

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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U.S. DISTRICT COURT
SOUTH FLORIDA - WPB

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

Civil Action No.:

v.

04-80862

WILSHIRE INVESTMENT MANAGEMENT,
CORPORATION; NATIONAL COMMODITIES
CORPORATION, INC.; ANDREW ALAN
WILSHIRE; ERIC SCOTT MALCOLMSON; and
JAMES JOSEPH RUSSO,

CIV. MIDDLEBROOKS

**MAGISTRATE JUDGE
JOHNSON**

Defendants.

**Complaint for Permanent Injunction, Civil Monetary Penalties and Other Equitable Relief
Pursuant to The Commodity Exchange Act, as Amended, 7 U.S.C. §§ 1 et seq.**

I. SUMMARY

1. Since at least September 2000 (“the relevant period”), Wilshire Investment Management Corp. (“WIM”), Eric Scott Malcolmson (“Malcolmson”), and James Joseph Russo (“Russo”) have been fraudulently soliciting customers to open commodity trading accounts through WIM to trade commodity futures options contracts (“commodity options”) by knowingly misrepresenting, and failing to disclose material facts, concerning, among other things, (i) the likelihood that a customer would realize large profits from commodity options trading; (ii) the risk involved in trading commodity options; and (iii) WIM’s excessively poor trading record on behalf of customers, all in violation of Section 4c(b) of the Commodity Exchange Act, as amended, (the “Act”), 7 U.S.C. § 6c(b) (2002), and Section 33.10(a) and (c) of the Commission’s Regulations (“Regulations”), 17. C.F.R. § 33.10(a) and (c) (2003).

2. Andrew Alan Wilshire (“Wilshire”) directly or indirectly controls WIM and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting WIM’s violations alleged in this Complaint, therefore Wilshire is liable for WIM’s violations of the Act and Regulations pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2002).

3. Wilshire failed to supervise diligently the handling by his partners, officers, employees and agents (or persons occupying similar status or performing a similar function) of all commodity interest accounts that WIM carried, operated, advised or introduced and all other activities of his partners, officers, employees, and agents (or persons occupying a similar status or performing a similar function) relating to his business as a Commission registrant, in violation of Section 166.3 of the Regulations, 17 C.F.R. § 166.3 (2003).

4. NCCI entered into a guarantee agreement with WIM. Based on this agreement, NCCI was responsible for any violations of the Act or the Regulations committed by WIM or associated persons (“APs”) of WIM from September 7, 2000 to May 31, 2004.

5. Accordingly, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, plaintiff Commodity Futures Trading Commission (“Commission”) brings this action against WIM, Wilshire, Russo, Malcolmson, and NCCI (collectively the “Defendants”), to enjoin their unlawful acts and practices and to compel their compliance with the Act and the Regulations. In addition, the Commission seeks civil monetary penalties, restitution to customers for losses proximately caused by the Defendants’ fraud, disgorgement of the Defendants’ ill-gotten gains, and such other relief as this Court may deem necessary or appropriate.

6. Unless restrained and enjoined by this Court, WIM, Wilshire, Russo, and Malcolmson 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

7. The Act establishes a comprehensive system for regulating the purchase and sale of commodity futures contracts and options on commodity futures. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which provides that, whenever it shall appear to the Commission that any 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 promulgated thereunder, the Commission may bring an action against such person to enjoin such practice or to enforce compliance with the Act.

8. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), because defendants are found in, inhabit, or transact business in this District or the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this District, among other places. In particular, WIM and NCCI are Florida corporations. WIM's principal business address is in Jupiter, Florida and NCCI's principal business address is in Fort Lauderdale, Florida. Defendants Malcolmson and Russo reside in this district and solicit customers from WIM's Jupiter location. Defendant Wilshire also resides in this district and manages the Jupiter office.

