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UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

IN THE MATTER OF **DARREN LEE SHANKS AND** **FOREX AUTO PROFITS, LLC,** Respondents.	)))))))	**CFTC Docket No.** 11-03

ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT AND MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Darren Lee Shanks ("Shanks") and Forex Auto Profits, LLC ("FAP") (together, "Respondents") have violated Section 4b(a)(2)(A)-(C) of the Commodity Exchange Act (the "Act"), Commodity Exchange Act ("Act"), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 ("CRA")), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), to be codified at 7 U.S.C. §§ 6b(a)(2)(A)-(C). Therefore, the Commission deems it appropriate and in the public interest that a public administrative proceeding be, and hereby is, instituted to determine whether Respondents have engaged in the violations as set forth herein and to determine whether an order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of this administrative proceeding, Respondents have submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondents acknowledge service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act and Making Findings and Imposing Remedial Sanctions ("Order").[1]

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[1] Respondents consent to the entry of this Order, the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, that Respondent does not consent to the use of the Offer, or the findings or conclusions consented to in this Order, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of

III.

The Commission finds the following:

A. Summary

During the period October 1, 2007 to September 18, 2009, Respondents accepted funds for investment in foreign currency from over 45 investors. In the process of obtaining these funds, Shanks misrepresented his prior trading history.

Respondents transferred most of this money to trading accounts at futures commission merchants held in Shanks's personal name. Almost from the beginning, these accounts began recording trading losses. Respondents provided fictitious trading records to their clients that appeared to demonstrate that the trading was in fact profitable.

B. Respondents

Darren Lee Shanks is an individual who during the relevant time period, resided and conducted business at 10269 Alder Grove Way, South Jordan, Utah. Shanks is the sole member of FAP and conducted his business through FAP.

Forex Auto Profits, LLC was a Utah limited liability company created by Shanks with its principal place of business at his residence. Shanks was the sole member of FAP.

C. Facts

During the period October 2007 to September 2009, Shanks received approximately $3.3 million from over 45 investors to trade foreign currency ("forex"). This money was usually given to Shanks pursuant to a written agreement between the customer and FAP. In addition to specifying that the money would be placed into a trading account by FAP, the contract between FAP and customers specified a sliding scale of management fees based on profits earned.

Between 2007 and 2009, Shanks maintained accounts at four registered Futures Commission Merchants ("FCMs"). The account records from these FCMs show that at least $2.3 million of the funds received were in fact invested in these trading accounts. These accounts were opened either in his name or in accounts that he controlled.

Respondents Made False Representations in Soliciting Prospective and Existing Customers

During the relevant time period, Shanks would show prospective investors graphs and charts depicting historical trading results. Shanks would also tell prospective investors that he typically generated three to five percent returns per month. These representations of his trading history were false or misrepresented his trading performance.

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this Order. Nor do Respondents consent to the use of the Offer or this Order, or the findings or conclusions consented to in the Offer or this Order, by any other party in any other proceeding.

Shanks did not inform any prospective investors that he had been previously convicted for embezzlement from a bank. To Shanks's knowledge, none of his investors knew otherwise that he had previously been convicted.

During the relevant time period, Shanks usually did not generate profits from his trading. In or around June 2009, Shanks sought to generate profits through an investment opportunity connected to mining interests. Shanks thus loaned $255,000 to the company that purported to control these mining interests and expected that he would earn substantial interest on the principal. No principal or interest has been returned. Respondents' customers did not know at the time that their money was being used for any type of investment other than forex trading.

Because of substantial withdrawals by some customers, the continuing trading losses, the supposedly secured loans, and Shanks' own personal use of the monies given to him, by July 2009 Shanks's trading balances were only $30,000. At that point, he withdrew the money from the trading accounts, but continued to tell investors that he was still trading their investments profitably.

In mid-September 2009, one customer noticed discrepancies in the purported trading results. After Shanks was confronted about this, Shanks sent an e-mail on September 18, 2009, to his customers admitting that contrary to his prior statements, in fact he had sustained significant losses trading and thus "violated the trust that you placed in me."

Respondents Made False Statement in Monthly Statements

Shanks would e-mail his customers monthly statements for FAP that purported to show their monthly returns. These statements were normally sent around the tenth of each month. The statements generally reported the previous monthly balances, any deposits, any withdrawals, purported net profits, fees, and other adjustments to reach a net total. The monthly statements generally bore the legend "Forex Auto Profits, LLC" above the investor's name.

