment's legislative history, the structure of the Act generally, and persuasive case law compel the Court to conclude that Global Link was not a board of trade as contemplated in the Treasury Amendment.

The Division first launches a plain-meaning assault on the Global Link contracts.[108] It reasons that the Court need look no further than the Act's definition of board of trade, set out in Section 1a(1),[109] in order to determine the scope of the Treasury Amendment's proviso.[110] As the Division suggests,[111] the Court's

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[108] In arguing that "board of trade" in the Treasury Amendment means nothing less than the definition set out in Section 1a(1), 7 U.S.C. §1a(1), and arguing, in the alternative, that board of trade includes all associations except banks and other institutional investors, the Division attempts nothing less than a relitigation of Frankwell Bullion. See 99 F.3d at 301 ("The CFTC argues that 'board of trade' includes any association selling foreign currency, making the Treasury Amendment very narrow. As a fallback position, the CFTC argues that 'board of trade' includes all associations except banks and other sophisticated investors.").

[109] 7 U.S.C. §1a(1).

[110] Memorandum at 26-28.

[111] Memorandum at 26 ("Settled rules on statutory construction require that where Congress has spoken by creating a statutory definition, it is reasonable to assume that Congress intended that definition to apply when the term is used in statutory amendments.").

analysis of the term "board of trade" begins, as it must, with the plain meaning of the statute's terms.[112] Generally, when Congress defines a term and subsequently uses it, the Court will presume that Congress meant the term to have the meaning prescribed in the definition. However, the Commission teaches that the plain meaning of congressionally-defined term should not necessarily govern the Court's construction of the Act.[113] When that plain meaning would lead to absurd or self-contradictory results, the Court must look beyond the plain meaning of a term and consider

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[112] As the 11th Circuit put it,

> "In construing a statute, we must begin, and often should end, with the language of the statute itself.
>
> . . . .
>
> Once Congress has expressed its resolution of such [policy] concerns in a statute, it is the duty of the courts to give effect to that resolution by applying the statute according to its terms. We cannot refuse to give effect to the legislative will merely because we think Congress acted unwisely."

Merritt v. Dillard Paper Co., 120 F.3d 1181, 1185, 1188 (11th Cir. 1997); see supra note 68.

[113] See e.g., New York Currency Research Corp., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,223 at 45,914-15 (CFTC Feb. 6, 1998), rev'g [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,222 (ALJ Jan. 12, 1998).

legislative history.[114] Reading "board of trade" as defined in the statute leads to such absurd results because the proviso would effectively consume the amendment, rendering it a nullity.

The Act defines "board of trade" as "any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment."[115] It requires little reflection to conclude that applying this plain meaning would "render[] the Treasury Amendment meaningless."[116] Under this definition, any association for the purposes of trading would qualify as a board of trade. The over-the-counter market is a collection of such associations. Banks (associations in and of themselves) trade for themselves and customers, executing their orders with other banks and dealers. Dealers trade for banks.[117] Significant portions of the market systematically connect themselves to others through computer networks that perform many

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[114] Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980).

[115] 7 U.S.C. §1(a)(1).

[116] Frankwell Bullion, 99 F.3d at 302.

[117] Arvind K. Jain, International Financial Markets and Institutions 28-29 (1994); D.R. Mandich, Foreign Exchange Trading Techniques and Controls 14-15 (1976).

of the same roles of formal exchanges.[118] To hold that each and every one of these "associations" constitutes a "board of trade" would produce a result that is absurd. That rule would read the Treasury Amendment entirely out of existence.[119] Accordingly, the Court must look to the legislative history of the Treasury Amendment in order to construe "board of trade." As a result of this inquiry, the Court rejects the Division's broad construction of the amendment's proviso as contradicted by clearly stated congressional intent.

As the 1974 amendments to the Act worked their way through Congress, the Department of Treasury ("Treasury") observed that the Commission's jurisdiction, as set out in the relevant bills, would have included trading in foreign currency futures that was not conducted on "organized exchanges."[120] Treasury weighed in on the issue, writing:

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[118] Id. at 15.

[119] Even courts that disagree as to the meaning of "board of trade" in the Treasury Amendment tend to agree that the term is ambiguous. See e.g., Frankwell Bullion, 99 F.3d at 302; CFTC v. Standard Forex, Inc., No. CV-93-0088(CPS), 1993 WL 809966 at *8 (E.D.N.Y. Aug. 9, 1993).

[120] Letter from Donald L. E. Ritger, Acting General Counsel for the Department of Treasury, to the Honorable Herman E. Talmadge, Chairman of the Senate Committee on Agriculture and Forestry, ("Treasury Letter"), dated July 30, 1974, reprinted in S. Rep.

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"The Department believes that the bills[, H.R. 13,113 and S. 2578,] do not clearly indicate that the new regulatory agency's authority would be limited to the regulation of futures trading on organized exchanges, and would not extend to futures trading in foreign currencies off organized exchanges.

. . . .

The Department feels strongly that foreign currency futures trading, other than on organized exchanges, should not be regulated by the new agency.

. . . .

Where the need for regulation of transactions on other than organized exchanges exist, this should be done through strengthening existing regulatory responsibilities now lodged in the Comptroller of the Currency and the Federal Reserve.

. . . .

In view of the foregoing, we strongly urge the Committee to amend the proposed legislation to make clear that its provision would not be applicable to futures trading in foreign currencies . . . other than on organized exchanges. This could be accomplished by inserting a new section at an appropriate place reading as follows: 'Sec. . . . Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, re-purchase options, government securities, mortgages and mortgage purchase commitments, or in puts or calls

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93-1131, 93rd Cong., 2nd Sess., reprinted in 1974 U.S.C.C.A.N. 5843 (1974). See Frankwell Bullion, 99 F.3d at 302; Salomon Forex, 8 F.3d at 972.