III. THE PARTIES

9. Plaintiff **Commodity Futures Trading Commission** is an independent federal regulatory agency that is charged with the administration and enforcement of the Act, 7 U.S.C. §§ 1 *et seq.*, and the regulations promulgated thereunder.

10. Defendant **Wilshire Investment Management Corporation** is a Florida corporation with its principal place of business at 825 US Highway One, Suite 230, Jupiter, Florida 33477. WIM has been registered with the Commission as an Introducing Broker ("IB") since February 17, 2000, except for a brief period between September and August 2000. WIM is currently registered as an IB, a Commodity Trading Advisor ("CTA"), and a Notice Broker Dealer.

11. Defendant **James Joseph Russo**, who resides at 2585 Laliq Circle, Palm Beach Garden, Florida 33410, has been registered as an AP of WIM since May 14, 2001.

12. Defendant **Eric Scott Malcolmson**, who resides at 1 Pinehill Trail West, Tequesta, Florida 33469, has been registered as an AP and Principal of WIM intermittently since January 2000. Currently, Malcolmson is registered as an AP of WIM.

13. Defendant **Andrew Alan Wilshire**, who resides at 210 Riverpark Drive, Jupiter, Florida 33477, has been registered as an AP and Principal of WIM intermittently since November 1997. Currently, Wilshire is registered as an AP of WIM and is listed as a principal of WIM. Wilshire is WIM's President and Chief Executive Officer.

14. Defendant **National Commodities Corporation, Inc.**, is a Florida corporation and has its principal place of business at 1700 NW 64 Street, Suite 100, Ft. Lauderdale, Florida 33309. NCCI has been registered as a futures commission merchant (“FCM”) since April 22, 1997, and a Notice Broker Dealer since December 19, 2001. NCCI was WIM’s guarantor from September 7, 2000 to May 31, 2004.

IV. FACTUAL STATEMENT

A. Background

15. Since at least September 2000, WIM, by and through its APs, including but not limited to Malcolmson and Russo, solicited members of the general public to open commodity options trading accounts at NCCI.

16. In telephone calls, Malcolmson, Russo, and other WIM APs made and continue to make fraudulent and misleading sales solicitations by knowingly: (1) misrepresenting the likelihood that customers will profit from the purchase of commodity options; (2) misrepresenting the risk of trading commodity options; and (3) failing to disclose, in light of the profit representations they are making, WIM’s dismal performance record trading commodity options for its customers.

B. Misrepresentations Exaggerating the Likelihood of Profit

17. During the relevant period, WIM, through its APs, including but not limited to, Russo and Malcolmson, commonly misrepresented the likelihood of customers profiting from the purchase of commodity options.

18. Malcolmson made exaggerated profit claims, including, but not limited to, the following:

- a. that he would double or triple the customer's investment in a short period of time;
- b. that he had managed accounts with initial investments of \$5,000 and \$10,000 and turned them into \$100,000 accounts;
- c. Malcolmson told one customer "I know I can make you money." After suffering losses in his account, Malcolmson told this same customer, "I will make your money back;"
- d. that the recommended trade was as close as he could get to a 100% chance of success; and
- e. that he has a proven method for making profitable trades.

19. Russo made exaggerated profit claims, including, but not limited to, the following:

- a. "I guarantee" you will make money trading;
- b. that "the only time you [the customer] will hate me will be at tax time" when the customer would pay taxes on all his trading profits;
- c. that the upside to trading options was infinite and that profits were almost "guaranteed;"
- d. that he would recoup a customer's losses and grow his account to \$200,000 or \$300,000;
- e. that if the customer opened an account at WIM, the customer would have more than enough money to pay for his children's college education within a few months;

- f. that if the customer trusted Russo, Russo would make him a lot of money;
and
- g. that he had a “slam dunk” trade.

