

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

**COMMODITY FUTURES TRADING,  
COMMISSION,**

Plaintiff,

v.

**FXTRADE FINANCIAL, LLC, et al.**

Defendants.

**Case No. 04-2181-D/An**

---

**ORDER FOR ENTRY OF DEFAULT JUDGMENT,  
PERMANENT INJUNCTION, AND ANCILLARY EQUITABLE RELIEF AGAINST  
DEFENDANTS FXTRADE FINANCIAL, LLC; JEFFREY A. MISCHLER;  
MARY JO SIBBITT; ERNST H. BEHR; AND REVERIE LLC**

---

As a result of significant discovery difficulties with defendants, the Commodity Futures Trading Commission (CFTC) filed a number of discovery-related motions with the Court beginning in late 2004. These motions were against, among others, defendants FxTrade Financial, LLC (FxTrade), Jeffrey A. Mischler (Mischler), Mary Jo Sibbitt (Sibbitt), Ernst H. Behr (Behr), and Reverie LLC (Reverie) (collectively, Defaulting Defendants). The Court granted the CFTC's motions to compel discovery and motions for discovery sanctions against Defaulting Defendants throughout 2005 and early 2006. Eventually, Defaulting Defendants' misconduct during the course of this litigation led to the striking of the Defaulting Defendants' answers and the entry of default judgment against Defaulting Defendants. In particular, on January 24, 2006, the Court ordered

Mischler's and FxTrade's Answers stricken and entered default judgments against Mischler and FxTrade (DE #187 and #189); on January 27, 2006, the Court ordered Sibbitt's Answer stricken and entered default judgment against her (DE #190); on February 10, 2006, the Court ordered Behr's Answer stricken and entered default judgment against him (DE #200); and, on March 1, 2006, the Court ordered that default judgment be entered against Reverie (DE #209).

The CFTC has submitted its Application for Entry of Default Judgment, Permanent Injunction, and Ancillary Relief (Application) pursuant to Federal Rule of Civil Procedure 55(b)(2). The Court has considered carefully the First Amended Complaint for a Permanent Injunction, Other Equitable Relief, and Civil Monetary Penalties (DE #52) (Amended Complaint), the allegations of which are well-pleaded and hereby taken as true, the Application, and all oppositions thereto, and being fully advised in the premises, hereby **GRANTS** the CFTC's Application and enters the following findings of fact and conclusions of law finding Defaulting Defendants liable as to all violations as alleged in the Amended Complaint. Accordingly, the Court now issues the following Order for Entry of Default Judgment, Permanent Injunction, and Ancillary Relief Against Defaulting Defendants (Order), which determines that Defaulting Defendants have violated Section 4b(a)(2)(i) and (iii) of the Commodity Exchange Act, as amended (Act), 7 U.S.C. § 1 *et seq.* (2006).

## **FINDINGS OF FACT**

### **A. Parties**

The **Commodity Futures Trading Commission** is an independent federal regulatory agency of the United States that is charged with the responsibility of administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.*, and CFTC Regulations, 17 C.F.R. §§ 1.1 *et seq.* (2005), promulgated thereunder.

**FxTrade Financial, LLC** was a Tennessee limited liability company with its principal place of business at 8653 Heatherly Cove, Germantown, TN 38138. FxTrade has never registered with the CFTC in any capacity.

**Jeffrey A. Mischler** was a managing partner and CEO of FxTrade. Mischler has a last known address of 2506 Forest Hill Irene Road, Germantown, Tennessee 38139. Mischler has never registered with the CFTC in any capacity.

**Mary Jo Sibbitt** was an agent of FxTrade and solicited investors to trade with FxTrade. Sibbitt has a last known address of 551 Roosevelt Road #106, Glen Ellyn, IL 60137. Sibbitt has never registered with the CFTC in any capacity.

**Ernst H. Behr** was an agent of FxTrade and solicited investors to trade with FxTrade. Behr has a last known address of 6698 East Dartmouth Avenue, Denver, Colorado 80224. Behr has never registered with the CFTC in any capacity.

**Reverie LLC** was an Illinois corporation with its principal place of business at 21 W. 611 Glen Park Road, Glen Ellyn, IL 60137. Reverie was owned by Sibbitt and her husband. Reverie has never been registered with the CFTC in any capacity.