> for securities, unless such transactions involve the sale thereof for futures delivery conducted on a board of trade.'"[121]

As the letter indicated, despite a primary concern with exempting interbank transactions, the Department of Treasury "repeatedly and explicitly" described the proposed amendment as exempting "all transactions other than on 'organized exchanges.'"[122]

Congress adopted the proposed amendment "virtually verbatim."[123] The Congress's direct response to Treasury's request supports the inference that Treasury received what it asked for.[124] In other words, the Treasury Amendment appears to have effected a Congressional intent to exclude the entire off exchange market. The Congressional description of the amendment only strengthens this inference.

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[121] Id. (emphasis added).

[122] Frankwell Bullion, 99 F.3d at 303 ("It appears that the Treasury Department intended to draft language exempting the entire off-exchange market, with banks being the primary beneficiaries.").

[123] Salomon Forex, 8 F.3d at 976. Congress excluded the language "puts and calls for securities," instruments already covered by securities law. Id.; See 7 U.S.C. §2(i)(I).

[124] See Salomon Forex, 8 F.3d at 976 ("This Treasury request and direct congressional response is revealing.").

In addition to adopting the language that Treasury proposed, Congress explained the reason for the amendment, stating,

> "Also, the Committee included an amendment to clarify that the provisions of the bill are not applicable to trading in foreign currencies and certain enumerated financial instruments unless such trading is conducted on a formally organized futures exchange. . . . The Committee believes that this market is more properly supervised by the bank regulatory agencies and that, therefore, regulation under this legislation is unnecessary."[125]

Thus, Congress, despite an obvious concern for interbank trading, indicated an intent to exclude all trading in foreign currency from Commission jurisdiction unless it occurs on a formally organized futures exchange.[126] Like the remainder of Section 2,

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[125] S. Rep. 1131, 93rd Cong., 2nd Sess. (1974) (emphasis added).

The Court notes that Congress took an additional step to clarify the scope of the Amendment. Whereas Treasury asked for an amendment that would preclude Commission jurisdiction over foreign currency trading unless it involved futures trading conducted on an "organized exchange," Congress went one small step further, explaining that the Act does not apply to foreign currency trading "unless such trading is conducted on a formally organized futures exchange." Id. (emphasis added)

[126] Frankwell Bullion, 99 F.3d at 303 ("The legislative history thus indicates that Congress intended the Treasury Amendment to exclude all off-exchange transactions . . . .").

As Salomon Forex explained,

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both the Treasury Amendment and its congressional explanation define jurisdiction in terms of types of transactions and their location. They make no distinctions based on the parties to those transactions.[127] The Treasury Department sought the exclusion of

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> "If the congressional goal underlying the adoption of the Treasury Amendment was protection of the interbank market . . . this could have been accomplished easily by statutory language aimed at exempting only transactions in which both the buyer and seller are banks. What the statute commands instead is the exemption of all trading off organized exchanges, including the entire informal professional trading network of which banks are a key part."

8 F.3d at 977. To borrow this reasoning, if Congress had intended to limit the exclusion to banks and sophisticated institutions and individuals, it could have chosen words to that effect. However, Congress was asked to exclude "all trading off organized exchanges." Id. In response, Congress went one better, enacting legislation intended to exclude foreign currency trading that took place off formally organized exchanges. See id.

[127] The Division appeals to Congress's discussion of the inter-bank market as support for the notion that only the inter-bank market in foreign currency is excluded by the Treasury Amendment. This argument lacks logic. Congress may have been particularly concerned with excluding the inter-bank market from Commission regulation, and it drafted an amendment that accomplishes that goal. There is nothing, however, in the language of the amendment to suggest that Congress stopped there, and chose not to exclude from Commission jurisdiction all other participants in

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off-exchange foreign currency transactions. To the contrary, clear expressions of congressional intent indicate otherwise.

One of the cases upon which the Division relies, Standard Forex, presents a similar illogic. Memorandum at 27, 29, 32, 38. Standard Forex, having found that "board of trade" was ambiguous as employed in the Treasury Amendment, reviewed the legislative history discussed above and determined that the term was limited to a "formally organized futures exchange." 1993 WL 809966 at *8-10. But this did not end the court's inquiry as it then became necessary to construe this latter term. Id. at *11. Chief Judge Sifton observed that the Treasury Letter "referred to 'organized exchanges' as including 'individuals and small traders who may need to be protected by some form of regulation.'" Id. (emphasis added). On the basis of his observation, he concluded that both Treasury and Congress intended to define "organized exchanges" as "situations where private unsophisticated investors are transactional participants." Id.