20. Other WIM APs made exaggerated profit claims, including, but not limited to, the following:

- a. “How would you like me to send you a \$100,000;”
- b. that the customer’s initial investment would double in a short period of time;
- c. that customer’s account could provide a 50% or more return;
- d. that Malcolmson would “pick me the winners” if the customer opened an account immediately; and
- e. that the customer would make money, and to “trust me [the AP], I won’t let you down.”

C. Profit Misrepresentations Based on Purported Seasonal Trends

21. WIM, through its APs, commonly uses misleading investment advice based on seasonal trends already factored in by the commodity markets to entice customers to open accounts with WIM.

22. During the course of telephone sales solicitation, WIM, through its APs, misrepresent the likelihood of customer profitability based on seasonal trends in various commodity options markets. For example:

- a. Malcolmson told at least one customer that if he purchased heating oil options immediately, before it got cold, that the customer would make

money once the winter arrived, especially in the Northeast. Malcolmson further explained that heating oil prices go up in the winter, and that the customer would profit from this trend if he purchased heating oil options;

- b. A WIM AP recommended that a customer purchase unleaded gasoline options because the summer months were approaching and increased travel during the summer would lead to a greater demand for gasoline. This greater demand would drive up the value of gasoline options. The AP said this typically happened every year;
- c. A WIM AP recommended the purchase of oil and natural gas options because as winter approached and demand for heating oil and natural gas increased, so would the value of these commodity options. The AP further explained that this pattern of rising prices for oil and natural gas had occurred the past few winters and was going to repeat itself again that year;
- d. A WIM AP told at least one customer to invest heavily in crude oil options because, historically, crude oil takes a real jump in the spring, and that the customer could make money on this seasonal pattern;
- e. A WIM AP told at least one customer that there was a cold winter coming, that heating oil was going to go “through the roof,” and that the customer would be able to take advantage of this seasonal swing; and
- f. A WIM AP told at least one customer that the purchase of gasoline options was not risky since gasoline options went up every summer.

D. Misrepresentations and Omissions Minimizing the Risk of Loss

23. During the course of their telephone sales solicitations, WIM, through its APs, including but not limited to Malcolmson and Russo, routinely fail to disclose adequately the risk of loss inherent in trading commodity options. Their occasional references to risk are nullified when defendants urge customers to invest immediately and falsely represent that while losses on commodity options are theoretically possible, trading commodity options with WIM is highly profitable and virtually risk-free. For example, during the relevant time period:

- a. Malcolmson told at least one customer that there were ways to trade commodities to limit risk and that his trading method was “fool-proof” and a simple “turn-key operation”;
- b. Malcolmson told at least one customer that the recommended trade was “fail-safe” and “almost a sure thing”;
- c. Malcolmson told at least one customer not to worry about risk, because he had it under control;
- d. Russo told at least one customer that trading commodity options entailed little or no risk unless the trader was a “complete moron;”
- e. Russo acknowledged to one customer that there was some risk, but then immediately told the customer that there was “no way you can lose;” and
- f. A WIM AP told at least one customer that the purchase of gasoline options was not risky since gasoline options went up every summer.

E. Misrepresentation Overstating WIM's Performance Record

24. During the course of their telephone sales solicitations, WIM, through its APs, including but not limited to Malcolmson and Russo, routinely misrepresented and overstated their performance record to customers. For example, during the relevant time period:

- a. Malcolmson told at least one customer that WIM's research team had produced a winning trade percentage between 75% and 80%;
- b. Malcolmson told at least one customer that both his and WIM's clients were making money;
- c. Malcolmson told at least one customer that WIM's clients had made a lot of money;
- d. Malcolmson told at least one customer that his trading for other clients was very successful, and that he had made clients rich trading commodities for them;
- e. Russo told at least one customer that WIM had a 70% successful trade ratio and was a "top-five" investment company;
- f. Russo told at least one customer that all the clients who followed his recommendations reaped enormous profits;
- g. Wilshire told at least one customer that WIM's other clients were making money; and
- h. Other WIM APs also told customers the WIM's clients were making money.

