

RECEIVED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

13 CV 2287

U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

4X SOLUTIONS, INC. and
WHILEON CHAY,

Defendants.

) Case No.

) ECF Case

) COMPLAINT FOR INJUNCTIVE AND
) OTHER EQUITABLE RELIEF AND FOR
) CIVIL MONETARY PENALTIES
) PURSUANT TO THE COMMODITY
) EXCHANGE ACT

RECEIVED
APR 08 2013
U.S.D.C. S.D. N.Y.
CASHIERS

Plaintiff U.S. Commodity Futures Trading Commission ("Commission" or "CFTC")

alleges as follows:

I. SUMMARY

1. From at least April 16, 2008 through at least November 2010 (the "relevant period"), 4X Solutions, Inc. ("4X"), acting through its officers, employees, or agents, and Whileon Chay ("Chay" and, collectively with 4X, "Defendants"), individually and as an officer, employee, and/or agent of 4X, orchestrated and operated a foreign currency trading Ponzi scheme.

2. Defendants, acting through Chay and one other individual, solicited approximately \$4.8 million from at least 19 individuals and entities for the purpose of participating in a pooled investment vehicle Chay controlled that traded off-exchange leveraged or margined foreign currency contracts ("forex" or "foreign currency").

3. Defendants, acting through Chay and one other individual, lured prospective pool participants with the prospect of earning investment returns of 24% to 36% per year.

4. There were no such returns, however. Of the approximately \$4.8 million that pool participants entrusted to Defendants to trade forex, Chay deposited only approximately \$3 million in actual trading accounts. Chay lost approximately \$2 million of those funds trading forex.

5. Defendants, through the acts of Chay, misappropriated the balance of the pool participants' funds, using approximately \$2.8 million to pay for personal expenses, make purported profit payments to other pool participants, trade securities, and fund 4X's operations.

6. Defendants, through the acts of Chay, concealed the trading losses, the misappropriation, and the fraudulent scheme by issuing and/or causing the issuance of, among other things, false monthly account statements and checks to pool participants that were purported to represent, at least in part, trading profits and investment returns.

7. By virtue of the conduct described above and the further conduct described herein, Defendants have engaged in, or are about to engage in, acts in violation of the Commodity Exchange Act ("Act"), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (CFTC Reauthorization Act of 2008 ("CRA")), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), Pub. L. No. 111-203, Title VII (Wall Street Transparency and Accountability Act of 2010), §§ 701-774, 124 Stat. 1376 (enacted July 21, 2010), to be codified at 7 U.S.C. §§ 1 *et seq.*, specifically Section 4b(a)(2)(A)-(C) of the Act, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C).

8. During the relevant period, Chay controlled 4X, and failed to act in good faith, or knowingly induced the acts constituting 4X's violations alleged herein. Therefore, Chay is liable for 4X's violations of the Act pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2006).

9. During the relevant period, Chay and one other individual committed the acts described herein within the course and scope of their employment, agency, or office with 4X. Therefore, pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Commission Regulation ("Regulation") 1.2, 17 C.F.R. § 1.2 (2012), 4X, as the principal, is liable for the violations of the Act committed by its agents, employees, and officers, including Chay and one other individual.

10. Accordingly, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), and Section 2(c)(2)(C) of the Act, as amended by the CRA, 7 U.S.C. § 2(c)(2)(C) (Supp. III 2009), the Commission brings this action to enjoin Defendants' unlawful acts and practices, and to compel their compliance with the Act, as amended by the CRA and the Dodd-Frank Act. In addition, the Commission seeks civil monetary penalties and remedial ancillary relief, including, but not limited to, trading and registration bans, restitution, disgorgement, rescission, pre- and post-judgment interest, and such other relief as the Court may deem necessary and appropriate.

11. Unless restrained and enjoined by this Court, Defendants are likely to continue to engage in the acts and practices alleged in this Complaint and similar acts and practices, as more fully described below.

II. JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (2006), which provides, in relevant part, that whenever it shall appear to the Commission that any person has engaged, is engaging, or is about to engage in any act or

practice constituting a violation of the Act or any rule, regulation, or order thereunder, the Commission may bring an action against such person to enjoin such practice or to enforce compliance with the Act.

