

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 11-22275-Civ-COOKE/TURNOFF

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff

vs.

JUVENAL E. MACHADO, *et al.*,

Defendants.

**ORDER OF DEFAULT JUDGMENT,
PERMANENT INJUNCTION, CIVIL MONETARY PENALTY, AND
ANCILLARY EQUITABLE RELIEF AGAINST ALL DEFENDANTS**

I. INTRODUCTION

On June 23, 2011, Plaintiff United States Commodity Futures Trading Commission (“CFTC” or “Commission”) filed its complaint for injunctive and other equitable relief and for civil monetary penalties (“Complaint”) (ECF No. 1) against Defendants Juvenal Eduardo Machado, a/k/a. Juvenal Eduardo Machado Bogadi, Edward Kaufman and Eduardo Machado (“Machado”), and Invers Forex, LLC (“Invers”) (collectively the “Defendants”).

The Complaint alleged that, between December 2008 and at least as late as October 2010, Defendants engaged in a fraudulent scheme and solicited and accepted at least \$717,100 from at least 28 members of the general public (collectively the “customers”) for the purpose of trading off-exchange foreign currency contracts (“forex”). Specifically, the Complaint alleged violations of Sections 4b(a)(2)(A)-(C) of the Commodity Exchange Act (the “Act”), 7 U.S.C. §§ 6b(a)(2)(A)-(C) (Supp. III 2009), and sought, *inter alia*, injunctive relief, disgorgement, restitution and civil monetary penalties.

Defendants' Answers were due on or before September 28, 2011. Neither Defendant has filed or served an Answer. On October 3, 2011, the CFTC filed its Requests for Clerk's Entry of Default against Invers (ECF No. 8) and against Machado (ECF No. 9) pursuant to Fed. R. Civ. P. 55(a). The Clerk of the Court entered the defaults against Machado and Invers on October 4, 2011 (ECF No. 12).

The CFTC now has submitted its Amended Application for Entry of Default Judgment, Permanent Injunction, Civil Monetary Penalty, and Ancillary Equitable Relief Against Defendants Machado and Invers ("Application") pursuant to Fed. R. Civ. P. 55(b)(2) and Local Rule 7(a)(1)(E). The Court has considered the Application, the record, and relevant legal authorities, and it is hereby **ORDERED and ADJUDGED** that the CFTC's Amended Application for Entry of Default Judgment, Permanent Injunction, Civil Monetary Penalty and Ancillary Equitable Relief Against Defendants (ECF No. 20) is **GRANTED** as detailed below.

II. FINDINGS OF FACT

1. The 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, 7 U.S.C. §§ 1 *et seq.* and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* The CFTC maintains its principal office at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

2. Invers Forex, LLC, a Florida limited liability company with its principal office at 3131 SW 147th Court, Miami, Florida 33185, was formed on January 8, 2009, as the successor company to Interior Remodeling USA, Inc. Machado was the manager and registered agent for both Interior Remodeling USA, Inc. and Invers. Neither Invers nor Interior Remodeling USA, Inc. has ever been registered with the CFTC in any capacity.

3. Juvenal Eduardo Machado, a.k.a. Juvenal Eduardo Machado Bogadi, Edward Kaufman and Eduardo Machado, is an individual whose last known address in the United States is in Miami, Florida. Machado currently lives in Ontario, Canada. Machado is the sole principal, manager and registered agent of Invers. Machado has never been registered with the CFTC in any capacity.

4. Beginning in December 2008 and continuing to at least March 2010, Machado, individually and in his capacity as officer, employee, and agent of Invers, solicited his friends, neighbors and members of his church, among others, to provide him funds in order to trade forex on their behalf.

5. Many of Machado's prospective customers attended prayer meetings in his home, where Machado touted his forex trading experience and ability. Machado told customers and prospective customers that God had put him on the earth to help people financially, or words to that effect, and that by trading forex contracts for them, he could give them financial freedom for the rest of their lives. Machado also told them that he was one of the best forex traders in Miami, and that because his trading had been so profitable, others paid him to share his forex-trading techniques.

