

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

Case No: 6:09-cv-1743-Orl-36GJK

TRADER'S INTERNATIONAL RETURN
NETWORK and DAVID MERRICK,

Defendants.

_____ /

ORDER

This cause comes before the Court upon Plaintiff U.S. Commodity Futures Trading Commission's ("CFTC") Motion for a Supplemental Order Imposing Restitution Against Defendant Trader's International Return Network ("Defendant TIRN") and a Civil Monetary Penalty Against Defendant TIRN and Defendant David Merrick ("Defendant Merrick") ("Motion for Restitution") (Doc. 22). Defendants TIRN and Merrick did not file any response in opposition to CFTC's Motion for Restitution, although the Court issued an Order to Show Cause advising them that the Court would consider the motion as unopposed, if they failed to respond (Doc. 28). Upon consideration, the Court will grant CFTC's Motion for Restitution.

I. BACKGROUND

This Court has jurisdiction over this action pursuant to Section 6c of the Commodity Exchange Act, 7 U.S.C. § 13a-1 (the "Act"), which authorizes the CFTC to seek injunctive relief against any person who has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation or order promulgated thereunder. The CFTC is an independent federal regulatory agency that is charged by Congress

with administering and enforcing the provisions of the Act. The CFTC is authorized by Section 6c of the Act to bring a civil action to enjoin any act or practice constituting a violation of the Act, to enforce compliance with the Act, and to seek civil penalties. *See* 7 U.S.C. § 13a-1.

Defendant TIRN is a Panamanian corporation that has never been registered with the CFTC. *See* Order of Permanent Injunction, Doc 21, ¶ 4. Defendant Merrick is a Florida resident, was the president of TIRN until at least March 2009, and has never registered with the CFTC. *Id.* at ¶ 5.

On October 21, 2009, CFTC filed a complaint against Defendants TIRN and Merrick seeking a permanent injunction, civil penalties, and other equitable relief, for violations of the Act. Doc. 5. On April 22, 2010, the Court entered a Consent Order of Permanent Injunction and for Other Statutory and Equitable Relief against Defendant Merrick (Doc. 16), and on September 8, 2010, the Court entered an Amended Order of Permanent Injunction on Consent Against Defendant TIRN (Doc. 21) (collectively, the “Permanent Injunctions”). The Permanent Injunctions found that, among other acts, Defendants TIRN and Merrick made numerous misrepresentations in promotional materials and misappropriated at least \$22.5 million from at least 560 customers in violation of Section 4b(a)(2)(A) and (C) of the Act, as amended by the Food, Conservation, and Energy Act of 2008 (CFTC Reauthorization Act of 2008 (“CRA”). Doc. 21, ¶ 11.

In his related criminal case, Defendant Merrick pleaded guilty to one count of violation of 18 U.S.C. § 1371 (conspiracy to commit wire fraud, money laundering and securities fraud), one count of violating 18 U.S.C. § 1957 (money laundering), and three additional property seizure counts in connection with Defendant TIRN’s fraudulent enterprise. *See U.S. v. David*

Merrick, Case No. 6:10-cr-00109-CEH-DAB (M.D. Fla. 2010). He is currently in federal prison in Duluth, Minnesota. Doc. 28, p. 2.

II. STANDARD

Upon finding a violation of the Act, a district court has broad discretion in determining equitable remedies to be imposed. *U.S. CFTC v. Capital Blu Management, LLC*, 2011 WL 2357629, *3 (M.D. Fla. 2011); *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1344 (11th Cir. 2008). Specifically, the Act authorizes the imposition of injunctive relief, restitution, and civil monetary penalties. 7 U.S.C. § 13a-1(d)(1)¹; *Wilshire.*, 531 F.3d at 1344 (“We conclude that the unqualified grant of statutory authority to issue an injunction under § 13a-1 carries with it the full range of equitable remedies, among which is the power to grant restitution.”).

III. ANALYSIS

A. Restitution

The statutory authority to issue an injunction pursuant to 7 U.S.C. § 13a-1 carries with it the full range of equitable remedies, including the power to order parties to pay restitution. *Wilshire*, 531 F.3d at 1345. In its Motion for Restitution, the CFTC states that the appropriate amount of restitution is the amount Defendants wrongfully gained as a result of their fraudulent misconduct.² Doc. 23, pp. 3-4. Indeed, the Eleventh Circuit calculates restitution in these cases

¹ (1) In general. In any action brought under this section, the Commission may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation—

(A) a civil penalty in the amount of not more than the greater of \$100,000 or triple the monetary gain to the person for each violation; or

(B) in any case of manipulation or attempted manipulation in violation of section 9, 15, 13b, or 13(a)(2) of this title, a civil penalty in the amount of not more than the greater of \$1,000,000 or triple the monetary gain to the person for each violation.