E. WIM's Losing Performance Record

25. Despite their repeated claims concerning profit and the minimization of risk, the trades into which the WIM customers entered, seldom, if ever, earned the magnitude of profits represented. In fact, the overwhelming majority of WIM's customers lose money from their investments.

26. In 2000, 117 out of 123 WIM customer accounts lost money. Customer losses in 2000 totaled \$502,446.60. During the same time that 95% of their customers lost money in 2000, WIM APs generated \$216,996.75 in commission fees.

27. In 2001, 96 out of 122 WIM customer accounts lost money. Customer losses in 2001 totaled \$381,136.61. During the same time that over 78% of their customers lost money in 2001, WIM APs generated \$527,112.42 in commission fees.

28. In 2002, 212 out of 231 WIM customer accounts lost money. Customer losses in 2002 totaled \$1,402,598.44. During the same time that over 91% of their customers lost money in 2002, WIM APs generated \$638,741.90 in commission fees.

29. In 2003, 227 out of 243 WIM customer accounts lost money. Customer losses in 2003 totaled \$3,115,999.93. During the same time that over 93% of their customers lost money in 2003, WIM APs generated \$1,987,339.03 in commission fees.

30. Despite these mounting losses, WIM, through its APs, including but not limited to Malcolmson and Russo, continue to solicit new customers by highlighting the profit potential of commodity options trading, without disclosing the fact that the overwhelming majority of their customers lose most, if not all, of their investment while WIM makes millions in commissions from this unprofitable trading.

F. Wilshire is a controlling person at WIM

31. Wilshire is the President and Chief Executive Officer of WIM and is registered as an AP of the firm and listed as a Principal.

32. Wilshire is responsible for the sales training of new APs.

33. Wilshire monitors the sales presentations of WIM APs on a daily basis.

34. Wilshire purchases leads for APs to use to contact prospective customers.

35. Wilshire is responsible for the overall day-to-day operation of WIM.

G. NCCI is WIM's Guarantor

36. In September 2000, NCCI and WIM entered into a "Guarantee Agreement."

37. Pursuant to this agreement, NCCI guarantees the performance of WIM and "shall be jointly and severally liable for, all obligations of the introducing broker [WIM] under the Commodities Exchange Act, as it may be amended from time to time, and the rules, regulations and orders which have been or may be promulgated thereunder with respect to the solicitation of and transactions involving all commodity customer, option customer, foreign future customer and foreign options customer accounts of the introducing broker [WIM] entered into on or after the effective date of this agreement."

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

COUNT ONE

**VIOLATIONS OF SECTION 4c(b) OF THE ACT
AND SECTION 33.10(a) AND (c) OF THE REGULATIONS:
OPTIONS FRAUD**

38. Paragraphs 1 through 37 above are re-alleged and incorporated by reference.

39. Since at least September 2000, Malcolmson and Russo knew, or recklessly disregarded, the fact that the misrepresentations in their telephone sales solicitations, including those set forth in paragraphs 17 through 24, were false, deceptive, or misleading, or had no reason to believe that they were true. Further, they knew, or, absent reckless disregard, should have known, that their telephone sales solicitations failed to disclose material facts to customers.

40. In or in connection with an offer to enter into, the entry into, the confirmation of, the execution of, or the maintenance of commodity options transactions, Malcolmson and Russo cheated, defrauded, or deceived or attempted to cheat, defraud, or deceive, other persons by making false, deceptive, or misleading representations of material facts and by failing to disclose material facts necessary to make other facts they disclosed not misleading, including but not limited to those statements and omissions identified in paragraphs 17 through 24, all in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulation 33.10(a) and (c), 17 C.F.R. § 33.10(a) and (c).

