

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 06-60886

CIV - DIMITROULEAS
/TORRES

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

EXECUTIVE COMMODITY CORP.,
THOMAS C. KENNEDY, DON D. CAMPBELL,
and ALBERTO J. JIMENEZ,

Defendants.

FILED BY _____
2006 JUN 20 PM 1:40
CLERK OF U.S. DISTRICT COURT
S.D. OF FLA.-FT. L.

**COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF,
AND FOR CIVIL PENALTIES UNDER THE COMMODITY EXCHANGE ACT, AS
AMENDED, 7 U.S.C. §§ 1 ET SEQ.**

I. SUMMARY

1. Executive Commodity Corporation (“Executive”), located in Pompano Beach, Florida, is an Introducing Broker (“IB”). Executive is managed by Thomas C. Kennedy (“Kennedy”). Don D. Campbell (“Campbell”) and Alberto J. Jimenez were, until recently, employed by Executive as senior brokers (collectively “Defendants”). Executive solicits members of the public to trade in options on commodity futures contracts using false and misleading sales representations regarding the likelihood of profits therefrom, and by downplaying or failing to discuss the substantial risks associated with trading therein.

2. Between at least January 1, 2002 and November 1, 2005 (the “relevant period”), Executive, by and through its Associated Persons (“APs”), fraudulently solicited actual and

prospective customers to trade in exchange-traded options on commodity futures contracts in accounts held at two futures commission merchants (“FCMs”). During the period from January 1, 2003 through December 2003, for example, Executive solicited approximately 495 members of the public to trade options with the result that 95% of Executive’s customers lost money, totaling more than \$6.2 million, while Executive and its employees earned commission revenues of almost \$4 million dollars.

3. During the relevant period, Executive employees, under the direct supervision of Defendant Kennedy, including Campbell and Jimenez during the period of their employment, made false and materially misleading sales solicitations to actual and potential customers by, *inter alia*: (a) exaggerating the magnitude and likelihood of potential profit from trading in options on commodity futures contracts; and (b) downplaying the risk of loss from trading in options on commodity futures contracts. During the relevant period, Executive employees, when making profit representations, failed to advise actual and prospective customers that they were aware that at least 85% of Executive’s customers lost money trading in options on commodity futures contracts.

4. Defendants have engaged in acts and practices that constitute violations of the Commodity Exchange Act, as amended (“Act”), 7 U.S.C. § 1 *et seq.* (2002), and Regulations promulgated thereunder (“Commission Regulations”), 17 C.F.R § 1.1 *et seq.* (2004). Executive’s employees, including Campbell and Jimenez, knew or recklessly disregarded the fact that the representations and omissions of material fact in Paragraph 3 above were false or acted in an extreme departure from the standards of ordinary care by making such representations or omitting material information. Consequently, these acts and practices violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b), (2002), and Commission Regulation 33.10, 17 C.F.R.

§ 33.10 (2005). With regard to Executive, these acts and practices further violated Commission Regulation 33.7(f), 17 C.F.R. § 33.7(f)(2005). Because these violations by Executive employees were done within the scope of their employment, Executive is therefore vicariously liable for those violations pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2002).

5. Defendant Kennedy controlled Executive during the relevant period and either knowingly induced or did not act in good faith respecting the acts and practices of Executive's employees that constitute the violations of Section 4c(b) of the Act and Commission Regulation 33.10. Defendant Kennedy is therefore liable as a controlling person for those acts and practices pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2002).

6. Since 1999, when Executive was first registered with the National Futures Association ("NFA") as an IB, the firm has been the subject of regulatory actions in 2002 and 2004 by the NFA for violations of NFA rules by Executive employees, including those regarding sales solicitations. Defendant Kennedy was named in both of the NFA regulatory actions. Defendants Campbell and Jimenez were named in the 2004 NFA action against Executive.

7. Accordingly, Plaintiffs Commodity Futures Trading Commission ("Commission" or "CFTC") brings this action pursuant to Sections 6c and 6d of the Act, 7 U.S.C. §§ 13a-1 and 13a-2 (2002), to enjoin the Defendants' unlawful acts and practices and to compel their compliance with the Act. In addition, Plaintiffs seek disgorgement of the Defendants' ill-gotten gains, restitution to customers, civil monetary penalties and such other relief as this Court may deem necessary or appropriate.

