

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Commodity Futures Trading Commission.,)	
)	
Plaintiff,)	
)	C/A No.: 8:16-cv-03258-TMC
v.)	
)	
Jody Dupont and)	ORDER
Open Range Trading LLC,)	
)	
Defendants.)	
_____)	

I. Introduction

Plaintiff, Commodity Futures Trading Commission (the “CFTC”), sued Defendants Jody Dupont (“Dupont”) and Open Range Trading LLC (“Open Range”), alleging that Dupont and Open Range practiced fraudulent marketing of their trading system, which violated the antifraud provisions of the Commodity Exchange Act. (ECF No. 1). CFTC properly served both Dupont and Open Range with copies of the Summons and Complaint. (ECF No. 5). On October 25, 2016, Dupont, acting pro se, wrote a letter to the court that explained that “both parties have agreed to a 60 day extension for Defendant(s)” to respond to the Complaint. (ECF No. 6). Because Dupont appeared pro se, the case was referred to a magistrate judge for pretrial handling pursuant to Local Civil Rule 73.02(B)(2)(E), D.S.C. The magistrate judge subsequently entered an Order that explained to Dupont that he could not “represent and file pleadings on behalf of Open Range.” (ECF No. 10).

On December 19, 2016, Dupont filed a Motion for an Extension of Time to Answer. (ECF No. 16). The magistrate judge granted this motion. (ECF No. 17). The CFTC then filed a motion to stay the proceedings to allow the parties to negotiate a settlement. (ECF No. 19). On

February 24, 2017, Dupont filed his Answer on behalf of “Defendant(s).” (ECF No. 20). The magistrate judge subsequently granted the Plaintiff’s motion to stay the proceedings and directed the parties to file a status report by March 20, 2017. (ECF No. 22). The CFTC and Dupont filed separate status reports stating that they had not reached a settlement. (ECF Nos. 25, 26). Thereafter, the magistrate judge lifted the stay of the case. (ECF No. 30). On March 29, 2017, Dupont filed a Motion to Hold the Scheduling Order in Abeyance for thirty days. (ECF No. 35). The court denied this motion but extended the Scheduling Order deadlines by thirty days. (ECF No. 37).

On April 11, 2017, the CFTC filed a Motion to Strike Dupont’s Answer as it pertained to Open Range, to Strike Certain Answers of Dupont, and to Strike Affirmative Defenses as well as a Motion to Dismiss Dupont’s Counterclaims and Crossclaims. (ECF No. 41). The magistrate judge issued an Order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Dupont of the potential consequences if he did not respond accordingly. (ECF No. 43). Thereafter, Dupont sent a letter to the court explaining that he was confused about court procedure and needed guidance. (ECF No. 45). In response to this letter, the magistrate judge entered an Order directing Dupont to the District of South Carolina website, where he could find the procedural rules and the Pro Se Guide, which gives information to parties representing themselves in a civil action. (ECF No. 46). Dupont subsequently filed a Motion to Dismiss (ECF No. 48) and a Motion for a Hearing (ECF No. 49). The CFTC responded to both motions. (ECF Nos. 55, 59). Dupont replied to the CFTC’s Response to the Motion to Dismiss. (ECF No. 61).

As of June 28, 2017, Dupont had failed to respond to the CFTC’s Motion to Strike (ECF No. 41) and had seemingly abandoned his crossclaims and counterclaims. The court entered an Order notifying Dupont that he had until July 18, 2017 to file his response. (ECF No. 68). The

court warned Dupont that if he failed to respond, the motion to strike would be granted and the counterclaims and cross-claims that Dupont had set forth in his Answer would be dismissed for failure to prosecute. (ECF No. 68). Despite this warning, Dupont never filed a response. In the meantime, on August 31, 2017, the clerk filed an Entry of Default as to Open Range pursuant to Federal Rule of Civil Procedure 55(a).

The magistrate judge subsequently recommended to the undersigned judge that Plaintiff's motion to strike be found as moot in part and granted in part. (ECF No. 81). Specifically, the magistrate judge recommended that the CFTC's Motion to Strike be granted with respect to the portion that sought to strike paragraphs 2, 3, 4, and 7 of Dupont's Answer and to strike Dupont's affirmative defenses. (ECF No. 81 at 8). However, the magistrate judge recommended that the CFTC's Motion to Strike be found as moot with respect to the portions pertaining to Open Range because Dupont had already been warned that he could not represent Open Range, and that, therefore, the court construed the Answer as having been filed only by Dupont. (ECF No. 61). Finally, the magistrate judge recommended dismissing Dupont's crossclaims and counterclaims for failure to prosecute, finding as moot CFTC's motion to dismiss those crossclaims and counterclaims, and denying Dupont's Motion to Dismiss. (ECF No. 81 at 8).

Dupont, though alerted of his right to file objections to the magistrate judge's Report and Recommendation filed no objections. The court adopted the Report and Recommendation of the magistrate judge on October 5, 2017. (ECF No. 91). On November 2, 2017, the CFTC alerted the court of a pending settlement with Dupont and asked the court to stay the scheduling order, which the court did. (ECF Nos. 95, 96).