13. The Commission has jurisdiction over the forex transactions at issue in this case pursuant to Section 2(c)(2)(C) of the Act, as amended by the CRA, 7 U.S.C. § 2(c)(2)(C) (Supp. III 2009), which grants the Commission jurisdiction over agreements, contracts, and transactions in forex.

14. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2006), because certain of the transactions, acts, practices, and courses of business alleged to have violated the Act occurred within this District.

III. PARTIES

15. Plaintiff **U.S. Commodity Futures Trading Commission** is an independent federal regulatory agency that is charged by Congress with the administration and enforcement of the Act, to be codified at 7 U.S.C. §§ 1 *et seq.*, and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2012). The Commission maintains its principal office at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

16. Defendant **4X Solutions, Inc.** is a New York corporation that, during the relevant period, maintained its principal place of business in New York City. Chay and his spouse were the only officers and shareholders of 4X. Upon information and belief, Chay exercised nearly exclusive and complete control over 4X. 4X has never been registered with the CFTC. 4X is not a financial institution, registered broker dealer, insurance company, financial holding company, or investment banking company, and is not an associated person of such entities.

17. Defendant **Whileon Chay** maintained an address in New York City during the relevant period. During the relevant period, Chay was the president of 4X. Chay has never been registered with the CFTC. Chay is not a financial institution, registered broker dealer, insurance company, financial holding company, or investment banking holding company, and is not an associated person of such entities.

IV. FACTS

A. Defendants' Fraudulent Solicitation of Pool Participants

18. During the relevant period, Defendants directly and indirectly fraudulently solicited at least 19 individuals and entities to entrust funds to 4X and Chay for the purpose of participating in a pooled investment vehicle Chay controlled that traded forex ("forex pool").

19. Defendants solicited pool participants through oral and written solicitations by Chay and one other individual. These solicitations included, but were not limited to, false and misleading claims of extraordinary historical trading successes and profits. For instance, in certain written solicitations, Defendants enticed prospective pool participants with the prospect of earning investment returns of 24% to 36% per year. Further, in certain written solicitations, Defendants claimed the ability to profit even in adverse market conditions, stating "[i]n times of great market turbulence such as we are now experiencing 4X has made money when most have lost and lost dearly."

20. While luring prospective pool participants with claims of historical trading profits and the prospect of participating in the continuation of such profits, Defendants, through Chay and one other individual, minimized the risks of forex trading. For example, in certain written solicitations, Defendants claimed they had not suffered a single losing month in 14 years.

Further, in certain written solicitations, Defendants claimed that 4X “provides a safe haven in our current financial environment.”

21. In their solicitations and communications throughout the relevant period, Defendants, through the omissions of at least Chay, failed to disclose to pool participants and prospective pool participants that Defendants’ claims of experience and success in trading forex were false, and that there was no basis for their representations that pool participants might achieve the trading profits and investment returns consistent with the purported historical trading success of Chay.

22. Defendants, through the omissions of at least Chay, further failed to disclose that Chay deposited only a portion of pool participants’ funds into forex trading accounts, operated a Ponzi scheme designed to defraud pool participants, and misappropriated pool participant funds to pay the personal expenses of Chay and to make payments to other pool participants, as further alleged below.

23. Defendants, through the acts and omissions of Chay, knowingly or with reckless disregard of the truth made and/or caused to be made the aforementioned material misrepresentations and omissions in order to induce pool participants to invest funds with the Defendants.

24. Pool participants and prospective pool participants relied on Defendants’ representations and omissions of fact in making their decisions to invest with Defendants.

B. Defendants Traded Only Some Pool Participant Funds and Lost a Majority of Those Funds Trading

25. Lured by Defendants’ misrepresentations and omissions, pool participants transferred approximately \$4.8 million to 4X for foreign currency trading during the relevant period.

26. Defendants, through Chay and one other individual, instructed pool participants to provide checks payable to 4X, or wire funds directly to one of 4X's corporate bank accounts.

27. During the relevant period, 4X maintained several corporate bank accounts. Chay was a signatory on each of the 4X corporate bank accounts.