**B. Defaulting Defendants Made Fraudulent Misrepresentations and Omissions.**

From at least June 2003 through at least May 2004, FxTrade, by and through its managing partner and CEO Mischler, as well as its agents, solicited individuals to invest in or otherwise provide funds to FxTrade for the purported purpose of trading foreign currency.<sup>1</sup> FxTrade advised investors and potential investors that if they provided FxTrade funds for six months, FxTrade would

---

<sup>1</sup> In an effort to circumvent the Court's March 18, 2004 *Ex Parte* Statutory Restraining Order and the asset freeze contained therein, FxTrade began conducting business through TradeQuest, Inc. in early April 2004. In this Order, the term "FxTrade" will refer to the conduct of both FxTrade and TradeQuest.

invest those funds in foreign currency and provide investors a guaranteed return ranging between three and seven percent a month (for an annual return ranging between thirty-six and eighty-four percent). Further, investors and potential investors were told that their principal would be guaranteed by a standby letter of credit.

Defaulting Defendants, however, were simply operating a Ponzi scheme. In furtherance of this scheme, each of the Defaulting Defendants made misrepresentations and fraudulent omissions to induce investors to trade foreign currency through FxTrade. Defaulting Defendants misrepresented, *inter alia*, who had provided funds to FxTrade, the extraordinary rates of return investors (including certain of the Defaulting Defendants) purportedly enjoyed, the existence of a standby letter of credit to guarantee investors' principal, the foreign currency trading experience and track record of FxTrade and Mischler, and when FxTrade was created. Defaulting Defendants' fraudulent misrepresentations and omissions defrauded nine investors out of \$1,045,500, with the vast majority of these funds never even making it into a foreign currency trading account. As part of defendants' Ponzi scheme, \$127,800 was returned to these investors in the form of monthly return-on-investment payments. Set forth below is a more detailed description of the fraudulent misrepresentations and omissions committed by Defaulting Defendants with respect to various FxTrade investors.

**1. FxTrade, Mischler, and Sibbitt Committed Fraud with Respect to FxTrade Investors Anne Williamson and Barbara Sheehan.**

In June 2003, with Mischler's knowledge and approval, Sibbitt and defendant Lee Romano (Romano) approached Anne Williamson about investing in foreign currency through FxTrade.

Sibbitt and Romano told Ms. Williamson that FxTrade had an established track record of success in trading foreign currency and that it used a proprietary software program that generated recommendations regarding when it should buy and sell various foreign currencies. In addition, Sibbitt told Ms. Williamson that she herself had invested in FxTrade and made approximately \$50,000 in only three weeks. Sibbitt and Romano further told Ms. Williamson that FxTrade investments were "100 percent guaranteed." As a result of these and other representations by FxTrade and Mischler (by and through Sibbitt and Romano), Ms. Williamson invested \$25,000 in FxTrade on June 28, 2003.<sup>2</sup>

In August 2003, with the knowledge and approval of Sibbitt and Mischler, Ms. Williamson passed on to Barbara Sheehan the information that Sibbitt and Romano had conveyed to Ms. Williamson about FxTrade. Ms. Williamson then put Ms. Sheehan in contact with Mischler, who sent Ms. Sheehan an FxTrade account agreement. The FxTrade account agreement promised her a five percent monthly return on her investment and a return of her principal after six months. As a result of the representations made by FxTrade and Mischler (including those through Sibbitt and Romano), Ms. Sheehan invested \$100,000 in FxTrade on August 26, 2003.

Numerous representations made to Ms. Williamson and Ms. Sheehan by FxTrade, Mischler, Sibbitt, and Romano were false. First, contrary to what Ms. Williamson was told, FxTrade did not have an established track record of success in trading foreign currency. In fact, FxTrade did not even exist until July 11, 2003, and FxTrade did not establish a foreign currency futures trading account until the end of August 2003. Moreover, when FxTrade finally did establish foreign

---

<sup>2</sup> Unlike other FxTrade investors, Ms. Williamson was told that she would receive her principal back after thirty days, along with a minimum return of ten percent.

currency trading accounts, its limited trading was highly unsuccessful. Second, Sibbitt claimed that she had made significant profits investing in FxTrade when, actually, she never invested any money with FxTrade. Third, statements made by FxTrade and Mischler (including those through Sibbitt and Romano) with respect to promised rates of return and the guaranteed nature of the investments were simply untrue. Neither Ms. Williamson nor Ms. Sheehan received the monthly payments they were promised, and neither investor (or any other FxTrade investor for that matter) ever received her principal back from FxTrade. At all times, FxTrade lacked the capability to pay investors their promised monthly returns, which was evidenced by, among other things, the losses FxTrade sustained when it traded foreign currency. Further, as a result of these false representations to Ms. Williamson and Mr. Sheehan, Sibbitt received thousands of dollars in commissions from FxTrade.