On March 29, 2018, CFTC filed a “Motion for Consent Order of Permanent Injunction, Civil Monetary Penalties, and Other Equitable Relief” as to Jody Dupont (ECF No. 113) and a “Motion for Default Judgment as to Open Range Trading LC, Motion for Permanent Injunction, Motion for Civil Monetary Penalty and other Statutory and Equitable Relief” (ECF No. 114). Accordingly, the court scheduled a hearing on these motions for June 6, 2018. The clerk’s office mailed a notice of this hearing to Jody Dupont, the registered agent of Open Range, at both his home address and a P.O. Box address.

The hearing was held as scheduled on Wednesday, June 6, 2018. (ECF No. 125). Neither Dupont nor Open Range appeared at the hearing. Attorneys Barbara Bowens and Jon Kramer appeared on behalf of the CFTC, and Attorneys Camille Arnold and David Terrell appeared via telephone on behalf of the CFTC. Since that time, the case against Dupont has been terminated by Consent Order. Therefore, this order focuses solely on the case as to Open Range.

A. Relief Sought

The CFTC seeks the following relief as to Open Range: (1) a permanent injunction prohibiting Dupont and Open Range from engaging in conduct that violated the antifraud provisions of the Commodity Exchange Act (“the Act”); (2) a disgorgement of all benefits that Dupont, Open Range, and their successors received as a result of their violations of the Act; (3) a civil penalty under the Act; and (4) costs and fees.¹ (ECF No. 1 at 17–19). Additionally, the CFTC sought a permanent injunction that would prohibit Dupont, Open Range, and any successors of Dupont and Open Range from (a) trading on or subject to the rules of any registered entity; (b) entering into any transaction involving a commodity interest; (c) having any commodity interest traded on their behalf; (d) controlling or directing trading on behalf of

¹ There is no mention of costs and fees in the present motion before the court. The CFTC has not provided the court with what costs and fees they are seeking or why the amount is appropriate. As such, the court declines to order costs and fees at this time.

someone else on any account involving a commodity interest; (e) soliciting, receiving, or accepting any funds from anyone for the purpose of purchasing or selling any commodity interest; (f) applying for registration with the CFTC or claiming any exemption from registration with the CFTC and engaging in any conduct requiring such registration or exemption; and/or (g) acting on behalf of any person registered or exempt from registering with the CFTC except as provided in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9). (ECF No. 1 at 17–18).

B. Jurisdiction and Venue

The court has subject matter jurisdiction over Plaintiff’s claims pursuant to 28 U.S.C. §§ 1331 and 1367. The court has personal jurisdiction over Dupont and Open Range, and venue in this District is proper pursuant to 28 U.S.C. § 1391. Open Range is a limited liability company that was incorporated in South Carolina and whose principal place of business is in South Carolina. Additionally, the alleged wrongful acts occurred in this District.

C. Process and Service

On October 5, 2016, CFTC’s private process server served Dupont both personally (ECF No. 5-1 at 2) and as the Registered Agent of Open Range (ECF No. 5-1 at 1). Accordingly, the court finds that Open Range was properly served. *See* Fed. R. Civ. P. 4 (e), (h).

D. Grounds for Entry of Default

Open Range has failed to timely file an answer or other pleading in this case. The magistrate judge expressly warned Dupont that he could not “represent and file pleadings on behalf of Open Range Trading LLC.” (ECF No. 10 at 2). However, despite this admonition, no attorney appeared for Open Range and no filings were made on Open Range’s behalf. The Clerk of Court properly entered default as to Open Range on August 31, 2017. (ECF No. 78). On March 29, 2018, the CFTC filed a “Motion for Default Judgment as to Open Range Trading

LLC, Motion for Permanent Injunction, Motion for Civil Monetary Penalty, and other Statutory and Equitable Relief.” (ECF No. 114). The CFTC mailed a copy of these filings to Open Range’s Registered Agent, Jody Dupont, at two separate addresses – (1) the physical location of Open Range, which is also Dupont’s home, and (2) a P.O. Box. (ECF No. 116). The court held a hearing on June 6, 2018, to address this motion. (ECF No. 125). Open Range had been properly notified of this hearing, but no one appeared on its behalf.

II. Findings of Fact²

Having reviewed the entire record and having heard from the CFTC at the hearing, the court accepts the CFTC’s well-pleaded factual allegations as true and makes the following factual findings. *See DIRECTV, Inc. v. Rawlins*, 523 F.3d 318, 322 n.2 (4th Cir. 2009) (accepting plaintiff’s allegations against defaulting defendant as true, noting a defaulting defendant ““admits the plaintiff’s well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established””) (quoting *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780 (4th Cir. 2001)).

The CFTC is an independent federal regulatory agency that Congress has charged with the responsibility of enforcing provisions of the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.* (2012) and the Commission Regulations, promulgated under 17 C.F.R. §§ 1.1 *et seq.* (ECF No. 1 at 3). Open Range is a South Carolina company that does business in Anderson, South Carolina and that has never been registered with the CFTC. *Id.* Co-defendant Dupont is a South Carolina resident and is the sole owner and founder of Open Range. *Id.* Likewise, Dupont has never been registered with the CFTC. *Id.*

² All of these findings of fact were asserted in CFTC’s Complaint (ECF No. 1) and were corroborated by either the Declaration of CFTC Investigator Melissa Cavers (ECF No. 114-2) or by the Deposition of Dupont (ECF No. 114-3), which were attached to CFTC’s current motion.