6. As part of his solicitation, Machado also falsely represented to at least one prospective customer that he had never lost money trading forex.

7. As part of his solicitation, Machado also offered prospective customers guaranteed "interest" (*i.e.*, profits) on their investments of five percent or more per month.

8. Defendants executed written trading agreements with their customers memorializing guarantees and other terms of agreement. The written trading agreements provided, *inter alia*, that:

- a. the customer would open a forex trading account in his or her own name at a futures commission merchant (“FCM”) selected by Defendants where the customer’s funds would be deposited;
- b. the customer authorized Defendants to trade forex in the account on the customer’s behalf;
- c. Defendants would act in “good faith and seek to achieve the common goal of generating income by applying appropriate Capital Management;”
- d. the customer would earn five percent or more per month in “interest;” and
- e. while it was “suggested” to the customer to maintain his or her account for at least six months, the customer could withdraw his or her funds at any time upon 30 days prior written notice.

9. Although the written trading agreements contained various broad statements regarding the risk of loss associated with forex trading, the agreements also contained contradictory statements that such risks were limited. Specifically, the written trading agreements purported to limit risk by providing, *inter alia*, that:

- a. the maximum risk would not exceed 1.5 percent of the capital available in the customer’s trading account; and
- b. in the event that 30 percent of the customer’s “initial capital” was lost trading, Defendants would cease trading, notify the customer, and request the customer’s permission to either continue trading the account or withdraw the customer’s funds.

10. As a result of Defendants’ misrepresentations, guarantees of monthly profits, assurances of limited risk, and Machado’s claims of forex trading acumen, at least 28 people sent

Defendants at least \$717,100 in the form of checks, wires, and cash between December 2008 and June 2010 for trading forex.

11. Defendants did not deposit the customers' funds into individual trading accounts in the customers' names as promised. Rather, between December 2008 and October 2010, Defendants pooled \$134,400 of the customers' funds in two forex trading accounts held in Machado's name. In trading these two accounts, Defendants incurred total net trading losses of \$120,117, or almost 90 percent of the total funds traded.

12. Rather than report these trading losses to their customers (and prospective customers), Defendants sent checks to customers representing profits purportedly earned in the customers' accounts when, in fact, they were not profitable and their individual accounts had never been opened in the first place.

13. Specifically, between December 2008 and October 2010, Defendants returned a total of \$395,370 to customers, most of which was denominated as purported "interest" or profits on Defendants' fictitious forex trading. The remainder of the customers' funds – i.e., \$201,613 not returned to the customers or lost in trading – was misappropriated by Defendants and was used to pay Machado's personal expenses totaling at least \$90,767, including, among other things, \$2,000 to Jackson Memorial Hospital on May 12, 2009, and \$3,081.33 to City Furniture on February 1, 2010. Additionally, checks payable to Machado personally totaling \$66,550, and checks payable to persons who appear to be members of Machado's family totaling \$5,800 were also drawn on the same Invers' account at BOA that was used for the deposit of customer funds.

14. In addition to making false interest payments, Defendants sent false IRS forms 1099-INT (for the tax year 2009) to the customers. These forms reflected purported interest

payments totaling \$133,484 for 2009, even though the limited amount of actual forex trading conducted by Defendants resulted in net losses.

15. Beginning at least as early as March 2010, some of Defendants' customers asked Defendants to return all or a portion of the funds that they had provided to trade forex. Defendants responded to these requests with excuses and delay.

16. In May or June of 2010, without returning all of the customers' remaining funds, Machado moved from his home in Miami, Florida to Ontario, Canada. Machado's telephone in Miami has been disconnected, and his customers have not been able to contact him.

17. In sum, of the \$717,100 provided by customers to Defendants for trading forex, \$120,117 was lost trading forex, \$395,370 was returned to customers as purported profits, and Defendants misappropriated the remaining \$201,613.