To begin with, Standard Forex's conclusion rests, in part, on a slight but important inaccuracy. Its reference to the Treasury Letter creates the impression that Treasury considered the presence of individuals and small traders as the primary characteristic of an organized exchange. The cited portion of the Treasury Letter, in fact, describes participants on "organized exchanges" as "in some cases, includ[ing] individuals and small traders who may need to be protected by some form of regulation." Treasury Letter (emphasis added). Treasury's use of the words "in some cases" precludes the inference that it considered the presence or absence of small traders indicative of formally organized exchanges. The Treasury Letter leaves open the possibility that banks and sophisticated traders may trade on organized exchanges (and may be the only participants on such an exchange) without causing the exchange to become something other than an "organized exchange". Likewise, the proposition that the traders on organized markets may include individual traders hardly leads to the conclusion that a location where an individual trades is, therefore, an organized exchange. That conclusion results not from deduction, but from an effort to avoid an unpalatable result, robbing Standard Forex and cases that follow the same reasoning of persuasiveness. See Salomon

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all foreign currency futures trading not conducted on an organized exchange and the Senate Committee's report indicates that Congress granted that wish. In other words, "board of trade," as used in the Treasury Amendment, refers to organized exchanges, and the Commission lacks jurisdiction over foreign currency futures transactions that do not occur on those organized exchanges.[128]

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Forex, 8 F.3d at 974. To the extent that the Treasury Amendment deprives the Commodity Futures Trading Commission of the ability to police fraud and abuse in the marketing and sale of foreign exchange derivatives, "these are arguments best addressed to Congress, not the Courts." Dunn, 519 U.S. at ___, 117 S. Ct. at 921.

In addition, an attempt to interpret the Treasury Amendment as drawing distinctions based on the identity of the participants must come to terms with the unambiguous language of Section 2(a). "[T]he Treasury Amendment's plain language is not qualified in any respect to limit the covered participants. And legislative history may not be invoked to create an ambiguity where none otherwise exists." Salomon Forex, Inc. v. Tauber, 795 F. Supp. 768, 774 (E.D. Va. 1992), aff'd, 8 F.3d 966 (4th Cir. 1993) (citing Railroad Comm'n of Wisconsin v. Chicago, Burlington and Quincy R.R. Co., 257 U.S. 589 (1922)); See Board of Trade of the City of Chicago v. SEC, 677 F.2d 1137, 1179 (7th Cir. 1982) (Cudahy, J., dissenting) ("In the instant case, neither the language of the CEA nor its legislative history supports the engrafting of a 'sophisticated institution' limitation onto the Treasury Amendment."), vacated as moot, 459 U.S. 1026 (1982).

[128] Frankwell Bullion, 99 F.3d at 304; Kwiatkowski v. Bear Stearns Co., Inc., No. 96 CIV. 4798 (JGK), 1997 WL 538819 at *10 (S.D.N.Y. Aug. 29, 1997).

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The Division opines that Salomon Forex supports its argument that the Treasury Amendment draws distinctions based on the parties and undermines Frankwell. Memorandum at 32. In doing so, the Division confuses the act of limiting a holding to the case facts with the rejection of a rule applicable to dissimilar facts. The Salomon Forex appellant argued on appeal that a failure to limit the Treasury Amendment to the interbank market would provide a basis for the marketing of off-exchange foreign currency futures contracts to the general public. 8 F.3d at 978. In response, Salomon Forex was careful to limit its holding to the facts before it, involving individually negotiated transactions and sophisticated investors, and, therefore, avoided an express rule that would achieve a more general result. Id. ("This case does not involve mass marketing to small investors, which would appear to require trading through an exchange, and our holding in no way implies that such marketing is exempt from the CEA.") However, that does not change the analysis used by the court to reach its holding or the court's characterization of Congressional intent, analysis that is directly on point in this case. In other words, a refusal to consider issues not raised in a case does not imply a contrary rule regarding the issue not addressed.

Salomon Forex may have stayed within its facts, but it refused to draw distinctions based on the form of the trader. Recognizing that "[t]he statute distinguishes only between on-exchange and off-exchange trading," it stated "[w]hat the statute commands instead is the exemption of all trading off organized exchanges." Id. at 977. Since Salomon Forex held that "the corporate form of trader" does not determine "whether a trade is within the Act," it is baffling as to how Salomon Forex, under a different set of facts, would consider the corporate form of the trader in determining the reach of the Treasury Amendment. Id.

As an alternative to relying on Salomon Forex, the Division brings to the Court's attention a case that deemed Salomon Forex irrelevant to the "board of trade" issue. In its latest supplemental filing, the Division appeals to Rosner v. Peregrine Finance Ltd., No. 95 Civ. 10904(KTD), 1998 WL 249197 (S.D.N.Y. May 18, 1998) ("Rosner"), one of three pending cases before a single court in which the court discussed the Treasury Amendment's scope

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The complaint does not charge Global Link with operating a formally organized exchange nor does the Division argue that point in support of its motion.[129] Moreover, the complaint's factual

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in the context of motions to dismiss. Supplemental Memorandum. See Rosner v. Emperor Int'l Exchange Co., No. 95 Civ. 10906(KTD), 1998 WL 255437 (S.D.N.Y. May 20, 1998); Rosner v. Geldermann, Ltd., No. 95 Civ. 10905(KTD), 1998 WL 255439 (S.D.N.Y. May 20, 1998). Rosner rejected Frankwell Bullion and Kwiatkowski as unpersuasive. 1998 WL 249197 at *5. As to Kwiatkowski, Judge Duffy noted the case's reliance on Salomon Forex and Salomon Forex's statement that it "did not consider the reach of the term board of trade." Id. at *6 (citing Salomon Forex, 8 F.3d at 973 n.5). On that basis, he disregarded Kwiatkowski's conclusion and Salomon Forex's analysis. While Rosner's discussion of Salomon Forex is technically accurate as far as it goes, it creates the impression that the Fourth Circuit's decision is inapposite. Such is not the case.