Relevant to this litigation, the CFTC alleges in its Complaint that Open Range and Dupont have “fraudulently solicited clients and prospective clients to subscribe to a commodity futures day-trading system” and other trading services. *Id.* at 1. The CFTC alleges that Open Range and Dupont did this by soliciting clients via their website, written solitication materials, and verbal communications, which “falsely claimed Dupont had been investing and trading futures for over twenty years, falsely claimed that the system generated large profits with minimal risk, and failed to disclose that the reported performance results were not based on actual trading.” *Id.* These are practices that the CFTC claims are violations of the antifraud provisions of the Act. *Id.*

Specifically, the CFTC alleges that Open Range “generates specific trading signals to buy and sell futures contracts in various futures markets” and that these signals “instruct clients what commodity futures to trade, when to trade [], and at what price.” *Id.* at 6. Prospective clients go online to Open Range’s website, fill out an application to subscribe to the system, and receive the trading signals. *Id.* Open Range accepts payment for these services through PayPal. *Id.* The price of these services range from \$250 per month to up to \$25,000 a one-time fee. *Id.* at 7. The CFTC further alleges that after paying for access, clients can join Open Range’s “Live Trading Room,” where clients can log-in to receive the trading signals that alert them how to trade. *Id.* at 6. According to the CFTC, since the inception of Open Range, Open Range and Dupont have collectively received approximately \$92,000 from clients through their PayPal account. *Id.* at 7.

The CFTC alleges that in soliciting those clients, Dupont and Open Range made false representations of material facts. *Id.* First, Dupont and Open Range represented that Dupont had been investing for over twenty years, when, in fact, his only trading experience before developing Open Range was “limited to two accounts – both traded for less than a year and both

traded at a loss.” *Id.* Second, Dupont and Open Range mislead clients to believe that their system had “large profits with minimal risk” by representing (1) that from January 2013 to January 2016 Open Range had profits ranging from \$700 to \$13,000 a month, with thirty of those thirty-seven months being profitable; (2) that from September 2014 to April 2016, the “Live Trade Room results” showed weekly profits ranging from \$900 to \$3,000 per week, with 90% of the weeks being profitable; (3) that based on their chart entitled “2014 Total Win/Loss Approach,” out of the 564 trades for the year 2014, 424 were “wins” and 140 were “losses.” *Id.* at 7–8. According to the CFTC, Dupont and Open Range also made statements that they had a “proven track record of consistent profits”; that in one week in April 2015, their traders had “\$2,800 in gross profit”; and that for “three years in a row [they] ha[d] produced consistent and profitable” trading calls. *Id.* at 8. The CFTC alleges that these misrepresentations of material facts were made knowingly or recklessly because “Open Range never had a futures account to make the[] purported profits and Dupont only had two futures accounts both of which he traded at a loss.” *Id.*

Additionally, the CFTC alleges that Dupont and Open Range made clients believe that these “hypothetical performance results” were real by making statements such as (1) Dupont “takes weekly profit for 11th week in a row”; (2) “[o]ver the last three weeks we have had 20 wins and just 4 losses with OVER \$7,500 in gross profit taken!”; and “[a]t Open Range Trading, we don’t make excuses, we take profits month over month year over year.” *Id.* at 9. The CFTC contends that these misstatements were made knowingly and recklessly because Open Range “never engaged in any actual futures trading and Dupont never engaged in actual futures trading in which an account was profitable overall.” *Id.* Additionally, Dupont and Open Range did not include a hypothetical disclaimer, which is required by Commission Regulation 4.41(b), in order

to alert clients that the trading was simulated and not real and that, therefore, the reported results were hypothetical.

Instead, according to the Complaint, Dupont and Open Range mislead clients to believe that Open Range was “conducting actual trading” when, in fact, they “did not do any trading in a futures account since 2013.” *Id.* at 8. The CFTC alleges that Dupont and Open Range did this by having statements on their website that said the following: (1) that “[o]ur live trade room trades the e-mini, the Russell, oil, gold, soybeans and Euro”; (2) that Open Range was “currently trading E-mini S&P 500 index, Russell Index, Oil and Gold”; (3) “[s]ince all trade calls are made live and marketed on a chart in real time, we have an accurate and instant record of our performance”; (4) that clients could “[t]rade along with us with confidence”; (5) that Dupont “reduced [his] position as prescribed and now have most position sizes at or under 75% full load”; and (6) that Dupont “plan[ned] to start adding some hedge protection and looking to time taking of profits off the top until [he] reduce[d] position sizes closer to 50%.” (ECF Nos. 1 at 8–9; 114-2 at 8–11). The CFTC contends that these false and misleading statements were made knowingly and recklessly because “Open Range never engaged in any live trading and Dupont had already stopped trading his one futures account in 2013.” (ECF No. 1 at 9).

