

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING COMMISSION,))	08-CIV-9962 (GBD)(JLC)
))	
Plaintiff,))	ECF Filed
))	
v.))	[PROPOSED] ORDER
))	IMPOSING CIVIL MONETARY
KEVIN CASSIDY, EDWARD O'CONNOR))	PENALTY AGAINST
OPTIONABLE INC., DAVID LEE and))	DEFENDANT KEVIN CASSIDY
ROBERT MOORE,))	
))	
Defendants.))	

I. INTRODUCTION

This matter is now before the Court on the Plaintiff Commodity Futures Trading Commission's ("Commission" or "CFTC") Motion for Imposition of Civil Monetary Penalty Against Defendant Kevin Cassidy and for Entry of Final Judgment ("Motion"), filed November 30, 2012. (DOC 110). The CFTC's Motion seeks a civil monetary penalty ("CMP") against Cassidy in the amount of one million dollars (\$1,000,000). The Court having considered the briefs and documents submitted by the parties, the CFTC's Motion is GRANTED.

II. FINDINGS AND CONCLUSIONS

1. On November 18, 2008, the CFTC filed a Complaint against Cassidy, and others, seeking injunctive and other equitable relief, as well as the imposition of civil penalties, for violations of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 1 *et seq.* (2006), and the Commission Regulations ("Regulations") promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2008).

2. This Court has already found, in the Amended Partial Consent Order for

Permanent Injunction and Other Equitable Relief Against Defendant Kevin Cassidy issued April 30, 2012 (DOC 106) (“Consent Order”), that Cassidy violated the anti-fraud provisions of Section 4c(b) of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 6c(b), and Commission Regulations 33.10 (a), (b) and (c), 17 C.F.R. §§ 33.10 (a), (b), & (c), and ordered that Cassidy “shall pay” a CMP in an amount to be determined by the Court. *See* Consent Order at ¶¶ 26, 30. Cassidy agreed to the entry of the Consent Order.

3. Paragraph 31 of the Consent Order provides that in connection with any hearing, briefing or argument to determine the amount of the CMP:

(a) Cassidy shall be precluded from arguing that he did not violate the Act as alleged in the Complaint and found in [the Consent Order]; (b) Cassidy may not challenge the validity of [the Consent Order] or his consent thereto; (c) solely for purposes of such hearing, briefing or argument, the allegations of the Complaint shall be accepted and deemed true by the Court; and (d) the Court may determine the issues raised in the hearing, briefing or argument on the basis of affidavits, declarations, excerpts of sworn testimony or investigative testimony and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure and without conducting an evidentiary hearing.

Consent Order at ¶31.

4. The Findings of Fact and Conclusions of Law contained in Complaint and the Consent Order are deemed true as provided in the Consent Order and are incorporated herein by reference.

5. In addition to the facts set forth in the Complaint and the Consent Order, the Commission relies on the Declaration of Patricia Gomersall (“Gomersall Decl.”) which was filed contemporaneously with the Motion.

6. The Court has reviewed the Gomersall Decl., and its attachments, and finds it credible.

7. As part of his employment with Optionable, Cassidy was a “voice broker” for

Bank of Montreal (“BMO”) and was Defendant David Lee’s (“Lee”) primary voice broker during the relevant period. Complaint at ¶10.

8. As BMO’s natural gas trader, Lee traded, i.e., bought and sold, natural gas contracts, including futures and options contracts on the New York Mercantile Exchange (“NYMEX”). *Id.* at ¶17.

9. From at least 2003 through April 2007, Optionable obtained a significant amount of its revenue from its relationship with BMO and Lee. *Id.* at ¶¶1, 33, 43, 48.

10. From January 2005 through April 2007 alone, BMO paid Optionable commissions totaling \$6,917,507.95 on natural gas trades. *See* Gomersall Decl. at ¶¶3a, 6, and Attachments B and C.

11. From 2003 through 2007 Optionable paid Cassidy \$1,140,641 in salary and fees, while Cassidy’s total compensation from Optionable during that period was \$3,263,488. *Id.* at ¶¶3b, 3c, 3d, 9, 10.