Salomon Forex affirmatively declined to define the limits of "board of trade." However, in reaching the matters it decided, Salomon Forex analyzed the same legislative history that Rosner, and every other court that has found the term "board of trade" ambiguous, has relied upon. Salomon Forex, 8 F.3d at 976-77; see e.g., Rosner, 1998 WL 249197 at *5. As a result of this analysis, Salomon Forex characterized the Treasury Amendment's underlying legislative intent in a manner that is contrary to Rosner and the Division's arguments. Compare Id. at *5 ("the Treasury Amendment was not intended to exempt all 'off-exchange' transactions from the CEA, but only 'off-exchange' interbank transactions"), with Salomon Forex, 8 F.3d at 976 ("We are thus satisfied that under the appropriate interpretation of the Treasury Amendment, all off-exchange transactions in foreign currency, including futures and options, are exempt from regulation by the CEA.").

[129] See Memorandum at 26-29 ("The Division contends that transactions engaged in by Global Link . . . were 'conducted on a board of trade,' and that the Treasury Amendment therefore does

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allegations do not support a finding that Global Link contracts were traded on a formally organized exchange as the term is normally understood.[130] In two rounds of pleadings and a voluminous evidentiary submission, the Division has made no indication that additional procedures would lead to the adducement of facts that would change this. Dismissal of the complaint is,

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not deprive the Commission of jurisdiction over this action."). Likewise, the Division maintains that "board of trade" is a term that is distinct from "exchange." Id. at 29.

[130] The complaint and record indicate that Global Link was not organized like an exchange. It was a corporation owned by four shareholders and did not offer memberships that included exclusive trading rights and a role in corporate governance. The complaint does not allege that Global Link operated like an exchange. Global Link offered and sold standardized commodity contracts, but the well-pled and evidenced similarities end there. There is no well-pled allegation that it provided a facility (or technology) that allowed other parties to trade among themselves. Indeed, the Division alleges that Global Link's representations regarding the execution of customer orders opposite of third parties were false. Likewise, there is no allegation in the complaint and no evidence in the record that Global Link operated a clearing mechanism. Global Link may have taken the opposite position of each of its customers' orders. If this occurred, however, Global Link did this for its own benefit whereas an exchange serves merely as an intermediary between two other parties who reach an express agreement and does not take beneficial commodities positions. Along with making efficient offset possible, the clearing mechanism ensures that the exchange's intermediary role does not leave it holding a net position. Finally, exchanges provide facilities for the trading of actual commodities that are the subject of its contracts while

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therefore, proper at this time. Although there is no need to discuss the Division's other theories of the case further, some comment is merited.

The Division's Substantive Claims

But for the Treasury Amendment, Global Link's Activity Would Have Violated Section 4(a)

The Division's claims in this case include an allegation that the respondents violated Section 4(a) of the Act.[131] While there is no need to consider that allegation at this point, comment is useful as it places a number of the Division's legal theories in context. Section 4(a) prohibits the offer or sale of a futures contract that does not occur on or subject to the rules of a contract market.[132]

Section 4(a) states that

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Global Link provided no facilities for the delivery of foreign currencies.

[131] Complaint at ¶¶48-57.

[132] 7 U.S.C. §6(a).

"it shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States . . . for the purpose of soliciting, or accepting any order for . . . any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery . . . unless--

(1) such transaction is conducted on or subject to the rules of a board of trade which has been designated by the Commission as a "contract market" for such commodity;

(2) such contract is executed or consummated by or through a member of such contract market; and

(3) such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery . . . ."[133]

Section 4(a) is the linchpin of the Act's regulatory scheme as it compels the public to conduct futures transactions through Commission-regulated contract markets.[134] Accordingly, those who engage in activity within the jurisdiction of the Act, yet seek to

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[133] Id.

[134] In re Stovall, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,941 at 23,784 (CFTC Dec. 6, 1979) ("The statutory requirement that all commodity futures trading be conducted on designated contract markets is the centerpiece of the pervasive regulatory scheme embodied in the Act."); William L. Stein, The

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avoid the scrutiny of the Commission or Commission-designated contract markets, violate one of the Act's core provisions.[135]

The Division alleges, and the Court agrees on the basis of an intentionally superficial analysis,[136] that Global Link sold futures contracts.[137] Had the Treasury Amendment not precluded

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Exchange-Trading Requirement of the Commodity Exchange Act, 41 Vanderbilt L. Rev. 473, 479 (1988).

[135] Stovall, ¶20,941 at 23,784 ("we view Stovall's willful violation of . . . [Section 4(a)] a most serious offense, deserving serious remedial sanctions").

[136] Section 4(a) pertains to contracts for the purchase or sale of a commodity for future delivery. 7 U.S.C. §6(a). Therefore, not all commodities contracts fall under Section 4(a). Section 4(a) distinguishes futures contracts from cash forward contracts, excluding the latter from Commission jurisdiction. Salomon Forex, 8 F.3d at 970-71. Given that the jurisdictional limits of the Treasury Amendment are dispositive in this case, there is no need to determine whether Global Link contracts were spot, forward, or futures contracts. Accordingly, the Court will limit itself to a general discussion and, thereby minimize the risk of muddling an already confusing, if not confused, area of the law.

[137] "Futures contract" is a term of art not defined in the Act. CFTC v. Noble Metals Int'l, Inc., 67 F.3d 766, 772 n.4 (9th Cir. 1995). The core characteristic of a futures contracts is its primary economic purpose. Futures contracts "are entered into primarily for the purpose of assuming or shifting the risk of change in value of commodities, rather than for transferring ownership of the actual commodities." Stovall, ¶20,941 at 23,777. In this case, the allegations describe Global Link's customers as unable to make or take delivery, lacking any intention of transferring ownership of foreign currency, and

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jurisdiction, trading Global Link contracts would have violated Section 4(a) as it did not occur on or subject to the rules of a Commission-designated contract market.