The CFTC further alleges that Dupont was the controlling person of Open Range. According to the Complaint, Dupont “formed Open Range, developed the trading system, created all of Open Range’s solicitation materials, and gave entry and exit trades to clients who logged into the ‘Live Trade Room.’” *Id.* at 10. Dupont was deposed on March 9, 2016, and he stated that he was the sole founder and sole employee of Open Range. (ECF No. 114-3 at 9–10). While Dupont contends that the expenses of Open Range exceed its income and that he has not personally benefitted from these practices because he has yet to draw a salary, (ECF No. 114-3 at

13), in her investigation, CFTC Investigator Melissa Cavers found that Open Range's PayPal Records indicate that approximately \$92,000 has been deposited into the account by Open Range customers (ECF Nos. 114-2 at 11–17).

III. Analysis

Having found the facts set forth in Plaintiff's Complaint as deemed admitted by default, the court must ensure the Complaint sets forth a proper claim before entering default judgment. *See GlobalSantaFe Corp. v. Globalsantafe.com*, 250 F. Supp. 2d 610, 612 n.3 (E.D. Va. 2003) (considering facts and evaluating Plaintiff's claims prior to entry of default judgment in copyright action). The court considers whether Plaintiff has set forth claims for which relief can be granted pursuant to the standard of Federal Rule of Civil Procedure 12(b)(6).

In applying the standard of Federal Rule of Civil Procedure 12(b)(6), the court should "accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). However, the court "need not accept the legal conclusions drawn from the facts" nor "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). While "a plaintiff is not required to plead facts that constitute a prima facie case . . . factual allegations must be enough to raise a right to relief above the speculative level." *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (citations omitted). Therefore, a plaintiff's complaint only needs to include "a short and plain statement of the claim showing that [he] is entitled to relief." Fed. R. Civ. P. 8(a)(2).

The court finds that the CFTC has made the proper showing for a default judgment for the reasons stated below.

A. Open Range is strictly liable for the violations of Dupont

As a practical matter, the present motion for a default judgment is against Defendant Open Range only. However, Open Range's liability under the Act is directly correlated to Defendant Dupont's liability. Under the Act, "[t]he act, omission, or failure of any official, agent, or other person acting for any . . . association, partnership, [or] corporation. . . within the scope of his employment or office shall be deemed the act, omission, or failure of such . . . association, partnership, [or] corporation . . . as well as of such official, agent, or other person." 7 U.S.C. § 2(a)(1)(B). Therefore, under the Act, a principal is vicariously liable for the acts of its agent if those acts were committed within the scope of the agent's employment. *Stotler and Co. v. Commodity Futures Trading Comm'n*, 855 F.2d 1288, 1292 (7th Cir. 1988). Furthermore, "it does not matter if the principal participated or even knew about the agent's acts" because the principal "is strictly liable for them." *Id.* (citing *Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 802 F.2d 963, 966–67 (7th Cir. 1986)).

Upon Dupont's own admission in his deposition testimony, Dupont is the sole owner and only employee of Open Range. (ECF No. 114-3 at 10). He developed the website, solicited advertising, set up the PayPal account, participated in trade calls, and posted updates to the website regarding the company's success. (ECF No. 114-3). All of these acts were in furtherance of his agency relationship with Open Range, as they were meant to benefit the company and draw in customers. *See Rosenthal*, 802 F.2d at 967–68. Therefore, to the extent that any of these acts constituted violations of the Act, Open Range is strictly liable for such violations. Accordingly, in addressing Open Range's violations of the Act below, the court also notes Dupont's violations that were within the scope of his agency relationship with Open Range, as they are imputed on Open Range pursuant to 7 U.S.C. 2(a)(1)(B).

B. Permanent Injunction

Section 6c of the Commodity Exchange Act, codified in 7 U.S.C. § 13a-1, authorizes the CFTC to seek permanent injunctive relief against a defendant that has violated the Act. 7 U.S.C. § 13a-1(a). However, “[a]ctions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence.” *Commodity Futures Trading Comm’n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). Instead, in order to obtain such relief under the Act, the plaintiff must show (1) that the defendant(s) committed a violation of the Commodity Exchange Act and (2) that there is a reasonable likelihood of future violation absent the defendant(s) being enjoined. *United States Commodity Futures Trading Comm’n v. Complete Devs., LLC*, No. 4:10 CV 2287, 2014 WL 794181, at *26 (N.D. Ohio Feb. 26, 2014) (citing *Commodity Futures Trading Comm’n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979)). Once the plaintiff has made a proper showing that a permanent injunction should be granted, such an order “shall be granted without bond.” 7 U.S.C. § 13a-1(b). The court finds, for the reasons stated below, that Open Range has violated the Commodity Exchange Act and that the CFTC has sufficiently shown that there is a reasonable likelihood of future violation absent a permanent injunction.

1. Violations of the Commodity Exchange Act

The court finds that the CFTC has made a sufficient showing that Open Range has engaged in acts and practices that violated Sections 4b(a)(1)(A) and (C), 4o(1)(A) and (B), and 6(c)(1) of the Commodity Exchange Act – as codified in 7 U.S.C. §§ 6b(a)(1)(A) and (C), 6o(1)(A) and (B), and 9(1) – as well as CFTC Regulations 4.41(a) and (b) and 180.1 – as codified in 17 C.F.R. §§4.41(a) and (b) and 180.1.

a. Violation of Section 4b(a)(1)(A) and (C) of the Commodity Exchange Act: Fraud by Making False Misrepresentations and Omissions

Sections 4ba(1)(A) and (C) of the Act, as codified in Title 7 of the United States Code, Sections 6b(a)(1)(A) and (C), make it unlawful for

[a]ny person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person . . . (A) to cheat or defraud or attempt to cheat or defraud the other person; . . . [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 . . . the other person

7 U.S.C. § 6b(a)(1). In order to establish that a defendant has committed fraud under Section 4b of the Act, the CFTC must prove “(1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality.” *Commodity Futures Trading Comm’n v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002).