III. CONCLUSIONS OF LAW

1. When a party against whom a default judgment is sought has failed to plead or otherwise assert a defense, and that fact has been documented, the clerk shall enter the party's default. Fed. R. Civ. P. 55(a). The party seeking the default shall then apply to the court for a default judgment. Fed. R. Civ. P. 55(b). Rule 55(b)(2) provides that judgment by default may be entered by a district court against a defendant upon the failure of that defendant to plead or otherwise defend. *United States Commodity Futures Trading Comm'n v. FX Prof'l Intern. Solutions, Inc.*, No. 1:10-cv-22311-PCH, 2010 WL 5541050 at *4 (S.D. Fla. Nov. 29, 2010); *Dunn v. Prudential Ins. Co. of America*, No. 8:10-cv-1626-T-24-TGW, 2011 WL 1298156 at *3-4 (M.D. Fla. Apr. 4, 2011); *Vaccaro v. Custom Sounds, Inc.*, No. 3:08-cv-776-J-32JRK, 2009 WL 4015569 (M.D. Fla. Nov. 19, 2009). The grant or denial of a motion for default judgment lies within a district court's sound discretion. *Hamm v. DeKalb County*, 774 F.2d 1567, 1576

(11th Cir. 1985). Where a party fails to respond, after notice, the court is justified in entering a judgment against the defaulting party. *Natures Way Marine, LLC v. North Am. Materials, Inc.* No. 08-0005-WS-B, 2008 WL 801702 (S.D. Ala. March 24, 2008) (citing *International Brands USA, Inc. v. Old St. Andrews Ltd.*, 349 F. Supp. 2d 256, 261 (D. Conn. 2004)). Further, if a district court determines that a defendant is in default, the well-pled factual allegations of the complaint, except those relating to unspecified damages, will be taken as true and liability is established by the entry of a default. *Sampson v. Brewer, Michaels & Kane, LLC*, No. 6:09-cv-2114-Orl-31DAB, 2010 WL 2432084 (M.D. Fla. May 26, 2010) (citing *Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir.1987)); *see also* Fed. R. Civ. P. 8(b)(6) (effect of failure to deny an allegation). Moreover, “[i]t is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly.” *Pope v. United States*, 323 U.S. 1, 12 (1944).

2. The Clerk of the Court already has entered defaults against Defendants (ECF No. 12). As such, in accordance with Rule 55(b)(2), the CFTC’s allegations in the Complaint against Defendants are deemed to be well-pled and are taken as true, and a default judgment is hereby entered against Defendants.

A. Jurisdiction

3. Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (2006), authorizes the CFTC to seek injunctive relief in district court against any person whenever it shall appear that such person 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 thereunder. The CFTC has jurisdiction over

the conduct relating to the forex transactions at issue in this case pursuant to Section 2(c)(2) of the Act, 7 U.S.C. § 2(c)(2) (Supp. III 2009).

4. Venue properly lies with the Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2006), in that Defendants transacted business in the Southern District of Florida and the acts and practices in violation of the Act occurred within this District, among other places.

B. The Commodity Exchange Act

5. In analyzing the CFTC's Application, the Court keeps in mind a crucial purpose of the Act, *inter alia*, "protecting the innocent individual investor – who may know little about the intricacies and complexities of the commodities market – from being misled or deceived." *United States Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11th Cir. 2002). "[C]aveat emptor has no place in the realm of federal commodities fraud. Congress, the CFTC, and the Judiciary have determined that customers must be zealously protected from deceptive statements by brokers who deal in these highly complex and inherently risky financial instruments." *Id.* at 1334.

C. Violations of Sections 4b(a)(2)(A)-(C) of the Act

6. Sections 4b(a)(2)(A)-(C) of the Act, 7 U.S.C. §§ 6b(a)(2)(A)-(C) (Supp. III 2009), make 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 . . . (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, in the case of paragraph (2), with the other person.

7. Defendants, through their willful misappropriation of customer funds, fraudulent sales solicitations, and issuance of false statements violated Sections 4b(a)(2)(A)-(C) of the Act, 7 U.S.C. §§ 6b(a)(2)(A)-(C) (Supp. III 2009).