The Division notes that "contract market" is a term with a definite meaning. Employing a plain-meaning analysis, the Division distinguishes "board of trade" from "contract market," a specific type of board of trade. Rule 1.3(h) "defines the term 'contract market' as 'a board of trade designated by the Commission as a contract market under the Commodity Exchange Act . . . .'"[138] The Division bases its analysis on the long-held rule of statutory construction that when Congress chose one term (contract market) instead of another term (board of trade), Congress did not intend to equate the first term with the second.[139] Accordingly, transactions involving contracts traded

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never required to take delivery, even on spot contracts that were not offset for weeks. See Att. C.

[138] Memorandum at 20 (citing 17 C.F.R. §1.3(h)).

[139] The Act does not define "contract market," however it does set out requirements that a board of trade must meet before it is designated as a contract market. See 7 U.S.C. §7. Accordingly, the structure of the Act reveals that when Congress employed the term "contract market" it intended to cover a subset of boards of trade.

on or subject to the rules of a board of trade would violate Section 4(a) if the board of trade was not a Commission-designated contract market.

In this case, the Division alleges that the respondents solicited customer orders for futures contracts that were not traded on or subject to the rules of a Commission-designated contract market. The Court, taking this allegation as true, concludes that the respondents would have violated Section 4(a) but for the Treasury Amendment's exclusion.[140] The Division's success in establishing elements of a Section 4(a) violation, however, casts doubt on its ability to establish a violation of Section 4d.

For the Same Reason the Division's Section 4(a) Allegations Would Have Succeeded, But For the Treasury Amendment, Its Section 4d Allegations Cannot Succeed

In addition to violations of Section 4(a), the Division alleges that respondents violated Section 4d by operating as an unregistered futures commission merchant ("FCM") and converting

[140] Because the Court is not actually finding liability, due the lack of jurisdiction, it will not address the finer points of controlling person liability, aiding and abetting, or respondeat superior liability.

customer funds.[141] Even if Global Link had operated within Commission jurisdiction, the Division would not have been entitled to a default judgment on its Section 4d claims because Section 4d covers futures transactions on or subject to the rules of any contract market. Global Link did not engage in such transactions. Therefore, while Global Link would have violated Section 4(a), it could not logically have violated Section 4d.

Sections 4(a) and 4d complement each other. Section 4a compels those who engage in futures transactions to do so on or subject to the rules of a Commission designated contract market. That having been accomplished, Section 4(d) governs activity that occurs on or subject to the rules of a contract market by providing the following registration as well as anti-conversion and anti-commingling requirements.

> "It shall be unlawful for any person to engage as a futures commission merchant or introducing broker in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery, or involving any contracts for the sale of any commodity for future delivery, <u>on or subject to the rules of any contract market</u>, unless--
>
> (1) such person shall have registered, under this Act, with the Commission as such futures commission merchant . . . and

[141] Memorandum at 37-42; Complaint at ¶¶74-84.

> (2) such person shall, if a futures commission merchant . . . treat and deal with all money . . . of any customer . . . as belonging to such customer."[142]

As a threshold matter, the clear text of the Act requires the Division to establish that Global Link was engaged as an FCM or as an introducing broker. Otherwise, Section 4d's requirements would not apply to at all. Then, it further limits its coverage by governing only transactions in futures contracts on or subject to the rules of a contract market. The Division theorizes that Global Link operated as an FCM.[143] The facts indicate otherwise.

The Act defines an FCM, in part, as one that "is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market."[144] Thus, the clause "on or subject to the rules of any contract market" redundantly limits the reach of Section 4d. First, it limits to whom the section applies by its inclusion in the definition of FCM. In addition, the clause limits what activities of FCMs are governed.

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[142] 7 U.S.C. §6d (emphasis added).

[143] Complaint at ¶¶75-76, 81.

[144] 7 U.S.C. §1a(12).

Although the Division embraces a plain meaning interpretation of Section 4(a),[145] it abandons this approach with respect to Sections 4d and 1a(12). As to these sections, it maintains that "on or subject to the rules of any contract market" really means "should be on or subject to the rules of any contract market."[146] This reading is not only unnatural and without a reasoned basis, it is unnecessary. Accordingly, the facts as alleged and substantiated by the Division cannot form the basis of a Section 4(d) violation.

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[145] The Division draws the distinction, noting,

> "Section 1a(1) of the Act defines a 'board of trade' as 'any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale or consignment.' Regulation 1.3(4) defines the term 'contract market' as 'a board of trade designated by the Commission as a contract market under the Commodity Exchange Act . . . .' Under those provisions, persons or entities violate Section 4(a) if they conduct foreign currency futures transactions other than on a board of trade designated by the Commission as a contract market."

Memorandum at 20.

[146] Memorandum at 37-38.

Under long-standing rules of statutory construction, the Court presumes that Congress drafts statutes with the intent that each term have a definite meaning, and when a term is used in different sections of the same statute, that the term retains a consistent meaning.[147] The Court abandons this approach only when the plain meaning of a term would render the statute absurd or read a clause out of the statute entirely. Here, however, the Division encourages the Court to read additional terms into Congress's unambiguous language with an appeal to inapposite case law and illusory policy imperatives.