12. As a result of the activity underlying the CFTC’s Complaint, in *United States v. Kevin Cassidy*, Case No. 1:(S4)08-cr-1101-01 (TPG) (SDNY), Cassidy pled guilty to violating 18 U.S.C. § 371 (Conspiracy to Commit an Offense Against or Defraud the United States). In his allocution, Cassidy admitted only to deceiving BMO in connection with month-end valuations in eight months, from September 2006 through April 2007. *See* Exhibit A to the Consent Order.

13. Cassidy admitted in his allocution that he knew BMO wanted independent quotes, he did not give BMO independent quotes and he knew at the time he acted that this conduct was wrong. *See* Exhibit A to the Consent Order.

14. On October 16, 2012, the Court in the criminal case found Cassidy liable for

restitution to BMO in the amounts of \$5,035,059 for commissions and \$3,600,000 for compensation. See Minute Entry for Status Conference/Restitution Hearing on October 16, 2012, in *United States v. Cassidy*, 08-cr-1101 (TPG) (SDNY).

15. Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1) (2006), and Regulation 143.8(a)(1), 17 C.F.R. § 143.8(a)(1) (2011), set out the statutory framework for imposing CMP for violations of the Act and Regulations. This statutory framework provides the Court authority to impose a CMP that is not more than the higher of: (1) triple the monetary gain for each violation of the Act or Regulations; or (2) a penalty of \$120,000 for each violation of the Act or Regulations during the time period between October 23, 2000, and October 22, 2004, and \$130,000 for each violation of the Act or Regulations between October 23, 2004, and October 22, 2008. 7 U.S.C. § 13a-1(d)(1); 17 C.F.R. § 143.8(a)(1).

16. Multiple violations of the Act and Regulations may be consolidated into one or more counts in a Complaint, with each violation eligible for imposition of the statutory penalty. *CFTC v. Levy*, 541 F.3d 1102, 1111 (11th Cir. 2008). Here, the Complaint charged each and every act of fraud, attempted fraud, deceit, and attempted deceit as separate and distinct violations of the Act and Regulations. Complaint at ¶ 91.

17. Thus, the range of permissible penalty amounts is potentially wide. The district court employs “broad discretion” in calculating a CMP amount. *Levy*, 541 F.3d at 1112.

18. “[T]he purpose of sanctions under the [Act] is twofold: ‘to further the [Act]’s remedial policies and to deter others in the industry from committing similar violations.’” *Reddy v. CFTC*, 191 F.3d 109,123 (2d Cir. 1999) (quoting *In re Miller*, 1998 WL 107577, at *6 (CFTC Mar. 12, 1998)). Courts have found that “civil monetary penalties should ‘reflect the abstract or general seriousness of each violation and should be sufficiently high to deter future violations.’”

CFTC v. Gutterman, 2012 WL 2413082, at *10 (S.D.Fla. 2012); *CFTC v. Machado*, 2012 WL 2994396, at * 10 (S.D.Fla. 2012) (quoting *In re Grossfeld*, [1996–1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) 26,921 at 44,467–8 (CFTC Dec. 10, 1996), *aff'd*, 137 F.3d 1300 (11th Cir.1998)). The amount of CMP should be “rationally related” to the offense charged. *Levy*, 541 F.3d at 1112 (citing *R&W Technical Servs. Ltd. v. CFTC*, 205 F.3d 165, 177 (5th Cir. 2000); *Monieson v. CFTC*, 996 F.2d 852, 862 (7th Cir. 1993)) (“[W]e agree with our sister circuits that a rationally related standard adequately accounts for the broad discretion district courts typically exercise in calculating a civil monetary penalty.”). However, there is “no legal requirement that [CMPs] be uniform across assertedly similar or comparable cases, so long as the sanctions imposed fall within the range specified by Congress. *Guttman v. CFTC*, 197 F.3d 33, 41 (2d Cir. 1999) (citing *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28, 67 S.Ct. 213, 91 L.Ed. 204 (1946); *cf. In re Grossfeld*, 1996 WL 709219, at *12 (CFTC Dec. 10, 1996) (noting that effective deterrence may be undermined by undue focus on penalties imposed in other cases)).