Open Range, through the actions of Dupont, made misrepresentations and misleading statements to the public regarding its trading practices. These false representations include (1) stating that Dupont had been trading for over twenty years and misrepresenting his trading experience; (2) misleading the public about Open Range’s profits and losses; (3) falsely stating that Open Range was “currently trading” in various markets when no actual trading was taking place; and (4) misleadingly reporting performance results as real when those results were hypothetical or simulated. (ECF Nos. 1 at 7–9; 114-2 at 7–11).

Furthermore, Open Range and Dupont had the requisite scienter in making these representations. The scienter element is established when either the speaker knows that a representation is false or when the speaker makes the representation with reckless disregard for the representation’s truth or falsity. *See Drexel Burnham Lambert Inc. v. Commodity Futures Trading Comm’n*, 850 F.2d 742, 748 (D.C. Cir. 1988). This reckless disregard for the truth can

be met by showing that there was “a danger of misleading buyers or sellers that is either known . . . or is so obvious that the [speaker] must have been aware of it.” *Ziemba v. Cascade Intern., Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001). Here, Open Range had never had a futures account and Dupont had only two futures accounts, both of which were traded at a loss. (ECF No. 1 at 8). Furthermore, Open Range never engaged in any actual futures trading and Dupont never engaged in any actual trading that was profitable overall. *Id.* at 9. Additionally, Dupont had ceased actually trading on his futures account in 2013. *Id.* Therefore, undoubtedly Open Range and Dupont knew that their statements regarding profits, Dupont’s experience, the actual trading practices of Open Range, and the performance results were false. Thus, the court finds that Open Range acted with the requisite scienter to be held liable under 7 U.S.C. § 4b(a)(1)(A) and (C).

Finally, these misrepresentations were material. A representation is material “if a reasonable investor would consider it important in deciding whether to make an investment.” *R.J. Fitzgerald*, 310 F.3d at 1328–29. Statements regarding “past success and experience are material factors which a reasonable investor would consider when deciding to invest in commodity options” through a specific firm, broker, or advisor. *Commodity Futures Trading Comm’n v. Commonwealth Fin. Grp., Inc.*, 874 F. Supp. 1345, 1354 (S.D. Fla. 1994). Furthermore, representations regarding the probability or likelihood of profits and loss are material because such considerations “go to the heart of a customer’s investment decision.” *United States Commodity Futures Trading Comm’n v. Kratville*, 796 F.3d 873, 895 (8th Cir. 2015) (internal citation omitted). Accordingly, the court finds that Open Range’s representations regarding Dupont’s experience, the profits and losses of the company, the trading practices of the company, and the performance results of the company were representations that the customers

and potential customers would have relied on in making the decision whether or not to do business with Open Range. As such, these representations were material.

Accordingly, the court finds that Open Range violated Section 4b(a)(1)(A) and (C) of the Act.

**b. Violation of Section 4o(1)(A) and (B) of the Commodity Exchange Act:
Fraud by a Commodity Trading Advisor**

Sections 4o(1)(A) and (B) of the Commodity Exchange Act, as codified in Title 7 of the United States Code, Sections 6o(1)(A) and (B), make it unlawful for

a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) to engage in any transaction, practice, or course of business which operates as fraud or deceit upon any client or participant or prospective client or participant.

7 U.S.C. § 6o(1)(A), (B). In order to establish that a defendant has committed fraud under Section 4o(1) of the Commodity Exchange Act, the CFTC must prove that the defendant made a materially false statement or omission through the use of “the mails or any means or instrumentality of interstate commerce.” *See Commodity Futures Trading Comm’n v. Weinberg*, 287 F. Supp. 2d 1100, 1108 (C.D. Cal. 2003). Scienter is required to prove a violation of Section 4o(1)(A), but is not expressly required to prove a violation of 4o(1)(B). *See Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 233 F.3d 981, 993 (7th Cir. 2000).

As discussed above, Open Range and Dupont made materially false statements to clients and potential clients while knowing that these statements were false. The same acts that violated 4b(1)(A) and (C) above also violate 4o(1)(A) and (B) so long as they were made by a commodity trading advisor and were made through the use of “the mails or any means or instrumentality of interstate commerce.” 7 U.S.C. § 6o(1)(A), (B). Pertinent to this case, under the Act, a

“commodity trading advisor” is defined as a person who “for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity or future delivery, security futures product, or swap.” 7 U.S.C. §1a(12)(A)(i)(II). Here, Dupont acted as a commodity trading advisor because he advised others on how and when to trade commodity futures. (ECF No. 1 at 6). As discussed above, because these acts were in furtherance of his agency relationship with Open Range, these acts are imputed on Open Range.