1. Fraud by Misappropriation

8. Misappropriation of customer funds constitutes “willful and blatant fraudulent activity” in violation of Sections 4b(a)(2)(A) and (C) of the Act, 7 U.S.C. §§ 6b(a)(2)(A) and (C) (Supp. III 2009). *United States Commodity Futures Trading Comm’n v. Noble Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d 676, 687 (D. Md. 2000) (defendants violated Sections 4b(a)(2)(i) and (iii) (the predecessor to 4b(a)(2)(A) and (C)) by diverting investor funds for operating expenses and personal use), *aff’d sub nom. United States Commodity Futures Trading Comm’n v. Baragosh*, 278 F.3d 319 (4th Cir. 2002); *see also United States Commodity Futures Trading Comm’n v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985) (holding that defendant violated Section 4b when she misappropriated customer funds by soliciting funds for trading and then trading only a small percentage of those funds, while disbursing the rest of the funds to investors, herself, and her family); *United States Commodity Futures Trading Comm’n v. Weinberg*, 287 F. Supp. 2d. 1100, 1106 (C.D. Cal. 2003) (misappropriating investor funds violated Section 4b(a)(2)(i) and (iii) of the Act); *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. United States Commodity Futures Trading Comm’n*, 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); *United States Commodity Futures Trading Comm’n v. King*, No. 3:06-CV-1583-M, 2007 WL 1321762, at *2 (N.D. Tex. May 7, 2007) (“King’s violation of section 4b(a)(2)(i) [and] (iii) of the CEA is further proven by

his admitted misappropriation of customer funds for personal and professional use”); *United States Commodity Futures Trading Comm’n v. McLaurin*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,768 at 44,180 (N.D. Ill. 1996) (by depositing customer funds in accounts in which the customers had no ownership interest and making unauthorized disbursements for his own use, defendant violated Section 4b of the Act).

9. Defendants violated Sections 4b(a)(2)(A) and (C) of the Act, 7 U.S.C. §§ 6b(a)(2)(A) and (C) (Supp. III 2009), by willfully misappropriating customer funds. Specifically, of the \$717,100 provided by customers to Defendants for trading forex, the record reflects that \$120,117 was lost trading forex and Defendants returned \$395,370 to customers. Defendants misappropriated the remaining \$201,613 of these funds.

2. Fraud by Misrepresentations and Omissions to Customers and Prospective Customers

10. To establish that Defendants violated Sections 4b(a)(2)(A) and (C) of the Act, 7 U.S.C. §§ 6b(a)(2)(A) and (C) (Supp. III 2009), through misrepresentations and omissions, the CFTC must prove that 1) a misrepresentation or omission was made, 2) with scienter and 3) that the misrepresentation or omission was material. *R.J. Fitzgerald & Co.*, 310 F. 3d at 1328-29. Scienter requires proof that a defendant committed the alleged wrongful acts “intentionally or with reckless disregard for his duties under the Act.” *Drexel Burnham Lambert, Inc. v. United States Commodity Futures Trading Comm’n*, 850 F.2d 742, 748 (D.C. Cir. 1988); *see also Do v. Lind-Waldock & Co.* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,516 at 43,321 (CFTC Sept. 27, 1995) (determining that a reckless act is one where there is so little care that it is “difficult to believe the [actor] was not aware of what he was doing”). A statement is material if “it is substantially likely that a reasonable investor would consider the matter important in making an investment decision.” *R.J. Fitzgerald*, 310 F.3d at 1328 (internal

quotation omitted). Any fact that enables investors to assess independently the risk inherent in their investment and the likelihood of profit is a material fact. *In re Commodities Int'l Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943, at 44,563-64 (CFTC Jan. 14, 1997). Moreover, a material misrepresentation or omission is a violation whether or not it induces investor action or inaction; rather, it is sufficient that a material misrepresentation or omission is made to “attempt to cheat or defraud” or willfully to “attempt to deceive” a person. *See United States Commodity Futures Trading Comm’n v. Int’l Fin. Servs.*, 323 F. Supp. 2d 482, 502 (S.D.N.Y. 2004) (investor reliance need not be proven in an enforcement action alleging fraud) (citing *Slusser v. United States Commodity Futures Trading Comm’n*, 210 F.3d 783, 785-86 (7th Cir 2000)).