In support of the argument that "on or subject to the rules of any contract market," as employed in Section 4d, does not mean what it says, the Division relies on CFTC v. P.I.E., Inc.[148] In that case, the Ninth Circuit held that the anti-fraud provisions of Section 4b were not limited only to contracts on or subject to

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[147] See Russello v. United States, 464 U.S. 16, 23 (1983); Salomon Forex, 8 F.3d at 975 ("We assume that the legislature used words that meant what it intended; that all words had a purpose and were meant to be read consistently; and that the statute's true meaning provides a rational response to the relevant situation."); United States v. Wooten, 688 F.2d 941, 950 (4th Cir. 1982) ("[A] judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation.").

[148] 853 F.2d 721 (9th Cir. 1988).

the rules of a contract market, even though the plain terms of the statute indicated otherwise. The reasoning of P.I.E. is divided in two portions. One portion is unavailable to the Division in the case and the other one is half-baked.

First, P.I.E. reasoned that Congress initially intended to reach beyond Commission designated contract markets when it enacted Section 4b.[149] The panel based this proposition on an amendment of Section 4b that deleted the limiting "on or subject to" language. Although the amendment occurred after acts underlying the case had taken place, the panel observed that Congress termed the amendment a mere clarification of the existing statute rather than a gap-filling measure.[150] P.I.E. also blanched at the prospect of a "literal reading" of the operative version of Section 4b, concluding that such a reading would "thwart the underlying purposes" of the Act.[151]

Any way you slice it, the Division's serving of P.I.E. does not necessarily lead to the implication of statutory terms Congress chose to omit. P.I.E. primarily rested on the nature of

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[149] Id. at 725

[150] Id.

[151] Id.

an amendment to the Act that post-dated the defendant's charged activity and the legislative history of that amendment supporting an otherwise aberrant reading. Whatever the wisdom of disregarding unambiguous language in favor of one Congress's characterization of the intent of a prior Congress,[152] the Division does not have such an amendment of Section 4d to which to point.

The second piece of P.I.E. and a basis of the Division's theory, is an appeal to policy considerations. The Division claims that restricting Section 4d's reach by a literal reading may avert doing violence to the text of the Act, but would defeat the policies underlying the Act.[153] This argument wilts under examination.

It is, at best, a matter of debate as to whether a adjudicator should rush to fill a gap left by Congress.[154] Here

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[152] P.I.E., 853 F.2d at 727 (Kozinski, J., concurring) ("I question the authority of a congressional committee to declare that an earlier Congress did not mean what it said when it adopted statutory language expressly limiting the scope of its regulatory scheme.").

[153] Memorandum at 39-40 ("Respondents should not be able to avoid liability simply by engaging in illegal off-exchange transactions that are required to be conducted on an exchange.").

[154] See Crooks v. Harrelson, 282 U.S. 55, 60 (1930) ("Laws enacted with good intention, when put to the test, frequently,

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no debate is necessary, since no gap exists. If one section of the Act covers an activity and provides a basis for appropriate sanctions if violated, then there is generally no compelling policy rationale for trying to distort another section of the Act to encompass the same activity.[155] In this case, as discussed

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and to the surprise of the lawmaker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such a case the remedy lies with the lawmaking authority, and not with the courts.").

[155] In P.I.E., the panel proceeded under the premise that a regulatory gap existed. It reasoned that "[t]he Act requires futures sales to be made on a designated market in order to protect investors. [Defendants-Appellants] cannot illegally avoid sales on these markets and then argue that because they did so they need not answer for a fraud perpetrated on investors." P.I.E., 853 F.2d at 726. However, contrary to the panel's reasoning, a finding of liability under Section 4b was unnecessary to the proper sanctioning of defendants' fraud. The Commission had prevailed on its claim that the defendant violated Section 4 by selling off-contract market futures contracts. Proper sanctioning of the fraudulent conduct could have rested on this holding alone.

Not only did the Act sanction certain activity on or subject to the rules of contract markets, it prohibited, and provided for sanctioning, dealing in contracts not governed by contract markets entirely. Accordingly, the perception of a gap must rest on the assumption that selling contracts outside of contract markets is a technical, non-serious violation, such that substantial, deterring sanctions can not be imposed. However, Section 4 is recognized as a core requirement. See supra note 134. In purely abstract terms, there is no reason why intentionally avoiding the congressionally mandated regulatory scheme is less serious than fraud that was furthered by that

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above, the respondents' activity would have violated Section 4(a), but for a lack of jurisdiction. Thus, a literal reading of Section 4d creates no hole in the Act regarding Global Link's activity. Therefore, there is no reason to rob the phrase "on or subject to the rules of any contract market" of its plain meaning. Upon examination, the Division's position is revealed to rest on the notion that the policies of the Act are furthered when violative conduct is sanctioned under as many theories as possible.[156] Such a principle may promote unnecessary complexity and careless drafting, but not the public interest.[157]

The Division has demonstrated no reason to warp the plain language of Sections 4d and 1a(12). Accordingly, the Court reads the term "on or subject to the rules of any contract market" as

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avoidance. Case law bears this out. The Commission deems a willful violation of Section 4(a) "a most serious offense, deserving of serious remedial sanctions." Stovall, ¶20,941 at 23,784. There is no reason to believe that discrete acts of fraud are not subsumed in the act of regulatory avoidance that Section 4(a) condemns and, therefore, can sanction under that provision as an aggravating factor. Accordingly, the policy imperative relied upon in P.I.E. is really nonexistent.

[156] In other words, the Division's position is P.I.E. in the sky.