8. Unless restrained and enjoined by this Court, Defendants are likely to continue to engage in the acts and practices alleged in this Complaint, and similar acts and practices, as more fully described below.

II. JURISDICTION AND VENUE

9. The Act prohibits fraud in connection with the trading of commodity futures contracts and options on commodity futures contracts and establishes a comprehensive system for regulating the purchase and sale of commodity futures contracts and options on commodity futures contracts. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. §13a-1 (2002), which authorizes the Commission to seek injunctive relief against any person whenever it shall appear to the Commission 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.

10. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a(e) (2002), because the Defendants are found in, inhabit, or transact business in, among other places, this district, or the acts and practices in violation of the Act have occurred, are occurring or are about to occur within, among other places, this district.

III. PARTIES

11. Plaintiff Commission is the independent federal regulatory agency responsible for administering and enforcing the provisions of the Commodity Exchange Act and the Regulations promulgated thereunder.

12. Defendant Executive Commodity Corp. is a Florida corporation, incorporated in January 1999. It has been registered with the Commission as an IB since February 1999. During the relevant period, Executive operated pursuant to guarantee agreements with National Commodity Corporation, Inc. ("NCCI") and International Commodity Clearing, Inc. ("ICCI"), which are both registered FCMs. As a result, all of Executive's customers during the relevant

period maintained accounts at NCCI or ICCI. Executive's office is located in Pompano Beach, Florida.

13. Defendant Thomas C. Kennedy currently resides in Tamarac, Florida. Kennedy served as the president and as a manager of Executive during the relevant period. He has been a principal of the firm since its inception. Kennedy has been registered with the Commission as an AP since 1999 and is currently registered with Majestic Commodity Corporation, a registered IB. Kennedy is a corporate director of Executive and the co-owner.

14. Defendant Don D. Campbell resides in Parkland, Florida. Campbell was employed as a senior Executive broker until November 29, 2005, and his registration as an AP of Executive began in August 2001.

15. Defendant Alberto J. Jimenez resides in Coral Gables, Florida. Jimenez was employed as a senior Executive broker until November 29, 2005, and his registration as an AP of Executive began in May of 2003. Jimenez is currently seeking to register as an AP with Meridian Capital Investments, which is seeking to register as an IB.

III. STATUTORY AND REGULATORY BACKGROUND

16. A futures commission merchant ("FCM") is defined in Section 1a(20) of the Act, 7 U.S.C. § 1a(20) (2002), and Commission Regulation 1.3(p), 17 C.F.R. § 1.3(p) (2005), with certain qualifications, as an individual, association, partnership, corporation, or trust that is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility; and in or in connection with such solicitation or acceptance of orders, accepts any money, securities or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

17. An IB is defined in Section 1a(23) of the Act, 7 U.S.C. § 1a(23) (2002), with certain qualifications, as any person, other than an associated person of a FCM, engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

18. An associated person (“AP”) is defined in Section 4k of the Act, 7 U.S.C. § 6k (2002), and Commission Regulation 1.3(aa)(1) and (2), 17 C.F.R. § 1.3(aa)(1) and (2) (2005), with certain qualifications, as a natural person associated with any FCM or IB, as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves: (i) the solicitation or acceptance of customers’ or options customers’ orders; or (ii) the supervision of any person or persons so engaged.

IV. FACTS

A. **Executive Employees Misrepresented the Magnitude and Likelihood of Potential Profits and Downplayed the Risk of Loss to Customers and Potential Customers**

19. During the relevant period, Defendant Executive employed APs in the Pompano Beach office, including Campbell and Jimenez, for the purpose of soliciting actual and prospective customers to trade in exchange-traded options on commodity futures contracts.

20. Executive employees solicited actual and prospective customers by making telephone solicitations to individuals identified on lead lists. During these telephone solicitations, Executive employees, including Campbell and Jimenez, invariably recommended that actual and prospective customers enter into trades in particular options on commodity futures contracts, such as options on heating oil futures or options on currency futures.

21. Executive structured its AP sales force into two layers, with the first layer of APs soliciting customers to open accounts and to make an initial option purchase. After the initial option purchase, the vast majority of customers were moved to the second layer of designated AP “senior brokers”, which consisted exclusively of Campbell and Jimenez during most of the relevant period, and serviced all such accounts for the duration of the customer relationship.