11. As described above, the evidence demonstrates that Machado, individually and on behalf of Invers, misled customers and prospective customers through numerous misrepresentations and omissions, including guarantees of monthly profits, assurances of limited risk, actual account performance, and Machado’s own history of forex trading. Machado willfully or with reckless disregard of the truth made these misrepresentations and omissions in order to induce customers to invest with Defendants. These misrepresentations and omissions are material in that a reasonable customer would want to know, among other things, that Defendants’ trading track record was much worse than represented and that the customers’ accounts were not being managed as represented by Defendants. Accordingly, each of the elements of fraud by misrepresentation and omission is met in this case, and Defendants therefore violated Sections 4b(a)(2)(A) and (C) of the Act, 7 U.S.C. §§ 6b(a)(2)(A) and (C) (Supp. III 2009).

3. Fraud by False Statements

12. Delivering, or causing the delivery of, false statements to customers relating to forex trades (or other transactions regulated by the CFTC) constitutes a violation of Section 4b(a)(2)(B) of the Act, 7 U.S.C. § 6b(a)(2)(B) (Supp. III 2009). *See, e.g., United States Commodity Futures Trading Comm'n v. Skorupskas*, 605 F. Supp. at 932-33 (finding that defendant violated Section 4b(a) of the Act by issuing false monthly statements to customers); *CFTC v. Sorokin*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,855 at 27,585 (S.D.N.Y. August 25, 1983) (determining that distribution of false account statements which falsely report trading activity or equity is a violation of Sections 4o and 4b of the Act); *Weinberg*, 287 F. Supp. 2d. at 1107 (false and misleading statements as to the amount and location of investors' money violated Section 4b(a) of the Act.); *Noble Wealth*, 90 F. Supp. 2d at 685-87 (defendants violated Section 4b(a) of the Act through the delivery of false account statements).

13. Defendants violated Section 4b(a)(2)(B) of the Act, 7 U.S.C. § 6b(a)(2)(B) (Supp. III 2009), by willfully issuing checks to customers that falsely represented trading profits and sending customers IRS forms 1099-INT falsely representing interest paid on supposedly profitable forex trading, when, in fact, the limited amount of forex trading actually conducted by Defendants resulted in net losses.

D. Machado is Liable as a Controlling Person

14. Machado controlled Invers and, as a controlling person, is liable for Invers' violations of the Act pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2006). Pursuant to Section 13(b) of the Act:

Any person who, directly or indirectly, controls any person who has violated any provision of this Act or any of the rules, regulations, or orders issued pursuant to

this Act may be held liable for such violation in any action brought by the Commission to the same extent as such controlled person. In such action, the Commission has the burden of proving that the controlling person did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation.

A “fundamental purpose” of the statute is “to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the Act directly on such individuals as well as on the corporation itself.” *R.J. Fitzgerald & Co.*, 310 F.3d at 1334 (quoting *JCC, Inc. v. United States Commodity Futures Trading Comm’n*, 63 F.3d 1557, 1567 (11th Cir. 1995) (internal quotation marks and citation omitted)).