28. While Defendants received approximately \$4.8 million from pool participants, Chay deployed only a portion of those funds for forex trading, depositing approximately \$3 million into 4X's trading accounts at futures commission merchants ("FCMs") registered with the Commission.

29. Chay opened numerous trading accounts in the name of 4X at several FCMs registered with the Commission. Chay identified himself as the president of 4X on the account opening documents associated with the various 4X trading accounts. Chay and his wife were the only individuals authorized to trade on behalf of 4X, except that, from time to time during the relevant period, Chay delegated his trading authority to several different unrelated third parties that he selected and engaged to manage and trade the 4X accounts. The 4X trading accounts were corporate proprietary accounts and not trading accounts opened in the name of or on behalf of the forex pool.

30. Contrary to their representations, Defendants were not successful foreign currency traders. Of the approximately \$3 million that Chay deposited into 4X's trading accounts, Chay lost approximately \$2 million trading forex. Chay withdrew the remaining balance of approximately \$1 million.

31. The last of 4X's foreign currency trading accounts were closed on or around November 4, 2010 and the approximately \$11,800 remaining in the trading accounts was transferred to one of 4X's corporate bank accounts. Shortly thereafter, Chay transferred a similar

amount, approximately \$11,700, from the 4X corporate bank account to his personal bank account, where he used those funds for his personal expenses.

32. Chay never reported the trading losses to pool participants and prospective pool participants. Further, Chay never disclosed to pool participants and prospective pool participants that only a portion of their funds would be deposited into forex trading accounts.

C. Defendants Misappropriated Approximately \$2.8 Million of Pool Participant Funds

33. During the relevant period, Defendants, through the acts of Chay, misappropriated approximately \$2.8 million of pool participant funds to, among other things, pay for Chay's personal expenses, make purported profit or investment return payments to pool participants, trade securities, and fund 4X's operations.

34. In addition to being a signatory on the 4X corporate bank accounts, Chay controlled the handling and disposition of the pool participant funds deposited into the 4X corporate bank accounts.

35. Defendants, through the acts of Chay, used approximately \$1.8 million of pool participant funds to pay purported profits and/or investment returns to some pool participants. Consistent with the operation of a Ponzi scheme, these payments were funded by deposits from existing or subsequent pool participants, not by profits Chay generated by trading forex.

36. Defendants, through the acts of Chay, also misappropriated pool participant funds to pay Chay's personal expenses, including but not limited to luxury resorts, expensive restaurants, limousine service, and exotic car rentals.

D. Defendants Concealed Trading Losses and Misappropriation Through False Statements

37. Throughout the relevant period, Defendants, through the acts of Chay, concealed the unsuccessful forex trading, misappropriation, and fraudulent scheme through written and oral

communications that falsely represented Defendants were profitably trading forex on behalf of pool participants.

38. Chay issued and/or caused to be issued 4X monthly account statements that, by reporting “earnings” and showing increased account values nearly every month, falsely represented that Defendants were profitably trading forex on behalf of pool participants. Specifically, Chay prepared the monthly account statements and he made them available online and had them delivered to the pool participants.

39. Chay issued checks to pool participants that were purported to consist of trading profits and/or investment returns. These checks were drawn from the 4X corporate bank accounts and were signed by Chay. Any trading profits and/or investment returns paid to pool participants were false. All or nearly all of the purported trading profits and/or investment returns that Defendants paid to pool participants came from the principal of other pool participants.

E. Chay Controlled 4X

40. During the relevant period, Chay was the president of 4X. He had virtually complete authority over, and day-to-day control of, 4X. He did not report to anyone. Chay controlled the disposition of all pool participant funds. He was responsible for the handling and disposition of pool participant funds in the 4X corporate bank accounts. He also controlled the trading of pool participant funds, except to the extent that he delegated his trading authority to unrelated third parties.

F. The Nature of the Transactions

41. Neither Defendants, nor the FCMs that were the counterparties to the forex transactions conducted by Defendants, were United States financial institutions, registered broker

dealers, insurance companies, bank holding companies, or investment bank holding companies, or the associated persons of such entities.