[157] See In re Interstate Securities Corp., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,295 at 38,954-55 (CFTC June 1, 1992).

referring to on or subject to the rules of any Commission-designated contract market.[158] Therefore, where a respondent's entire transactional activity, as it relates to contracts for future delivery under Commission jurisdiction, violates Section 4(a), that respondent cannot possibly have violated Section 4d. Having considered the complaint and the Division's supplementary filings, the Court concludes that the Division's factual allegations not only fail to establish, but affirmatively preclude the conclusion that the respondents in this case violated Section 4d.[159]

The Division Failed to Allege Facts Sufficient to Establish That Global Link Operated as an FCM and, Therefore, Failed to Establish Violations of Sections 9(a) and 4k(1) and Rules 3.12(a) and 1.55.

The complaint contains a number of additional counts that share a threshold requirement with the Division's 4d theory. These

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[158] 7 U.S.C. §7; 17 C.F.R. §1.3(h).

[159] The Division also alleged a violation of Rule 1.20 without expressly identifying the precise subsection. Memorandum at 40-42; Complaint at ¶¶80-83. Rules 1.20(a) applies generally, Rule 1.20(b) applies to clearing organizations and Rule 1.20(c) governs FCMs. 17 C.F.R. §1.20. Having reviewed the Division's pleadings, the Court has reason to believe that the Division alleged a violation of Rule 1.20(a). Under circumstances not governed by the Treasury Amendment, the Court agrees that Global

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allegations include: (1) a second theory for liability based on the alleged conversion of customer funds, under Section 9(a)(1),[160] (2) alleged violations of Section 4k(1) and Rule 3.12(a) based on the individual respondents' failure to register as associated persons,[161] and (3) allegations that Global Link failed to distribute risk disclosure statements to its customers

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Link's conversion and commingling of funds would have violated Rule 1.20(a).

[160] Complaint ¶¶86-90.

Section 9(a)(1) provides criminal sanctions for the conversion of customer assets in excess of $100. 7 U.S.C. §13(a)(1). Its prohibitions apply to "[a]ny person registered or required to be registered" under the Act. Id.

[161] Complaint ¶¶91-93.

Section 4k(1) deems it

> "unlawful for any person to be associated with a futures commission merchant as a partner, officer, or employee . . . in any capacity that involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this chapter as an associated person of such futures commission merchant . . . ."

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as mandated by Rule 1.55.[162] Each of these theories depends on establishing that Global Link operated as an FCM.[163] As noted

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7 U.S.C. §6k(1). Rule 3.12(a), read in light of the Commission's definition of "associated person" in Rule 1.3(aa)(1), contains an identical prohibition. 17 C.F.R. §§1.3(aa)(1), 3.12(a).

[162] Complaint ¶¶98-99.

Rule 1.55(a) requires an FCM (or an introducing broker) to furnish to any prospective customer a written disclosure statement, containing the language prescribed in Rule 1.55(b), before opening a customer account. 17 C.F.R. §1.55(a); see 17 C.F.R. §1.55(b).

[163] Section 9(a)(1) applies generally, to "[a]ny person registered or required to be registered" under the Act. 7 U.S.C. §13(a)(1). Section 4k(1) and Rule 3.12(a) apply to those associated with an FCM. 7 U.S.C. §6k(1); 17 C.F.R. §3.12(a). Rule 3.12(a) also applies to those associated with introducing brokers, commodity trading advisors, commodity pool operators, and leverage transactions merchants. Id. Rule 1.55(a) applies to FCMs and introducing brokers. 17 C.F.R. §1.55(a). The Division alleges that Global Link operated only as an FCM and, on that basis, was required to register as such. Complaint at ¶76. It makes no allegation that Global Link operated or was required to register in any other capacity.

The Commission regulations employ a definition of FCM that is virtually identical to Section 1a(12). Rule 1.3(p) defines FCMs as

> "(1) Individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market . . . and

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above, the Division's allegations fall short of proving this. Accordingly, these theories would not have merited a default judgment even if the Treasury Amendment did not otherwise preclude it.

The Division's Allegations Fail to Establish Violations Under Part 30 of the Commission's Regulations

The complaint contains an alternative, "conditional" count.[164] The Division proposes a completely independent set of violations, based on the speculative claim that Global Link sold

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> (2) Shall include any person required to register as a futures commission merchant under the Act by virtue of Part 32 or Part 33 of this chapter."

17 C.F.R. §1.3(p). It automatically follows that the Division's failure to prove that Global Link was an FCM under the Act, due to the on or subject to the rules of any contract market requirement, amounts to a failure to prove the same under Rule 1.3(p).

[164] Count IX appears conditioned on the Court reaching the conclusion that the respondents comprised all or part of a foreign board of trade. Complaint at ¶102 ("If the court determines that the orders solicited by Respondents, alone or together with Addwealth, were or may have been executed on a foreign board of trade, the Commission alleges this Count IX in the alternative . . . .").

(or may have sold) foreign futures contracts.[165] The Division alleges that Global Link: (1) failed to properly register,[166] (2) failed to make appropriate disclosure,[167] (3) failed to properly segregate and account for the funds of foreign futures customers,[168] (4) commingled customer funds with its operating funds,[169] and (5) engaged in fraud in connection with its customer transactions.[170] The success of each of these claims requires the Division to establish that Global Link was, itself or in association with Addwealth, a foreign board of trade. In this case, the Division's well-pled allegations fall short.

Part 30 of the Commission's regulations governs customer transactions in foreign futures. Rule 30.3 prohibits "the offer and sale of any foreign futures contract . . . for or on behalf of a foreign futures . . . customer, except in accordance with" Part

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[165] Complaint at ¶¶101-26.

[166] Complaint at ¶¶109-11.

[167] Complaint at ¶¶112-14.