15. To establish controlling person liability under Section 13(b) of the Act, the Division must show both (1) control and (2) lack of good faith or knowing inducement of the acts constituting the violation. *In re First Nat’l Trading Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,142, at 41,787 (CFTC July 20, 1994), *aff’d without opinion sub nom. Pick v. United States Commodity Futures Trading Comm’n*, 99 F.3d 1139 (6th Cir. 1996). To establish the first element, control, a defendant must possess general control over the operation of the entity principally liable. *See, e.g., R.J. Fitzgerald*, 310 F.3d at 1334 (recognizing an individual who “exercised the ultimate choice-making power within the firm regarding its business decisions” as a controlling person). Evidence that a defendant is an officer, founder, principal, or the authorized signatory on the company’s bank accounts indicates the power to control a company. *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103, at 34,767 (CFTC Jan. 12, 1988); *see also Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,251, at 38,795 (CFTC Mar. 11, 1992) (finding that an individual who “maintained control over the economic aspects of the operations” of a firm was a controlling person of it).

16. Turning to the second element required under Section 13(b) of the Act, the evidence shows that Machado failed to act in good faith or knowingly induced the acts constituting the violations. To establish the “knowing inducement” element of the controlling person violation, the Commission must show that “the controlling person had actual or constructive knowledge of the core activities that constitute the violations at issue and allowed them to continue.” *JCC, Inc. v. United States Commodity Futures Trading Comm’n*, 63 F.3d at 1568 (quoting *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103, at 34,767 (CFTC Jan. 12, 1988)). Controlling persons cannot avoid liability by deliberately or recklessly avoiding knowledge about potential wrongdoing. *In re Spiegel*, ¶ 24,103, at 34,767. Indeed, constructive knowledge of wrongdoing is sufficient for a finding of knowing inducement. *See JCC, Inc.*, 63 F.3d at 1568. To support a finding of constructive knowledge, the Commission must show that a defendant “lacked actual knowledge only because he consciously avoided it.” *Id.* at 1569 (citations omitted).

17. In this case, at all material times, Machado controlled Invers and the forex trading accounts and had actual knowledge of the activities that constituted the violations of the Act. Machado is the founder and manager of Invers and is its sole principal, officer, and employee. Machado solicited customers to trade through Invers and was the only person with whom many, if not all, customers interacted. Machado made the forex trades through the futures commission merchants, corresponded with customers regarding their accounts, and knowingly caused the false statements to be sent to customers. Machado, thus, had the requisite control of Invers, knew of the fraudulent acts, and allowed them to continue. Machado, therefore, is also liable pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2006), for Invers’ violation of Sections 4b(a)(2)(A), (B) and (C) of the Act, 7 U.S.C. §§ 6b(a)(2)(A), (B), (C) (Supp. III 2009).

E. Invers is Liable for the Acts of its Agent

18. 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 (2011), provide, *inter alia*, that the act or omission of any agent or other person acting for a corporation within the scope of his employment shall be deemed the act or omission of such corporation as well as of such agent or other person. As described above, Machado, who was the founder and sole employee of Invers, committed the acts and omissions described herein within the course and scope of his employment at Invers. Therefore, Invers is liable under 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 (2011), as principal for Machado's acts and omissions in violation of the Act. *See United States Commodity Futures Trading Comm'n v. Sidoti*, 178 F.3d 1132, 1135-36 (11th Cir. 1999).

IV. REMEDIES

A. Permanent Injunction Against Defendants

Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), authorizes and directs the CFTC to enforce the Act and Regulations and allows a district court, upon a proper showing, to grant a permanent injunction. *United States Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1346 (11th Cir. 2008). In an action for permanent injunctive relief, the CFTC is not required to make a specific showing of irreparable injury or inadequacy of other remedies, which private litigants must make. *United States Commodity Futures Trading Comm'n v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978); *United States v. Quadro Corp.*, 928 F. Supp. 688, 697 (E.D. Tex. 1996) (citations omitted), *aff'd*, *U.S. v. Quadro Corp.*, 127 F.3d 34 (5th Cir. 1997); *United States Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 560 F.2d 135, 141-42 (2d Cir. 1977), *cert. denied* 438 U.S. 905 (1978). Rather, the CFTC makes the requisite showing for issuance of injunctive relief when it presents a *prima*

facie case that the defendant has engaged, or is engaging, in illegal conduct, and that there is a likelihood of future violations. *United States Commodity Futures Trading Comm'n v. American Bd. of Trade, Inc.*, 803 F.2d 1242, 1250-51 (2d Cir. 1986); *United States Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979), *cert. denied*, 442 U.S. 921 (1979).