² The CFTC does not seek restitution against Defendant Merrick because in the parallel criminal proceedings against him, the court ordered Defendant Merrick to pay restitution to his defrauded customers.

to equal the amount defendant was unjustly enriched.³ *CFTC v. Levy*, 541 F.3d 1102, 1113 (11th Cir. 2008) (holding that Levy could only be liable in restitution to the extent of his own unjust enrichment); *Wilshire*, 531 F.3d at 1345 (the proper measurement of restitution is the amount wrongfully gained by appellants' misrepresentations); *Waldrop v. Southern Co. Services, Inc.*, 24 F.3d 152, 158 (11th Cir. 1994) (defining restitution as an equitable remedy designed to cure unjust enrichment of the defendant absent consideration of the plaintiff's losses).

Here, the CFTC states that although the wrongful monetary gain to Defendant TIRN equals at least \$15 million, it requests restitution in the amount of \$11,437,573.15, plus post judgment interest. Doc. 23, p. 3; Doc. 22-Ex. 3, ¶ 6. This amount equals the amount of restitution still owed to Defendant TIRN's customers, as determined in the criminal case against Defendant Merrick. Doc. 22-Ex. 3, ¶ 5; *see* Criminal Judgment, Doc. 22-Ex. 2, p. 5. Defendants TIRN and Merrick have not filed any objections to the CFTC's Motion for Restitution. Although the CFTC represents that Defendant TIRN was wrongly enriched based upon its fraudulent conduct in the amount of fifteen (15) million dollars, the Court is satisfied that the documented \$11,437,573.15 is an appropriate award of restitution. *See Levy*, 541 F.3d at 1113 (11th Cir. 2008) (holding that Levy was liable in restitution to the extent of his own unjust enrichment).

Accordingly, the Court finds Defendant TIRN liable for restitution in the amount of \$11,437,573.15 plus post judgment interest, representing unjust earnings still owed to customers.

³ The CFTC states that since the Eleventh Circuit's decision in *Wilshire*, Section 6c of the Act was amended, and now explicitly authorizes the CFTC to seek "restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses)." Doc. 23, p. 3 n. 1 (citing § 6c(d)(3)(A) of the Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII, §§ 701-704, 124 Stat. 1376). In any event, the restitution sought by the CFTC is less than the amount it argues Defendant TIRN was enriched. *See* Criminal Judgment, Doc. 22-Ex. 2, p. 5.

Post judgment interest shall accrue on Defendant TIRN's restitution 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 this Order pursuant to 28 U.S.C. § 1961. *CFTC v. United Investors Group, Inc.*, 440 F. Supp. 2d 1345, 1360 (S.D. Fla. 2006), *partially overturned on other grounds in Levy*, 541 F.3d at 1113; *Wilshire*, 531 F.3d at 1344.

To effect payment of its restitution obligations and the distribution of restitution payments to Defendant TIRN's customers, the Court appoints the National Futures Association ("NFA") as Monitor ("Monitor"). The Monitor shall collect restitution payments from Defendant TIRN and make distributions.⁴

B. Civil Penalty

Pursuant to the Act, the Court shall have jurisdiction to order a civil penalty of not more than the higher of \$130,000 for each violation of the Act between October 22, 2004 and October 22, 2008, not more than the higher of \$140,000 for each violation of the Act after October 22, 2008, or triple the monetary gain to the defendant. 7 U.S.C. § 13a-1(d)(1); 17 C.F.R. § 143.8 (2012). In evaluating civil penalties under the Act, the Eleventh Circuit considers the general seriousness of the violation as well as particular mitigating or aggravating circumstances. *Wilshire*, 531 F.3d at 1346 (district court did not abuse discretion in imposing the maximum civil penalty where appellants made no attempt to provide restitution to their defrauded customers); *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1551 (11th Cir. 1995) (defrauding customers is a critical