Investors would also receive a detailed statement of trading activity for the month, which purported to show all the trades placed to show the overall profitability. These trading activity reports were entirely fictitious and generated by programmed software robots. These false trading activity reports generally identified the account name as "Income Mastery LLC."

Shanks admitted that every monthly statement falsely represented profits being generated, and the trading details were similarly fictitious.

Customer Funds Were Used for Personal Expenses

From October 2007 to September 2009, Shanks withdrew or allowed others to withdraw customer funds from his bank accounts. These monies paid for a variety of personal uses, including trips throughout the United States, car and house payments, satisfaction of support obligations, and other expenses. As the funds held by the Respondents during the relevant time

did not generate profits that would warrant the retention of fees, Respondents thus misused customers funds for Shanks's personal use.

D. Legal Discussion

Sections 4b(a)(2)(A)-(C) of the Act: Fraud by Misrepresentations, Omissions, Misappropriation and False Statements

Sections 4b(a)(2)(A)-(C) of the Act, as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 ("CRA")[2] provided that it was 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, . . . 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 contract for or . . . with the other person.

7 U.S.C. §§ 6b(a)(1)(A)-(C) (2009).

Respondents, through misrepresentations, omissions, misappropriation, and the issuance of false account statements, violated Sections 4b(a)(2)(A)-(C) of the Act.

1. Fraud by Misrepresentations and Omissions

To prove that a respondent has violated Sections 4b(a)(2)(A) and (C) of the Act by misrepresentations or omissions, the Commission need only show that: 1) the respondent

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[2] The June 2008 legislation reauthorizing the CFTC revised Section 4b of the Act, among other things. *See* Section 1302 of the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 ("CRA")). The objective of the revision was to "clarify that the CEA gives the Commission the authority to bring fraud actions in off-exchange 'principal-to-principal' futures transactions." H.R. REP. NO. 110-627, at 981 (2008) (Conf. Rep.). While the CRA did not change the Act's prohibition on misconduct such as that at issue here, it reorganized Section 4b so that similar misconduct occurring beforehand would be in violation of Sections 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii) (2006).

misrepresented or deceptively omitted certain information regarding commodity futures trading; 2) that the misrepresentation or omission was "material;" and 3) the respondent knew the information was false and calculated to cause harm or recklessly disregarded the truth or falsity of the information (in other words, that he acted with "scienter"). *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC Mar. 1, 1990); *In re JCC*, [1992-1994 Transfer Binder] Comm. Fut. L Rep. (CCH) ¶ 26,080 at 41,568 (CFTC May 12, 1994), *aff'd sub nom. JCC, Inc. v. CFTC*, 63 F.3d 1557 (11th Cir. 1995); *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002), *cert. denied*, 543 U.S. 1034 (2004).

A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *Sudol v. Shearson Loeb Rhoades, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 at 31,119 (CFTC Sept. 30, 1985) (*citing TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *R.J. Fitzgerald*, 310 F.3d at 1328 (same); *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 447 (D. N.J. 2000) (same); *see also Saxe v. E.F. Hutton & Co., Inc.*, 789 F.2d 105, 110 (2d Cir. 1986) ("material misrepresentations about the nature of the organization handling [an] account, the people [dealt] with, and the type of trading [the] funds were used for would be sufficient to state a cause of action pursuant to the CEA") (citing *Psimenos v. E.F. Hutton & Co. Inc.*, 722 F.2d 1041 (2d Cir. 1986)); *Hirk v. Agri-Research Counsel Inc.*, 561 F.2d 96, 103-04 (7th Cir. 1977) (defendants violated Section 4b of the Act by making misrepresentations about the profitability of their commodity trading when soliciting customers); *CFTC v. Commonwealth Fin. Group, Inc.*, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994) (misrepresentations regarding the trading record of a firm or broker are fraudulent because past success and experience are material factors to reasonable investors).

The scienter requirement is met when "highly unreasonable omissions or misrepresentations [are made]...that present a danger of misleading [customers] which is either known to the Defendant[s] or so obvious that Defendant[s] must have been aware of it." *R.J. Fitzgerald*, 310 F.3d at 1328.

Respondents, through Shanks, solicited prospective participants by misrepresenting the trading success he had obtained previously. Respondents, through Shanks, also provided false account statements showing profitable returns from the purported investment and used those statements to obtain additional funds for trading. Such misrepresentations and omissions are material in that a reasonable investor would want to know that Respondents had not previously obtained the purported profits in their trading and that the account statements provided by Respondents misrepresented the value of the client's investments and purported "returns" on those investments.