In a CFTC enforcement case, the 11th Circuit held that the district court's finding of a likelihood of future violations supported its entry of a permanent injunction. *See United States Commodity Futures Trading Comm'n v. Sidoti*, 178 F.3d 1132 (11th Cir. 1999). In *Sidoti*, the Eleventh Circuit stated: "In light of the likelihood of future violations, the district court did not abuse its discretion in enjoining further violations of the Act." 178 F.3d at 1137; *see also SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir.1982); *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978). Whether such a likelihood of future violations exists depends on the "totality of the circumstances." *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975); *United States Commodity Futures Trading Comm'n v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 676 (S.D.N.Y. 1979). Foremost among these circumstances is the past illegal conduct of the defendant, from which courts may infer a likelihood of future violations. *British Am. Commodity Options Corp.*, 560 F.2d at 142; *Management Dynamics, Ltd.*, 515 F.2d at 807; *Carriba Air, Inc.*, 681 F.2d at 1322.

The scope of the injunctive relief can be tailored to meet the circumstances of the violations shown. For example, upon the CFTC's showing of a violation, courts have entered permanent injunctions against future violations of the Act. *See, e.g., United States Commodity Futures Trading Comm'n v. U.S. Metals Depository Co.*, 468 F. Supp. 1149 (S.D.N.Y. 1979). Other courts have issued broader injunctions prohibiting trading activity, in addition to enjoining

defendants from future violations. *See, e.g., Wilshire Inv. Mgmt. Corp.*, 531 F.3d at 1346 (upholding the district court’s permanent injunction prohibiting the defendants from “engaging in any commodity-related activity”); *see also Noble Wealth Data Info. Servs.*, 90 F. Supp. 2d at 692 (“[t]he pervasiveness and seriousness of [the defendant’s] violation justify the issuance of a permanent injunction prohibiting him from violating the Act and from engaging in any commodity-related activity, including soliciting customers and funds.”); *Rosenberg*, 85 F. Supp. 2d at 454-55 (permanently enjoining defendant from trading commodities on behalf of others). Under these standards, permanent injunctive relief, including a comprehensive trading ban, is clearly warranted against Defendants.

B. Monetary Relief

The unqualified grant of statutory authority to issue an injunction under the Act carries with it the full range of equitable remedies, among which is the power to grant restitution. *United States Commodity Futures Trading Comm’n v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1344 (11th Cir. 2008); *see also United States Commodity Futures Trading Comm’n v. American Metals Exch. Corp.*, 991 F.2d 71, 76 (3d Cir. 1993) (“A number of courts have held that district courts have the power to order disgorgement as a remedy for violations of the Commodity Exchange Act for the purpose of depriving the wrongdoer of his ill-gotten gains and deterring violations of the law.”). In addition, Section 6c(d) of the Act, 7 U.S.C. § 13a-1(d) (2006), authorizes the imposition of civil monetary penalties. The CFTC seeks both forms of monetary relief in this case.

1. Restitution

The equitable remedy of restitution under the Act (prior to the effective date of the Dodd-Frank Act in July 2011) “does not take into consideration the plaintiff’s losses, but only focuses

on the defendant's unjust enrichment." *Wilshire*, 531 F.3d at 1345. Thus, "[t]he proper measurement [of restitution] is the amount that [Defendants] wrongfully gained." *Id.*; accord *United States Commodity Futures Trading Comm'n v. Levy*, 541 F.3d 1102, 1113 (11th Cir. 2008) (noting that the defendant "can only be liable in restitution to the extent of his unjust enrichment" (citing *Wilshire*, 531 F.3d 1339)). An appropriate restitution award in this case is calculated with straightforward arithmetic, *i.e.* the amount taken in less the amount returned and the amount lost in trading; in this instance, \$201,613, plus post-judgment interest.