22. Executive employees, including Campbell and Jimenez, were aware customers were sustaining significant losses by trading through Executive.

23. When soliciting prospective customers and customers, Executive APs, including Campbell and Jimenez, exaggerated the magnitude and likelihood of potential profits and downplayed the risk of loss. Executive APs, made misrepresentations of material fact to customers such as, by way of example, the following statements:

a) Campbell told one customer in a telephone call before the market opened that the Gross Domestic Product (“GDP”) number was coming out. In that conversation, Campbell made the following statements:

- “When it comes out the dollar is going to crash.”
- “It’s the largest deficit in American history; the Euro will run.”
- “Go into this Euro trade, and I guarantee it will hit.”
- “In two days we will come out with a 30% profit.”

b) Jimenez told one customer to buy 100 option positions of August ’04 Light Crude Oil, which within the next seven to ten days had the potential to make \$80,000. Jimenez told the customer that if he could send \$95,000 by that Wednesday, Jimenez could make this happen and that both would make a lot of money off of this deal.

24. The representations made in paragraph 23 were false or misleading, in part, because: the market in options on commodity futures contracts is highly speculative and customers were unlikely to realize the described profits within the described time periods; the Executive APs who made such claims had customers who did not realize the described profits within the described time periods; the likelihood that any of the customers would actually profit

from investing with Executive was substantially lower due to the very high commission fees, usually \$250.00 per contract traded; and the overwhelming majority — at least 95% — of Executive customers closed their accounts at a loss.

25. During the relevant period, Executive employees solicited customer funds by providing specific trade recommendations. In fact, almost all of the trades placed on behalf of Executive customers were based on the trade recommendations of Executive employees.

26. Executive employees, including Campbell and Jimenez, either knew the representations described in Paragraphs 23 through 24 were false, or they recklessly failed to determine the truth or falsity of such representations.

B. Executive Employees Failed to Disclose that the Vast Majority of Executive's Customers Lost Money Trading

27. Executive employees, including Campbell and Jimenez, made representations to actual and potential customers that created the impression they would earn substantial profits trading options on commodity futures contracts, including the representations described in Paragraphs 23 through 24 of this Complaint. Executive brokers were provided with and directed to follow the companies' "Advanced Sales Training Manual", which instructed brokers to provide customers with a "performance" or profit illustration as part of an "ethical sales presentation." The sales training manual limited brokers to profit projections of no greater than 100%, which management subsequently reduced to no greater than 50%. Brokers testified that in their sales presentations they always provided customers with a profit projection of under the 50% mark. While making these representations of rosy profit projections, Executive employees never disclosed to actual and potential customers that at least 85% of Executive's customers closed their accounts at a loss, and that their own customers were losing substantial amounts of their investment.

28. Moreover, Executive's employees, including Campbell and Jimenez, were aware that a significant number of Executive's customers were losing money because they received and reviewed a daily statement listing all of their customer's commodity option positions.

C. Defendant Kennedy was a Controlling Person of Executive

29. During the relevant period, Kennedy was the president, manager and co-owner of Executive. He had also been registered with the NFA as a principal of Executive since 1999. As Executive's president, manager and co-owner, Kennedy had responsibility to, *inter alia*: (1) develop, implement and distribute Executive's sales promotion materials; (2) supervise its sales, trading, compliance, marketing, recruitment and training functions; (3) prepare sales scripts for AP education and training; and (4) monitor trade recommendations.

30. Kennedy managed the daily operations of Executive's office. As the manager, Kennedy had direct supervisory responsibility over the APs and employees. He was also responsible for monitoring the APs' and employees' activities and ensuring their compliance with the rules, regulations and by-laws of the NFA, as well as with the Act and Commission Regulations.

31. Defendant Kennedy failed to develop or implement an adequate system of supervision to ensure that Executive's APs and employees did not make fraudulent statements and/or omissions while soliciting prospective customers and customers to trade in options on commodity futures contracts. Consequently, throughout the relevant period, Executive APs repeatedly made the fraudulent statements and/or omissions outlined in Paragraphs 23-24 and 27 of this Complaint while soliciting actual and prospective customers to trade in options on commodity futures contracts.