19. When determining the amount of CMP, it is appropriate to take into account the seriousness of the violation at issue. *In re JCC, Inc.*, 63 F.3d 1557, 1571 (11th Cir. 1995); *CFTC v. Wilshire Inv. Management Corp.*, 531 F.3d 1339, 1346 (11th Cir. 2008) (it is appropriate, when evaluating civil penalties under the Act, to consider “the general seriousness of the violation as well as any particular mitigating or aggravating circumstances that exist.”) “The general seriousness of a violation derives primarily from its relationship to the various regulatory purposes of the Commodity Exchange Act. Conduct that violates core provisions of the Act’s regulatory system—such as manipulating prices or defrauding customers should be considered very serious even if there are mitigating facts and circumstances” *JCC*, 63 F.3d at 1571. “If the respondent benefitted from the violation or if direct harm to customers or the market

resulted, respondent's violation is more serious than those that result only in potential benefit or harm." *Id.* (quoting *In re Premex*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at 34,890 to 34,891 (CFTC Feb. 17, 1988)) (footnotes and citations omitted).

20. Here, Cassidy has been found liable for violations of the anti-fraud provisions of the Act. Consent Order at ¶ 26. The Commission has stated that "[C]ustomer fraud [is] a violation going to the core provisions of the Act. As a general rule, such conduct is considered to be among the most serious of violations for purposes of initially determining the severity of the sanctions to be imposed" *Grossfeld*, 1996 WL 709219, at *13 (citation omitted). Cassidy's violations were among the most serious proscribed by the Act and Regulations and they warrant a substantial penalty.

21. Cassidy admittedly acted intentionally, the conduct occurred repeatedly over a long period of time and he directly benefitted from his conduct, in the form of large revenues to his company and salary to himself.

22. Deterrence is paramount in determining proper penalties. *See In re Murlas*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,440 at 35,929 (CFTC Apr. 24, 1989) ("In imposing monetary sanctions, the primary focus of the Commission's analysis has been deterrence.").¹ To achieve deterrence, penalties must be appropriately severe and certain. They must also be clear and predictable. Thus, in accordance with Section 6c of the Act, 7

¹ *See also In re Mayer*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,259 at 46,141 (CFTC Feb. 3, 1999) ("The penalties we impose . . . reflect and seek to deter."); *In re Sigler*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,978 at 37,579 (CFTC Jan. 8, 1991) ("Our focus is on deterrence of the individual respondent and those who will find themselves in similar positions in the future."); *A Study of CFTC and Futures Self-Regulatory Organization Penalties*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,264 at 42,209 (CFTC Nov. 1994) ("*CFTC Penalties Study*") ("Generally the academic literature suggests that sanctions for violations in regulated industries be based upon the goal of deterrence.").

U.S.C. § 13a-1, the Commission has looked to the gains that a defendant received from his illegal activity when calculating penalties.² A penalty that is intended to deter should “remove the economic benefit of the illegal activity.” *CFTC Penalties Study*, at *10 (internal quotation omitted).³ It should also “reflect[] a premium to offset the benefit of engaging in . . . undetected violations.” *In re GNP Commodities*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,223; *Grossfeld*, 1996 WL 709219, at *13 (financial benefit that accrued to the respondent and/or loss suffered by customers as a result of wrongdoing “are especially pertinent factors to be considered”); *In re Miller*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,440 (CFTC June 16, 1995) (vacating \$200,000 CMP because it represented only one-quarter of customer harm and respondent gain).

23. The CFTC seeks a CMP against Cassidy in the amount of \$1,000,000. This figure is well within the range permitted by the Act and Regulations.

24. Looking at monetary gain, Cassidy’s salary and fees alone during the time he engaged in the fraud amounted to \$1,140,641. Triple that gain would be \$3,421,923.

25. Alternatively, based on the number of violations admitted by Cassidy in his

² Congress spoke to the appropriate level of civil monetary penalties in Commission actions in Section 6c(d) of the Act, 7 U.S.C. § 13a-1(d), which provides for a civil penalty “of not more than the higher of \$100,000 or *triple the monetary gain to such person for each violation.*” (emphasis added). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, the Commission has increased the maximum \$100,000 level several times to its current level of \$130,000. By including the level of monetary gain as one basis for calculating the penalty, Congress implicitly stated that gain is an appropriate starting point to set the penalty.