Furthermore, these statements were made “on their website, in their newsletter, and in social media sites.” (ECF No. 1 at 7). These social media sites included Twitter, Facebook, YouTube, and GooglePlus. (ECF No. 114-3 at 15). The newsletter was sent out weekly via email to individuals that had subscribed to Open Range’s mailing list. (ECF No. 114-3 at 16). About 175 people subscribed to that list. *Id.*

The internet is “generally an instrumentality of interstate commerce.” *Utah Lighthouse Ministry v. Foundation for Apologetic Information and Research*, 527 F.3d 1045, 1054 (10th Cir. 2008); *see also United States v. Sutcliffe*, 505 F.3d 944, 952 (9th Cir. 2007) (holding that the internet is both an instrumentality and a channel of interstate commerce); *United States v. MacEwan*, 445 F.3d 237, 245 (3rd. Cir. 2006) (concluding that the internet is an instrumentality and channel of interstate commerce); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (“Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce. . . .”); *Epson Am., Inc. v. USA111, Inc.*, 259 F. Supp. 3d 387, 393 (D.S.C. 2017) (stating that “because the internet is an ‘instrumentality of interstate commerce,’ false advertisements” on websites were in interstate commerce) (internal citations omitted). Therefore, Open Range and Dupont made these false statements through the use of

instrumentalities of interstate commerce. Accordingly, the court finds that Open Range has violated Section 4o(1)(A) and (B) of the Act.

c. Violations of Commission Section 6(c)(1) of the Commodity Exchange Act and Regulation 180.1: Fraud

Section 6(c)(1) of the Act, as codified in Title 7 of the United States Code, Section 9(1), makes it unlawful, in pertinent part, for any person, “in connection with any . . . contract of sale of any commodity . . . for future delivery” to use or employ “any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate. 7 U.S.C. § 9(1). One such regulation, Commission Regulation 180.1(a), in relevant part, makes it unlawful to

- (1) [u]se or employ or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;
- (2) [m]ake, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading; or,
- (3) [e]ngage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person.

17 C.F.R. § 180.1(a). The coupling of Section 6(c)(1) of the Act and Rule 180.1 demonstrate CFTC’s “authority to prohibit fraud and manipulation.” *United States Commodity Futures Trading Comm’n v. Hunter Wise Commodities, LLC*, 21 F. Supp. 3d 1317, 1337 (S.D. Fla. 2014). The same conduct that violates Section 4b(a)(1) violates Section 6(c)(1) if it was “in connection with the purchase or sale of commodities.” *See id.* Here, as discussed above, Open Range made material misrepresentations to clients and potential clients and either knew that those representations were false or acted with reckless disregard as to their falsity. Furthermore, undoubtedly, these misrepresentations were “in connection with the purchase or sale of commodities.” *See id.* (finding that misstatements regarding a customer’s projected rate of return and detailing risk of the trade to be “in connection” with the purchase of commodities). False

statements made pertaining to Dupont's expertise and experience, the profits of the business, the business practices of Open Range, and the performance results of recent trades were all aimed at bringing in clients or at convincing current clients to purchase or continue to purchase access to Open Range's live trade room. Once the clients bought access to the trade room, they would have access to Open Range's trading signals, which would instruct clients on "what commodity futures to trade, when to trade [], and at what price." (ECF No. 1 at 6). Therefore, the court finds that the CFTC has sufficiently shown that Open Range's false statements were made "in connection with the purchase of commodities." As such, the court finds that Open Range violated Section 6(c)(1) of the Act and Commission Regulation 180.1.

d. Violations of Commission Regulation 4.41(a): False Advertising

Commission Regulation 4.41(a), found in 17 C.F.R. § 4.41(a), in pertinent part, prohibits commodity trading advisors from advising "in any manner which (1) employs any device, scheme or artifice to defraud any participant or client or prospective participant or client; [or] (2) [i]nvolves any transaction, practice or course of business which operates as a fraud or deceit upon any participant or client or any prospective participant or client." Open Range advertised its trading system on its website, through its weekly emails, and on various social media pages including YouTube, GooglePlus, Facebook, and Twitter. Through these advertisements, Open Range made false statements to clients and potential clients, which included misrepresentations about the expertise of its commodity trading advisor (Dupont), about profits and potential risk, about the performance results of the company, and about the trading practices of Open Range. (ECF No. 1 at 7–9). As discussed above, these statements were all fraudulent because they were false and material and because Open Range knew them to be false. After luring in clients and potential clients, Open Range then advised clients on how and when to trade futures. (ECF No. 1

at 6). Therefore, the court finds that CFTC has sufficiently proven that Open Range has violated Commission Regulation 4.41(a).

e. Violations of Commission Regulation 4.41(b): Failure to Include Hypothetical Disclaimer

Commission Regulation 4.41(b), found in 17 C.F.R. § 4.41(b), in pertinent part, prohibits any person from “present[ing] the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a . . . commodity trade advisor or any principal thereof . . .” unless such performance is accompanied by a hypothetical disclaimer. In this case, the pertinent hypothetical disclaimer requirement is laid out in Commission Regulation 4.41(b)(1)(i).