41. Wilshire, directly or indirectly, controlled WIM and did not act in good faith, or knowingly induced, directly or indirectly, the acts constituting WIM's violations of Section 4c(b) of the Act and Regulation 33.10(a) and (c), 17 C.F.R. § 33.10(a) and (c). Wilshire is therefore liable for these violations pursuant to Section 13(b) of the Act, 17 U.S.C. § 13c(b).

42. The foregoing acts, misrepresentations, omissions and failures of Malcolmson, Russo, and other WIM APs occurred within the scope of each person's employment or office with WIM. WIM is therefore liable for these acts pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B).

43. NCCI, as WIM's guarantor, is jointly and severally liable for WIM's violations of the Act from September 7, 2000 through May 31, 2004, pursuant to their guarantee agreement. Therefore, NCCI is liable for WIM's violations of Section 4c(b) of the Act and Regulation 33.10(a) and (c).

44. Each material misrepresentation or omission made during the relevant time period by Malcolmson, Russo, and other WIM APs, including, but not limited to, those specifically alleged herein, is a separate and distinct violation of Section 4c(b) of the Act and Regulation 33.10(a) and (c).

COUNT TWO

VIOLATION OF SECTION 166.3 OF THE REGULATIONS: FAILURE TO SUPERVISE DILIGENTLY

45. Paragraphs 1 through 44 are re-alleged and incorporated by reference.

46. Wilshire has supervisory duties relating to his business as a Commission registrant.

47. Wilshire has failed to exercise diligently his supervisory duties, including, but limited to the following:

- a. Failing to supervise diligently the sales practices and the sales solicitations of WIM's APs;
- b. Failing to supervise diligently the trading of customer accounts; and
- c. Failing to design, implement, monitor and follow a program of supervision and compliance designed to deter and detect violations of the Act or the Commission's Regulations including, but not limited to, the foregoing

violations of Section 4c(b) of the Act and Section 33.10 of the Commission's Regulations.

48. For the foregoing reasons, Wilshire failed to supervise diligently the handling by his partners, officers, employees and agents (or persons occupying similar status or performing a similar function) of all commodity interest accounts that WIM carried, operated, advised or introduced and all other activities of his partners, officers, employees, and agents (or persons occupying a similar status or performing a similar function) relating to his business as a Commission registrant, in violation of Section 166.3 of the Regulations, 17 C.F.R. § 166.3.

VI. RELIEF REQUESTED

WHEREFORE, the Commission 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, enter:

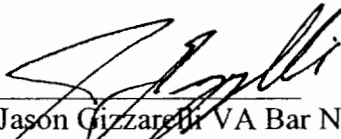
- a) an order finding that:
 - 1. WIM, Wilshire, Russo, Malcolmson and NCCI violated Sections 4c(b) of the Act and Sections 33.10(a) and (c) of the Regulations; and
 - 2. Wilshire violated Section 166.3 of the Regulations;
- b) a permanent injunction prohibiting:
 - 1. WIM, Wilshire, Malcolmson and Russo from engaging in conduct violative of Sections 4c(b) of the Act and Section 33.10 of the Regulations;
 - 2. prohibiting Wilshire from engaging in conduct violative of Section 166.3 of the Regulations; and
 - 3. prohibiting WIM, Wilshire, Malcolmson, and Russo from engaging in any commodity-related activity, including soliciting new customers;
- c) an order directing WIM, Wilshire, Malcolmson and Russo 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) an order directing WIM, Wilshire, Malcolmson, Russo and NCCI to make full restitution, pursuant to such procedure as the Court may order, to every customer whose funds were received by them as a result of acts and practices which constituted violations of the Act and Regulations, as described herein, and interest thereon from the date of such violations;
- e) an order directing WIM, Wilshire, Malcolmson, Russo and NCCI to pay a civil monetary penalty in the amount of not more than the higher of \$120,000 or triple the monetary gain to each defendant for each violation of the Act or Regulations; and
- f) such other and further remedial ancillary relief as the Court may deem appropriate.

Date: 9/13/04

Respectfully submitted,



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