Shanks committed these acts directly, and thus knew he was misrepresenting the trading and providing false statements. Accordingly, Respondents violated Section 4b(a)(2)(A) and (C) of the Act, 7 U.S.C. § 6b(a)(2)(A) and (C) (2009).

2. Fraud by Misappropriation

Respondents' misappropriation of client funds violates Sections 4b(a)(2)(A) and (C) of the Act. *CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d 676, 687 (D. Md. 2000) (defendants defrauded investors by diverting investor funds for operating expenses and personal use), *aff'd in part, vacated in part, sub nom. CFTC v. Baragosh*, 278 F.3d 391 (4th Cir. 2002); *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,315 (CFTC July 19, 1999), *aff'd in relevant part sub nom. Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000) (respondents violated Section 4b by surreptitiously retaining money in their own bank accounts that should have been traded on behalf of participants); *CFTC ex rel. Kelley v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985) (defendant violated Section 4b(a) of the Act by misappropriating customer funds entrusted to her for trading commodity futures contracts).

Respondents, through Shanks, used client funds to pay personal and business expenses as well as to make distributions to other participants. Accordingly, Respondents misappropriated pool participant funds in violation of Section 4b(a)(2)(A) and (C) of the Act, 7 U.S.C. § 6b(a)(2)(A) and (C) (2009).

3. Fraud by Issuance of False Statements

Issuing or causing to be issued false statements to investors concerning the profitability of commodity futures trading conducted on their behalf violates Section 4b(a)(2)(ii) of the Act. *CFTC v. Weinberg*, 287 F. Supp. 2d 1100, 1107 (C.D. Cal. 2003) (false and misleading statements as to the amount and location of investors' money violated Section 4b(a) of the Act); *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 448 (D.N.J. 2000); *CFTC ex rel. Kelley Skorupskas*, 605 F. Supp. 923, 932-33 (E.D. Mich. 1985) (defendant violated Section 4b(a) of the Act by issuing false monthly statements to customers); *CFTC v. Sorkin*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,855, at 27,585 (S.D.N.Y. Aug. 25, 1983) (distribution of account statements that falsely report trading activity or equity is a violation of Section 4b of the Act).

The written account statements that Respondents intentionally sent to clients showed that they were earning profits when they were actually losing money or their funds were being misappropriated. By knowingly issuing such false statements, Respondents violated Section 4b(a)(2)(B) of the Act, 7 U.S.C. § 6b(a)(2)(B) (2009).

IV.

FINDINGS OF VIOLATIONS

As described above, Respondents: (i) misrepresented or deceptively omitted certain information regarding commodity futures trading; (ii) misappropriated customer funds to pay personal and business expenses, and (iii) knowingly issued false statement to customers concerning trading conducted on their behalf.

Based on the foregoing, the Commission finds that Shanks and FAP violated Section 4b(a)(2)(A)-(C) of the Act, 7 U.S.C. 6b(a)(1)(A)-(C) (2009).

V.

OFFER OF SETTLEMENT

Respondents have submitted the Offer in which they acknowledge service of this Order, admit the jurisdiction of the Commission with respect to all matters set forth in this Order and waive: (1) the filing and service of a complaint and notice of hearing; (2) a hearing; (3) all post-hearing procedures; (4) judicial review by any court; (5) any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer; (6) any and all claims that it may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.*, relating to or arising from this proceeding; (7) any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121, §§ 231-232, 110 Stat. 862 (1996), as amended by Pub. L. No. 110-28, 121 Stat. 112 (2007), relating to or arising from this proceeding; and (8) any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief.

Respondents stipulate that the record basis on which this Order is entered consists of this Order and the findings in this Order consented to which Respondents consented in its Offer. Respondents consent to the Commission's issuance of this Order, which makes findings as set forth herein and orders that: (1) Respondents cease and desist from violating Section 4b of the Act, 7 U.S.C. § 6b; (2) Respondents pay restitution in the amount of One Million Seven Hundred Two Thousand Seven Hundred Seventy Dollars and 94 Cents ($1,702,770.94); (3) Shanks pay a civil monetary penalty in the amount of five hundred thousand dollars ($500,000), plus post-judgment interest; and (4) FAP pay a civil monetary penalty of seven hundred and fifty thousand dollars ($750,000), plus post-judgment interest.