³ See also *In re Premex*, [1987-1990 Transfer Binder] ¶24,165 at 34,892-93 (civil money penalties deter “by making it beneficial financially to comply with the requirements of the Act and Commission regulations rather than risk violations.”); *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (“potential violators will be discouraged from illegal conduct if they know that they are unlikely to profit from it”); *Grossfeld*, 1996 WL 709219, at *12 (“civil money penalties should be sufficiently high to deter future violations”) (citations omitted).

allocation in the criminal case, in which he admitted deceiving BMO in connection with eight month-end valuations, from September 2006 through April 2007, the penalty would be \$1,040,000 (8 months x \$130,000).

26. The Court finds that a CMP of \$1,000,000 is reasonable as it is well below the maximum amount the Court could impose, yet it deprives Cassidy of the economic benefit of his fraudulent conduct and it is likely to deter others from similar conduct because it sends the message that any proceeds of similar illegal conduct will be forfeited.

III. CIVIL MONETARY PENALTY

27. Cassidy shall pay a civil monetary penalty in the amount of one million dollars (\$1,000,000) ("CMP Obligation"), plus post-judgment interest, within ten (10) days of the date of entry of this Order. If the CMP Obligation is not paid in full within ten (10) days of the date of entry of this Consent Order, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2006).

28. Cassidy shall pay his CMP Obligation by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivables – AMZ 340
E-mail Box: 9-AMC-AMZ-AR-CFTC
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-5644

If payment by electronic funds transfer is chosen, Cassidy shall contact Linda Zurhorst or her successor at the address above to receive payment instructions and shall fully comply with those instructions. Cassidy shall accompany payment of the CMP Obligation with a cover letter that identifies Cassidy and the name and docket number of this proceeding. Cassidy shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

29. Partial Satisfaction: Any acceptance by the CFTC or the Monitor of partial payment of Cassidy's CMP Obligation shall not be deemed a waiver of his obligation to make further payments pursuant to this Consent Order, or a waiver of the CFTC's right to seek to compel payment of any remaining balance.

IV. MISCELLANEOUS PROVISIONS

30. Notice: All notices required to be given by any provision in this Order shall be sent certified mail, return receipt requested, as follows:

Notice to Commission:

Director, Division of Enforcement
Commodity Futures Trading Commission
1155 21st Street NW
Washington, DC 20581

Notice to Defendant Cassidy:

Lawrence R. Gelber, Esq.
Attorney At Law
The Vanderbilt Plaza
34 Plaza Street, Suite 1107
Brooklyn, NY 11238

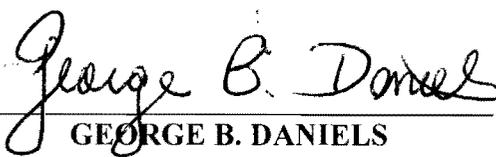
All such notices to the Commission shall reference the name and docket number of this action.

31. Change of Address/Phone: Until such time as Cassidy satisfies in full his CMP Obligation as set forth in this Order, Cassidy shall provide written notice to the Commission by certified mail of any change to his telephone number and mailing address within ten (10) calendar days of the change.

32. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this action for the purpose of implementing and enforcing the terms and conditions of this Order and for all other purposes related to this action, including any motion by Cassidy to modify or for relief from the terms of this Order.

33. There being no just reason for delay, the Clerk of the Court is hereby directed to enter this *Order Imposing Civil Monetary Penalty Against Defendant Kevin Cassidy*.

IT IS SO ORDERED on this _____ day of MAY 20 2013, 2013.



GEORGE B. DANIELS
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2013, I electronically filed a copy of the foregoing [Proposed] Order Assessing Civil Monetary Penalty Against Defendant Kevin Cassidy using the CM/ECF system. I also certify that the foregoing document is being served this day via email on the following persons:

Lawrence R. Gelber, Esq.
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Attorney for Kevin Cassidy

/s/ Christine Ryall
Christine Ryall