2. Civil Monetary Penalty

Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1) (2006), provides that "the [CFTC] 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 [of the Act or Regulations] a civil penalty." Pursuant to Section 6c(d)(1)(A) of the Act, 7 U.S.C. § 13a-1(d)(1)(A) (2006), and Regulation 143.8(a)(1), 17 C.F.R. § 143.8(a)(1) (2011), for the time period at issue in the case at bar, the civil monetary penalty no greater than \$140,000 for each violation of the Act or triple the monetary gain to Defendants. The CFTC has set forth several factors to consider in assessing a civil monetary penalty. These factors include: the relationship of the violation at issue to the regulatory purposes of the Act and whether or not the violations involved core provisions of the Act; whether or not scienter was involved; the consequences flowing from the violative conduct; financial benefits to a defendant; and harm to customers or the market. *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). Civil monetary penalties should "reflect the abstract or general seriousness of each violation and should be sufficiently high to deter future violations," which means that civil monetary penalties should make it financially detrimental to a defendant

to fail to comply with the Act and Regulations so that the defendant would rather comply than risk violations. *Id.* As the Commission has stated:

[Civil monetary] penalties signify the importance of particular provisions of the Act and the [CFTC]'s rules, and act to vindicate these provisions in individual cases, particularly where the respondent has committed the violations intentionally. Civil monetary penalties are also exemplary; they remind both the recipient of the penalty and other persons subject to the Act that noncompliance carries a cost. To effect this exemplary purpose, that cost must not be too low or potential violators may be encouraged to engage in illegal conduct.

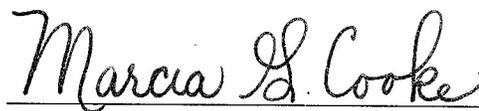
In re GNP Commodities, Inc. [1990-92 Transfer Binder] Com. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (CFTC Aug. 11, 1992); *see also Reddy v. United States Commodity Futures Trading Comm'n*, 191 F.3d 109, 123 (2d Cir. 1999) (civil monetary penalties serve to further the Act's remedial policies and to deter others from committing similar violations).

This case warrants the imposition of a substantial civil monetary penalty against Defendants because they knowingly engaged in fraud, which is a core violation of the Act. *See Grossfeld*, ¶ 26,921 at 44,467 and n.28 (citation omitted); *see also United Investors Group, Inc.*, 440 F. Supp. 2d 1345, 1361 (S.D. Fla. 2008) (determining that, among other things, “the gravity of the offenses, the brazen and intentional nature of the violations, [and] the vulnerability of the customers” justified “imposition of a substantial and meaningful [civil monetary] penalty”). Specifically, Defendants knowingly engaged in an illegal scheme by, *inter alia*, (i) misappropriating much of these customers' funds, (ii) fraudulently soliciting hundreds of thousands of dollars from customers for the purported purpose of trading forex, and (iii) sending false account statements and IRS documents to these customers. Of particular significance to the Court is the fact that many of Defendants' customers were not strangers. Rather, they were friends, neighbors and members of Machado's church, some of whom attended prayer meetings

in Machado's home where Machado falsely touted his forex trading ability, and as such were particularly vulnerable to falling victim to Machado's false pretenses.

A civil monetary penalty in the total amount of \$3,920,000 against Defendants, joint and several, is justified in this case. This amount represents a \$140,000 civil monetary penalty for each of the 28 individuals solicited to invest in Defendants fraudulent forex trading program. The amount of the civil monetary penalty is appropriate given the repeated and egregious nature of Defendants' fraudulent scheme. *See United Investors Group, Inc.*, 440 F. Supp. 2d at 1361; *see also United States Commodity Futures Trading Comm'n v. Levy*, 541 F.3d 1102 (11th Cir. Fla. 2008) (holding that the Commodity Exchange Act provides for multiple civil monetary penalties for multiple violations even when those multiple violations are set forth in a single count).

DONE and ORDERED in chambers at Miami, Florida this 20th day of April 2012.



MARCIA G. COOKE
United States District Judge