Open Range violated this provision by demonstrating its hypothetical performance results on its website, newsletter, and social media platforms, without including the required disclaimer. While Open Range’s website did provide a disclaimer of sorts (ECF No. 114-3 at 21), it is not the disclaimer that is required, which is provided verbatim in Commission Regulation 4.41(b)(1)(i) to warn clients that purported performance results were based on hypothetical or simulated trading results. As such, the court finds that the CFTC has sufficiently shown that Open Range violated Commission Regulation 4.41(b).

2. Likelihood of Repetition Absent Permanent Injunction

The second element that a plaintiff must satisfy in order to obtain the injunctive relief set forth in Section 6c of the Act is a showing that there is “some reasonable likelihood of future violation” of the Act. *Hunt*, 591 F.2d at 1220. In determining whether or not this likelihood exists, courts often look at past misconduct because “[w]hile past misconduct does not lead necessarily to the conclusion that there is a likelihood of future misconduct, it is highly suggestive of the likelihood of future violations.” *Id.* (internal citations omitted). In looking at

the past violations and at whether or not future violations may occur, courts “should look at the totality of the circumstances, and factors suggesting that the infraction might not have been an isolated occurrence.” *Id.* (internal citations omitted). Furthermore, “[w]hen the violation has been founded on systematic wrongdoing, rather than an isolated occurrence, a court should be more willing to enjoin future misconduct.” *Id.*; see also *Commodity Futures Trading Comm’n v. Am. Metals Exch. Corp.*, 693 F. Supp. 168, 191 (D.N.J. 1988) (“The likelihood of future violations may be inferred from past infractions based upon consideration of the totality of the circumstances to determine if the past infraction was an isolated occurrence as opposed to an indication of a systematic and continuous pattern of wrongdoing.”).

Here, the CFTC has made a showing that Open Range engaged in acts and practices that violated Sections 4(b)(a)(1)(A) and (C), 4o(1)(A) and (B), and 6(c)(1) of the Commodity Exchange Act – as codified in 7 U.S.C. §§ 6b(a)(1)(A) and (C), 6o(1)(A) and (B), and 9(1) – as well as CFTC Regulations 4.41(a) and (b) and 180.1 – as codified in 17 C.F.R. §§4.41(a) and (b) and 180.1. Open Range did not inadvertently mislead its clients on one standalone occasion. Instead, Open Range consistently and repeatedly lied to its clients and potential clients through weekly updates in the newsletter, various posts on its website, and numerous postings on its social media profiles. Based on the egregiousness and repetitive nature of this conduct, it is clear to this court that, unless restrained and enjoined by this court, there is a reasonable likelihood that Open Range will engage in further violations.

3. Permanent Injunction as to Open Range

Accordingly, because the CFTC has made the requisite showing that Open Range violated the Act and that further violations are reasonably likely absent Open Range being enjoined, the court grants CFTC’s motion for a permanent injunction. Based upon and in

connection with the foregoing conduct, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), Defendant Open Range is permanently restrained, enjoined and prohibited from directly or indirectly:

a. cheating or defrauding or attempting to cheat or defraud other persons in connection with any commodity futures contracts made, or to be made, on or subject to the rules of a designated contract market or willfully deceiving or attempting to deceive other persons by any means whatsoever regarding the disposition or execution of any such order or contract or any act of agency performed in connection with such order or contract, in violation of Section 4b(a)(1)(A) and (C) of the Act, 7 U.S.C. § 6b(a)(1)(A), (C) 92012);

b. while acting as a CTA, using the mails or any means or instrumentality of interstate commerce, directly or indirectly to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant, or to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant, in violation of Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (2012);

c. directly or indirectly, using or employing, or attempting to use or employ, in connection with any contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device, scheme, or artifice to defraud; making, or attempting to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading; or engage, or attempting to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person, in violation of Section 6(c)(1) of the Act, 7 U.S.C. § 9(1) (2012), and Commission Regulation 180.1, 17 C.F.R. § 180.1(a) (2017);

d. advertising in a manner which employs any device, scheme or artifice to defraud any participant or client or prospective participant or client or involves any transaction, practice or course of business which operates as a fraud or deceit upon any participant or client or any prospective participant or client, in violation of Commission Regulation 4.41(a), 17 C.F.R. § 4.41(a) (2017);

e. presenting the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a CTA, or any principal thereof, unless such performance is accompanied by the hypothetical disclaimer set forth in Commission Regulation 4.41(b), 17 C.F.R. § 4.41(b) (2017);

f. trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012));

g. entering into any transactions involving “commodity interests” (as that term is defined in Regulation 1.3(yy), 17 C.F.R. § 1.3(yy) (2017)) for its own personal account or for any account in which it has a direct or indirect interest;

h. having any commodity interests traded on its behalf;

i. controlling or directing the trading for, or on behalf of, any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;

j. soliciting, receiving or accepting any funds from any person for the purpose of purchasing or selling any commodity interests;

k. applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2017); and/or

l. acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2017)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012)) registered, exempted from registration or required to be registered with the Commission except as provided for in Regulation 4.14(a)(9).

4. Civil Penalties Assessed

Additionally, once the CFTC has made a proper showing that a defendant has violated the Act, the CFTC can seek 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” of the Act. 7 U.S.C. § 13a-1(d)(1)(A). When courts choose to impose civil penalties in these cases, those penalties should “reflect the abstract or general seriousness of each violation” and “should be sufficiently high to deter future violations.” *United States Commodity Futures Trading Comm’n v. Gutterman*, No. 12-21047-CIV, 2012 WL 2413082, at *10 (S.D. Fla. June 26, 2012). Accordingly, “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.* In

light of the conduct described above, the court concludes that a serious and significant sanction is appropriate and that civil monetary penalties are appropriate.