Upon consideration, the Commission has determined to accept Respondents' Offer.

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

A. Respondents shall cease and desist from violating Section 4b(a)(2)(A)-(C) of the Act, 7 U.S.C. § 6b(a)(2)(A)-(C).

B. Respondents are jointly and severally liable for and shall pay restitution in the amount of One Million Seven Hundred Two Thousand Seven Hundred Seventy Dollars and 94 Cents ($1,702,770.94) plus post-judgment interest (the "Restitution Obligation"). The Restitution

Obligation will be offset by any order of restitution (the "Criminal Restitution Order") entered by the United States District Court in the matter captioned *United States v. Shanks*, No. 2:10cr00318 (D. Utah). Respondents shall provide a copy of the Criminal Restitution Order and the amount by which the Restitution Obligation is to be reduced within ten (10) days of entry of the Criminal Restitution Order. Post judgment interest on any balance remaining in the Restitution Obligation after any offset from the Criminal Restitution Order shall accrue beginning eleven days after 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.

C. Shanks shall pay a civil monetary penalty in the amount of five hundred thousand dollars ($500,000), plus post-judgment interest, within ten (10) days from the date of this order subject to Section F of this order. Post judgment interest shall accrue beginning eleven days after 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. Shanks shall pay this 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 by other than electronic funds transfer, 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: Marie Bateman AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: 405-954-6569

If payment by electronic funds transfer is chosen, Shanks shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Shanks shall accompany payment of the penalty with a cover letter that identifies Shanks and the name and docket number of this proceeding. Shanks shall simultaneously transmit copies of the cover letter and the form of payment to: 1) the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, N.W., Washington, DC 20581, 2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, at the same address, and 3) Regional Counsel, Commodity Futures Trading Commission, Eastern Regional Office, 140 Broadway, 19th Floor, New York, NY 10005.

D. FAP shall pay a civil monetary penalty in the amount of five hundred thousand dollars ($750,000), plus post-judgment interest, within ten (10) days from the date of this order subject to Section F of this order. Post judgment interest shall accrue beginning eleven days after 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. Shanks shall pay

this 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 by other than electronic funds transfer, 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: Marie Bateman AMZ-300
DOT/FAA/MMAC
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Telephone: 405-954-6569

If payment by electronic funds transfer is chosen, FAP shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. FAP shall accompany payment of the penalty with a cover letter that identifies FAP and the name and docket number of this proceeding. FAP shall simultaneously transmit copies of the cover letter and the form of payment to: 1) the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, N.W., Washington, DC 20581, 2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, at the same address, and 3) Regional Counsel, Commodity Futures Trading Commission, Eastern Regional Office, 140 Broadway, 19th Floor, New York, NY 10005.

E. All payments by Respondents pursuant to this Order shall first be applied to satisfaction of the Restitution Obligation and/or the Criminal Restitution Order and Respondents shall not pay the civil monetary penalty until the Restitution Obligation is fully satisfied. After satisfaction of the Restitution Obligation, payments by Respondents shall be applied to satisfy Respondents' several civil monetary penalty obligations.

F. Respondents and their successors and assigns shall comply with the following undertakings set forth in its Offer:

1. Respondents shall never apply for registration or claim exemption from registration with the Commission in any capacity, and shall never engage 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) (2010).

2. Respondents shall never act as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2009)), agent, officer or employee of any person 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) (2010).

3. Respondents shall not enter into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.11(b)(1), 17 C.F.R. § 3211(b)(1) (2010)) ("commodity options"), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act) ("forex contracts") for his own personal account, and for any account in which he has a direct or indirect interest;

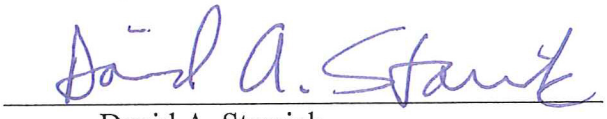
4. Respondents shall not control or direct the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving the commodity futures, options on commodity futures, commodity options or forex contracts.

5. Respondents shall not solicit, receive, or accept any funds from any purpose for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options or forex contracts.

6. Respondents agree that neither of them, nor any of their agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in this Order, or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondents: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondents shall undertake all steps necessary to ensure that all of their agents and employees under their authority or control understand and comply with this agreement.

The provisions of this Order shall be effective on this date.

By the Commission



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: January 7, 2011