[168] Complaint at ¶¶115-17.

[169] Complaint at ¶¶115-17.

[170] Complaint at ¶¶123-26.

30.[171] Part 30 includes a registration provision,[172] a disclosure requirement for FCMs,[173] customer fund minimum balance and customer fund segregation requirements for FCMs,[174] and antifraud

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[171] 17 C.F.R. §30.3(a).

[172] Rule 30.4(a) sets out the following prohibition.

> "[I]t shall be unlawful for any person, with respect to a foreign futures . . . customer:
>
> (a) To solicit or accept orders for or involving any foreign futures contract . . . and, in connection therewith, to accept any money . . . to margin . . . any trades . . . unless such person shall have registered, under the Act . . . as a futures commission merchant . . . ."

17 C.F.R. §30.4(a).

[173] Under Rule 30.6(a),

> "Except as provided in §1.65 of this chapter, no futures commission merchant . . . may open a foreign futures . . . account for a foreign futures . . . customer unless the futures commission merchant . . . first furnishes the customer with a separate written disclosure statement containing only the language set forth in §1.55(b) . . . ."

17 C.F.R. §30.6(a).

[174] Rule 30.7(a) provides,

> "Except as provided in this section, a futures commission merchant must maintain in a separate account or accounts money,

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provisions.[175] The Division argues that Global Link violated each of these provisions.[176] Part 30, in general, and each of the regulations upon which the Division relies, governs the offer and

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> securities and property in an amount at least sufficient to cover or satisfy all of its current obligations to foreign futures . . . customers denominated as the foreign futures . . . secured amount. Such money, securities and property may not be commingled with the money, securities or property of such futures commission merchant . . . ."

17 C.F.R. §30.7(a).

[175] Under Rule 30.9,

> "It shall be unlawful for any person, by use of the mails or by any means or instrumentality of interstate commerce, directly or indirectly, in or in connection with any account . . . or transaction involving any foreign futures contract or foreign options transaction:
>
> (a) To cheat or defraud or attempt to cheat or defraud any other person;
>
> . . . .
>
> (d) To bucket any order, or to fill any order by offset against the order or orders of any other person . . . ."

17 C.F.R. §30.9.

[176] Memorandum at 44-49; Complaint at ¶¶101-26.

sale of foreign futures contracts.[177] The Division proposes that Global Link sold its customers foreign futures contracts.[178]

A foreign currency futures contract is not necessarily a foreign futures contract. The Commission defines "foreign futures contract" as "any contract for the purchase or sale of any commodity for future delivery made, or to be made, on or subject to the rules of any foreign board of trade."[179] Accordingly, unless Global Link's contracts were sold on or subject to the rules of a foreign board of trade, it was never subject to Part 30's requirements even if the Commission had jurisdiction. The Division has a notion that Global Link may have been a foreign board of trade, but the tentative nature of its allegations reflect well-founded doubts.

The Division's claims assume, without any direct allegations or supporting argument, that Global Link, a Florida corporation operating out of Miami, was a foreign board of trade.[180] The term

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[177] See supra notes 172-175.

[178] Memorandum at 45-46; Complaint at 105.

[179] 17 C.F.R. §30.1(a).

[180] The Division never alleges that Global Link was a foreign board of trade. In its discussion of the Part 30 claims, it merely alleges that Global Link was a board of trade under

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"foreign board of trade" means "any board of trade . . . located outside the United States, its territories or possessions . . . where foreign futures or foreign options transactions are entered into."[181] The circularity of the definitions of foreign futures contract and foreign board of trade aside, the extraterritoriality requirement appears beyond the Division's allegations.

Assuming, arguendo, that Global Link was a board of trade, it appears to have been a domestic operation. Global Link located its only office in Miami and it registered as a Florida corporation. The Court must assume that the Division believes an alleged association with Addwealth would effectively expatriate Global Link. This theory lacks a basis in well-pled allegations regarding Addwealth.[182] Accordingly, there is no alleged association that would transform what appears to have been a

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Section 1a(1). Division's Findings of Fact at ¶116; Complaint at ¶104. The Division simply speculates that it may be a foreign board of trade. Memorandum at 45-46 ("While the foreign currency transactions conducted at Global Link may have been executed on a foreign board of trade . . . .").

[181] 17 C.F.R. §1.3(ss).

[182] As discussed in some detail above, the allegations regarding Addwealth are, as a whole, self-contradictory, indefinite, and therefore are not well-pled. See supra note 43.

domestic operation into a foreign board of trade.[183] Accordingly, the Division's Part 30 allegations would not have succeeded regardless of the jurisdiction issue.

Order

For the reasons set out above, the Court finds that the Division's well-pled factual allegations set forth in the complaint, as supplemented by additional pleadings and evidentiary submissions, and taken as true, do not state a cause in action under the Act. For this reason, the Court **DENIES** the Division's motion for a default order. In addition, neither the complaint

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[183] Because the Division's allegations fail to expatriate Global Link in the slightest, the Court need not determine what degree of integration or what geographical distribution of activities would amount to being "located outside the United States." It suffices to note that if a board of trade had a foreign association (such as a foreign firm providing price, crop or weather data) but it operates in the United States, all customer transactions occur in the United States and no customer orders are executed outside the country, then the Court would likely conclude that the board of trade was domestic and not a foreign board of trade.

nor the Division's supplemental submissions indicate that any additional fact-finding would change this outcome. Accordingly, the complaint is **DISMISSED**.

IT IS SO ORDERED.

On this 26th day of June, 1998

Bruce C. Levine
Administrative Law Judge