42. At least some, if not all, of the pool participants were not “eligible contract participants” (“ECP”) as that term is defined in Section 1a(12)(A)(xi) of the Act, as amended by the CRA, 7 U.S.C. § 1a(12)(A)(xi) (Supp. III 2009). An ECP, as relevant here, is an individual who has total assets in excess of (i) \$10 million or (ii) \$5 million and who enters into the transaction in order to manage risk.

43. The forex transactions Defendants conducted on behalf of the pool participants or the pool were entered into on a leveraged or margined basis. The forex transactions Defendants conducted neither resulted in the delivery of actual currency within two days nor created an enforceable obligation to deliver actual currency between a seller and a buyer that had the ability to deliver and accept delivery, respectively, in connection with their lines of business. Rather, these forex contracts remained open from day to day and ultimately were offset without anyone making or taking delivery of actual currency (or facing an enforceable obligation to do so).

V. VIOLATIONS OF THE COMMODITY EXCHANGE ACT

COUNT ONE:

Violations of Section 4b(a)(2)(A)-(C) of the Act:

Fraudulent Solicitation, False Statements, and Misappropriation

44. The allegations set forth in paragraphs 1 through 43 are realleged and incorporated herein by reference.

45. Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, 7 U.S.C. § 6b(a)(2)(A)-(C) (Supp. III 2009), makes it unlawful:

for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or other agreement, contract, or transaction subject to paragraphs (1) and (2) of section 5a(g), that is made, or to be made, for or on behalf of, or with, any

other person, other than on or subject to the rules of a designated contract market –

(A) to cheat or defraud or attempt to cheat or defraud the other person;

(B) willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record; [or]

(C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contact for or, in the case of paragraph (2), with the other person

Section 4b(a)(2)(A)-(C) of the Act applies to the forex transactions, agreements, or contracts offered to or entered into by Defendants for or on behalf of pool participants as if they were contracts of sale of a commodity for future delivery. Section 2(c)(2)(C)(iv) of the Act, as amended by the CRA, 7 U.S.C. § 2(c)(2)(C)(iv) (Supp. III 2009).

46. As set forth in detail above, during the relevant period, in or in connection with forex contracts, made, or to be made, for or on behalf of, or with, other persons, Defendants cheated or defrauded or attempted to cheat or defraud pool participants or prospective pool participants and willfully deceived or attempted to deceive pool participants or prospective pool participants by, among other things, knowingly: (i) fraudulently soliciting pool participants and prospective pool participants by making material misrepresentations and/or failing to disclose material facts to them; (ii) misappropriating pool participant funds; (iii) misrepresenting the profitability of pool trading accounts; and (iv) failing to disclose that Defendants were operating a Ponzi scheme and misappropriating pool participant funds, all in violation of Section 4b(a)(2)(A), (C) of the Act, as amended by the CRA, 7 U.S.C. § 6b(a)(2)(A), (C) (Supp. III 2009).

47. As set forth in detail above, during the relevant period, in or in connection with forex contracts, made, or to be made, for or on behalf of, or with, other persons, Defendants, through Chay and others, willfully made or caused to be made to the other persons false reports or statements by, among other things, knowingly issuing false monthly account statements and false profit checks to pool participants, in violation of Section 4b(a)(2)(B) of the Act, as amended by the CRA, 7 U.S.C. § 6b(a)(2)(B) (Supp. III 2009).

48. Defendants engaged in the acts and practices described above knowingly or with reckless disregard for the truth.

49. Chay controlled 4X and did not act in good faith or knowingly induced 4X's conduct constituting the violations alleged in this Complaint. Therefore, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2006), Chay is liable for 4X's violations of Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, 7 U.S.C. § 6b(a)(2)(A)-(C) (Supp. III 2009).

50. The foregoing acts, misrepresentations, omissions, and failures of Chay and one other individual occurred within the scope of their employment, office, or agency with 4X. Therefore, 4X is liable for these acts, misrepresentations, omissions, and failures pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2012).

51. Each act of fraudulent solicitation, misrepresentation or omission of material facts, misappropriation, and making or causing to be made a false report or statement, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, 7 U.S.C. § 6b(a)(2)(A)-(C) (Supp. III 2009).