The CFTC specifically asked for civil monetary penalties in the amount of \$100,000 (“CMP Obligation”). This amount is well within the parameters of the Act, and the court finds the amount appropriate. Therefore, Open Range is hereby ordered to pay, jointly and severally with Defendant Dupont, a civil penalty in the amount of one hundred thousand dollars (\$100,000), plus post judgment interest. Post judgment interest shall accrue beginning on the date of the entry of this Order and shall be determined using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2012).

Defendant Open Range shall pay its 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
DOT/FAA/MMAC/AMZ-341
CFTC/CPSC/SEC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
(405) 954-7262 office
(405) 954-1620 fax
nikki.gibson@faa.gov

If payment by electronic funds transfer is chosen, Defendant Open Range shall contact Nikki Gibson or her successor at the address above to receive payment instructions and shall fully comply with those instructions. Defendant Open Range shall accompany payment of the CMP Obligation with a cover letter that identifies Defendant Open Range and the name and docket number of this proceeding. Defendant Open Range 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.

Defendant Open Range shall receive a dollar-for-dollar credit against its CMP Obligation for any civil monetary penalty payments made by Defendant Dupont in this matter.

5. Disgorgement

Finally, once the CFTC has made a proper showing that a defendant has violated the Commodity Exchange Act, the CFTC can seek equitable remedies including “disgorgement of gains received in connection with such violation.” 7 U.S.C. § 13a-1(d)(3)(B); *see also Commodity Futures Trading Comm’n v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 193 (4th Cir. 2002). Unlike civil monetary penalties, the remedy of disgorgement is not meant to penalize but, rather, is designed specifically to deprive wrongdoers from a benefit from that resulted from illegal conduct. *Hunt*, 591 F.2d at 1222. Here, Open Range directly profited from its fraudulent activity. Open Range’s PayPal records show that it received at least \$92,000 in deposits from clients. (ECF No. 114-2 at 11–14). Allowing Open Range to keep this \$92,000 would be contrary to the purposes of the antifraud provisions of the Act. *See Commodity Futures Trading Comm’n v. United States Metals*, 468 F. Supp. 1149, 1160 (S.D.N.Y. 1979) (stating that “to permit [wrongdoers] to retain even a portion of their illicit profits would impair the full impact of the deterrent force that is essential if adequate enforcement of the Act is to be achieved.”)

Accordingly, Defendant Open Range shall pay jointly and severally with Defendant Dupont, disgorgement in the amount of ninety-two thousand dollars (\$92,000) (“Disgorgement Obligation”), representing the gains received in connection with such violation(s), plus post-judgment interest. Post-judgment interest shall accrue on this Disgorgement 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 (2012).

Defendant Open Range shall pay its Disgorgement Obligations 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
DOT/FAA/MMAC/AMZ-341
CFTC/CPSC/SEC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
(405) 954-7262 office
(405) 954-1620 fax
nikki.gibson@faa.gov

If payment by electronic funds transfer is chosen, Defendant Open Range shall contact Nikki Gibson or her successor at the address above to receive payment instructions and shall fully comply with those instructions. Defendant Open Range shall accompany payment of the Disgorgement Obligation with a cover letter that identifies Defendant Open Range and the name and docket number of this proceeding. Defendant Open Range 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.

Defendant Open Range shall receive a dollar-for-dollar credit against its Disgorgement Obligation for any disgorgement payments made by Defendant Dupont in this matter.

Finally, acceptance by the Commission of any partial payment of Defendant Open Range's Disgorgement Obligation or CMP Obligation shall not be deemed a waiver of Open

Range's obligation to make further payments pursuant to this Order or a waiver of the Commission's right to seek to compel payment of any remaining balance.

E. Duty to Provide Notice to CFTC

Until such time as Defendant Open Range satisfies in full its Disgorgement Obligation and CMP Obligation as set forth in this Consent Order, Defendant Open Range shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten (10) calendar days of the change.

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:

James McDonald
Director, Division of Enforcement
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

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

IV. Conclusion

Therefore, the Plaintiff's Motion for Default Judgment as to Open Range, Motion for Permanent Injunction, Motion for Civil Monetary Penalty, and other statutory and Equitable Relief (ECF No. 114) is **GRANTED** as set forth herein. Accordingly, judgment in favor of CFTC shall be entered against Defendant Open Range.

This Court shall retain jurisdiction of this action to ensure compliance with this Order and for all other purposes related to this action, including any motion by Defendant Open Range to modify or for relief from the terms of this Order.

The injunctive and equitable relief provisions of this Order shall be binding upon Defendant Open Range, upon any person under its authority or control, and upon any person who receives actual notice of this Order, by personal service, e-mail, facsimile or otherwise insofar as he or she is acting in active concert or participation with Defendant Open Range.

IT IS SO ORDERED.

s/ Timothy M. Cain
Timothy M. Cain
United States District Judge

June 22, 2018
Anderson, SC

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this order pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.