V. **VIOLATIONS OF THE COMMODITY EXCHANGE ACT
AND COMMISSION REGULATIONS**

Count One

**Violations of Section 4c(b) of the Act, , 7 U.S.C. § 6c(b) (2005),
and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2005):
(against Defendants Executive, Kennedy, Campbell and Jimenez)
and Commission Regulation 33.7(f), 17 C.F.R. § 33.7(f) (2005):
(against Defendant Executive)**

Fraud in Connection with Options on Commodity Futures Contracts

32. The allegations set forth in Paragraphs 1 through 31 are hereby realleged and incorporated herein.

33. Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2005), make it unlawful for any person directly or indirectly to cheat or defraud or attempt to cheat or defraud any other person; to make or cause to be made to any other person any false report or statement, or cause to be entered for any person any false record, or to deceive or attempt to deceive any other person by any means whatsoever, in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.

34. Commission Regulation 33.7(f), 17 C.F.R. § 33.7(f) (2005) states that making standard written risk disclosures "does not relieve ... an introducing broker ... from ... the obligation to disclose all material information to existing or prospective option customers ..."

35. Executive employees, including, but not limited to Campbell and Jimenez, violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2005), in connection with transactions in options on commodity futures contracts by making material misrepresentations and omissions of material facts as described in Paragraphs 24 through 31 above.

36. Because the acts and omissions of Executive's employees which constitute violations of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2005), were done within the scope of their employment, Executive is also liable for those violations pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B)(2002).

37. During the relevant period, Kennedy, as president and manager of Executive, directly and indirectly controlled Executive and its employees and did not act in good faith or knowingly induced, directly or indirectly, the acts and omissions constituting Executive's employees violations of Section 4c(b) and Regulation 33.10 described in this Complaint. Kennedy is therefore liable for Executive's employees violations of Section 4c(b) and Commission Regulation 33.10 pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2002).

38. By virtue of the conduct of Executive's employees as described above in paragraphs 23-24 and 27, Executive further violated Commission Regulation 33.7(f) by failing to comply with the obligation to disclose all material information to existing or prospective options customers.

39. Each material misrepresentation or omission made during the relevant period, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulation 33.10 and 33.7(f), 17 C.F.R. §§ 33.10 and 33.7(f) (2005).

VI. RELIEF REQUESTED

WHEREFORE, plaintiff respectfully requests that this Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1, and pursuant to its own equitable powers:

A. Find that:

- a) Defendants Executive, Kennedy, Campbell and Jimenez violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2005);
 - b) Defendant Executive violated Commission Regulation 33.7(f), 17 C.F.R. § 33.7(f) (2005).
- B. Enter an order of permanent injunction prohibiting the Defendants and any other person or entity associated with them, including any successor thereof, from:
1. Engaging in conduct in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulations 33.10, and 33.7(f), 17 C.F.R. §§ 33.10, and 33.7(f) (2005); and
 2. engaging in any activity relating to commodity interest trading, including but not limited to, soliciting, accepting or receiving funds, revenue or other property from any person, giving advice for compensation, or soliciting prospective customers, related to the purchase and sale of any commodity futures or options on commodity futures contracts.
- C. Enter an order directing the Defendants and any successor thereof, to disgorge, pursuant to such procedure as the Court may order, all benefits received from the acts or practices which constitute violations of the Act or Regulations, as described herein, and interest thereon from the date of such violations;
- D. Enter an order directing the Defendants to make full restitution to every customer whose funds were received by them as a result of acts and practices which constituted violations of the Act and Regulations, and described herein, including pre-judgment interest;

- E. Enter an order assessing a civil monetary penalty against each Defendant in the amount of not more than the higher of \$130,000 or triple the monetary gain to each Defendant for each violation by the Defendants of the Act or Regulations;
- F. Enter an order directing that the Defendants make an accounting to the Court of all their assets and liabilities, together with all funds they received from and paid to customers and other persons in connection with options on commodity futures transactions or purported options on commodity futures transactions, and all disbursements for any purpose whatsoever of funds received from commodity clients, including salaries, commissions, fees, loans and other disbursements of money and property of any kind, through the period of their employment with Executive and for Executive from, but not limited to, January 1, 2002 to the present, and including the date of such accounting;
- G. Such other and further remedial ancillary relief as the Court may deem appropriate.

Respectfully submitted,



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Dated: June 20, 2006