VI. RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests that the Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), and pursuant to the Court's own equitable powers, enter:

(a) An order finding that Defendants violated Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, 7 U.S.C. § 6b(a)(2)(A)-(C) (Supp. III 2009);

(b) An order of permanent injunction enjoining Defendants and all persons insofar as they are acting in the capacity of Defendants' agents, servants, employees, successors, assigns, and attorneys, and all persons insofar as they are acting in active concert or participation with Defendants and any successor thereof, who receive actual notice of such order by personal service or otherwise, from directly or indirectly:

(i) engaging in conduct in violation of Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified 7 U.S.C. §§ 6b(a)(2)(A)-(C).

(ii) trading on or subject to the rules of any registered entity as that term is defined in Section 1a(40) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 1a(40).

(iii) entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 1.3(hh), 17 C.F.R. § 1.3(hh) (2012)) ("commodity options"), swaps (as that term is defined in Section 1a(47) of the Act, as amended, and as further defined by Regulation 1.3(xxx), 17 C.F.R. § 1.3(xxx)(2012)) ("swaps"), security futures products, and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended by the CRA

and the Dodd-Frank Act, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i).

(“forex contracts”) for their own personal account or for any account in which they have a direct or indirect interest;

(iv) having any commodity futures, options on commodity futures, commodity options, swaps, security futures products, and/or forex contracts traded on their behalf;

(v) controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, swaps, security futures products, and/or forex contracts;

(vi) soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, swaps, security futures products, and/or forex contracts;

(vii) applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2012); and

(viii) acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2012)), agent or any other officer or employee of any person (as the term “person” is defined in section 1a(38) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 1a(38)) registered, required to be registered, or exempted from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2012);

(c) An order directing Defendants, as well as any successors to any Defendant, to disgorge, pursuant to such procedure as the Court may order, all benefits including, but not limited to, salaries, commissions, loans, fees, revenues, and trading profits derived, directly or indirectly, from the acts or practices which constitute violations of the Act, as described herein, and pre-judgment interest thereon from the date of such violations, and post-judgment interest;

(d) An order directing Defendants to make full restitution to every person or entity whose funds Defendants received or caused another person or entity to receive as a result of acts and practices that constituted violations of the Act, as described herein, and pre-judgment interest thereon from the date of such violations, and post-judgment interest;

(e) An order directing Defendants and any successors thereof, to rescind, pursuant to such procedures as the Court may order, all contracts and agreements, whether implied or express, entered into between Defendants and any of the participants whose funds Defendants received as a result of the acts and practices that constitute violations of the Act, as described herein;

(f) An order directing Defendants to pay a civil monetary penalty for each violation of the Act described herein, plus post-judgment interest, in the amount of the higher of: \$140,000 for each violation of the Act (\$130,000 for violations that occurred prior to October 23, 2008), or triple the monetary gain to Defendants;

(g) An order appointing a receiver, if necessary, to secure assets held by, under the control of, or in the name of Defendants;

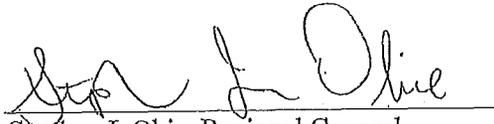
(h) An order requiring Defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2) (2006); and

(i) Such other and further relief as the Court deems necessary and appropriate under the circumstances.

Dated: April 8, 2013

Respectfully submitted,

ATTORNEYS FOR PLAINTIFF U.S.
COMMODITY FUTURES TRADING
COMMISSION



Stephen J. Obie, Regional Counsel
140 Broadway, 19th Floor
New York, NY 10005
(646) 746-9766
sobie@cftc.gov

Michael Solinsky (*pro hac vice* motion to be filed)
msolinsky@cftc.gov
Chief Trial Attorney
James A. Garcia (*pro hac vice* motion to be filed)
jgarcia@cftc.gov
Senior Trial Attorney

Gretchen L. Lowe, Associate Director
glowe@cftc.gov
U.S. Commodity Futures Trading Commission
Division of Enforcement
1155 21st Street, N.W.
Washington, D.C. 20581
(202) 418-5384 (Solinsky)
(202) 418-5362 (Garcia)
(202) 418-5523 (facsimile)