⁴ The Monitor shall oversee Defendant TIRN's restitution obligation and shall have the discretion to determine the manner of distribution of such funds in an equitable fashion to Defendant TIRN's customers identified by the CFTC, or may defer distribution until such time as the Monitor deems appropriate. In the event that the amount of Defendant TIRN's restitution payments are of a *de minimus* nature such that the Monitor determines that the administrative cost of making a distribution to eligible customers is impractical, the Monitor may, in its discretion, treat such restitution payments as civil monetary penalty payments.

provision of the [Commodity Exchange Act] and “should be considered very serious.”). Additionally, the Eleventh Circuit has approved securities penalties far in excess of a violator’s ability to pay. *See SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008) (affirming a restitution payment exceeding defendant’s ability to pay where the penalty was warranted by defendant’s fraudulent conduct).

In its Motion for Restitution, the CFTC seeks a civil monetary penalty of \$11,437,573.15, to be assessed jointly and severally against Defendants TIRN and Merrick. Doc. 23, p. 5. Although this is a significant penalty, the CFTC explains that the proposed sum is only 25.4% of the maximum penalty permitted by statute. *Id.*; see 7 U.S.C. § 13a-1(d).⁵ Upon consideration of Defendants’ defrauding of financial customers, and given that the proposed penalty is within the statutorily approved guidelines, the Court finds it to be appropriate. *Wilshire*, 531 F.3d at 1346; *JCC*, 63 F.3d at 1551.

Therefore, the Court orders Defendants TIRN and Merrick to pay a civil monetary penalty in the amount of \$11,437,573.15 plus post judgment interest. Post judgment interest shall accrue on Defendants’ civil penalty beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of this Order pursuant to 28 U.S.C. § 1961. *United Investors Group*, 440 F. Supp. 2d at 1360, *partially overturned on other grounds in Levy*, 541 F.3d at 1113; *Wilshire*, 531 F.3d at 1344.

Accordingly, it is hereby **ORDERED and ADJUDGED**:

1. CFTC’s Motion for a Supplemental Order Imposing Restitution Against Defendant TIRN and a Civil Monetary Penalty Against Defendant TIRN and Defendant Merrick (Doc. 22) is **GRANTED as follows**:

⁵ The CFTC maintains that the Act allows for a penalty up to three times the fraudulent money gain, which in this case would be \$45 million.

A. Defendant TIRN is hereby ordered to pay \$11,437,573.15 in restitution, plus post-judgment interest. Post judgment interest shall accrue on Defendant's restitution beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of this Order pursuant to 28 U.S.C. § 1961. Defendant TIRN shall make restitution payments in the name "TIRN-Settlement/Restitution fund" and shall send such payments by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check, or bank money order to Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606, with a cover letter that identifies the paying defendant and the name and docket number of this proceeding. Defendant TIRN shall simultaneously transmit copies of the cover letter and the form of payment to:

Chief Financial Officer, Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW,
Washington, D.C. 20581.

Defendants TIRN and Merrick shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify Defendant TIRN's customers to whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any of TIRN's restitution payments. Defendant Merrick shall execute any documents necessary to release funds that he has in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment towards Defendant TIRN's restitution.

B. Defendant TIRN and Defendant Merrick are hereby ordered, jointly and severally, to pay \$11,437,573.15 as a civil monetary penalty, plus post judgment interest. Post judgment interest shall accrue on Defendants' civil penalty beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of this Order pursuant to 28 U.S.C. § 1961. Defendants shall pay their monetary penalty 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, than it should be made payable to the CFTC and sent to this address:

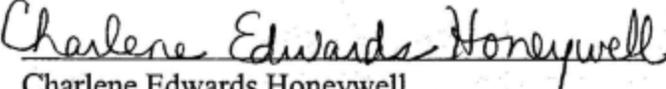
Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivable – AMZ 340
Email Box: 9-AMC-AMZ-AR-CFTC
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone (405) 954-5644

If payment is made by electronic funds transfer, Defendants TIRN and Merrick shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Defendants TIRN and Merrick shall submit their civil monetary payment with a cover letter identifying the paying defendant and the name and docket number of this proceeding. Defendants TIRN and Merrick shall simultaneously transmit copies of the cover letter and the form of payment to:

Chief Financial Officer, Commodity Futures Trading Commission

Three Lafayette Centre
1155 21st Street, NW,
Washington, D.C. 20581.

DONE and **ORDERED** in Orlando, Florida on January 22, 2013.


Charlene Edwards Honeywell
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Parties