**2. FxTrade, Mischler, Sibbitt, and Reverie Committed Fraud with Respect to FxTrade Investors Georgene Meagher, Lauralee Souza, and David Wilson, and FxTrade and Mischler Also Committed Fraud with Respect to FxTrade Investor Ronald Vandeveld.**

Beginning no later than December 2003, with Mischler's knowledge and approval, Vandeveld began soliciting investors to provide money to FxTrade. Vandeveld represented, among other things, that FxTrade would use the investors' money to trade foreign currency. Many of Vandeveld's clients, including Georgene Meagher, Lauralee Souza, and David Wilson, spoke with Sibbitt. Vandeveld and Sibbitt told these investors and others that they would receive monthly returns on their investments ranging between three and seven percent. Vandeveld and Sibbitt also told these investors and others that a standby letter of credit would guarantee their principal; thus, an investment in FxTrade was risk free.

These representations by Sibbitt and Vandeveld concerning promised rates of return and the return of principal were false. A standby letter of credit for the benefit of FxTrade or its investors

never existed. Further, none of the investors Vandeveld brought to FxTrade (which included not only Ms. Meagher, Ms. Souza, and Mr. Wilson, but also Vandeveld's brother, Ronald Vandeveld) received all the monthly returns on investment they were promised, and none of them ever received their principal back from FxTrade. At all times, FxTrade lacked the capability to pay investors their promised monthly returns, which was evidenced by, among other things, the losses FxTrade sustained when it traded foreign currency.

Sibbitt made a number of other fraudulent representations and omissions to Ms. Meagher, Ms. Souza, and Mr. Wilson. She told Ms. Meagher and Ms. Souza that Sibbitt's parents had invested money in FxTrade when, in fact, Sibbitt's parents never invested in FxTrade. She further told Ms. Souza that FxTrade had been in existence since 2001, but, as discussed above, FxTrade was not created until July 11, 2003. In addition, Sibbitt neglected to tell Ms. Meagher, Ms. Souza, or Mr. Wilson about FxTrade's poor and extremely brief foreign currency trading record or that FxTrade was a Ponzi scheme.<sup>3</sup>

Mischler communicated with the investors Vandeveld brought to FxTrade as well. Most of Mischler's communications came through FxTrade agents Vandeveld and Sibbitt. Mischler, however, spoke directly to Mr. Wilson. Mischler falsely claimed to Mr. Wilson that Mischler had developed and was using a unique computer program that recommended when to make foreign currency trades for various currencies. Mischler also misrepresented to Mr. Wilson that Mischler had years of experience trading foreign currency and that Mischler had been an extremely successful trader. Further, Mr. Wilson was continually and erroneously told that FxTrade was earning more

---

<sup>3</sup> Sibbitt's representations to Ms. Meagher, Ms. Souza, and Mr. Wilson were made not only on behalf of herself and FxTrade, but also Reverie, which was a company co-owned by Sibbitt and her husband. On or about October 20, 2003, FxTrade and Reverie entered into a broker agreement. Sibbitt and her husband signed the agreement on behalf of Reverie.

than enough money trading foreign currency to pay Mr. Wilson's guaranteed five percent monthly return and earn significant profits for the company. In addition, Mischler, through Vandeveld and Sibbitt, provided FxTrade agreements, falsely promising a guaranteed monthly return and a return of investors' principal within six months, to each of the investors who worked with Vandeveld and Sibbitt.

Based on these fraudulent representations and omissions, Ms. Meagher, Ms. Souza, Mr. Ronald Vandeveld, and Mr. Wilson invested in FxTrade. Ms. Meagher entered into an agreement with FxTrade on December 15, 2003 and invested \$200,000. Ms. Souza entered into an agreement with FxTrade on December 16, 2003 and invested \$80,000. Mr. Ronald Vandeveld entered into an agreement with FxTrade on February 19, 2004 and invested \$96,000. Mr. Wilson entered into an agreement with FxTrade on February 24, 2004 and invested \$200,000. As a result of these investments, FxTrade and Mischler received hundreds of thousands of dollars, and Sibbitt and Reverie received tens of thousands of dollars in commission payments from FxTrade.

**3. FxTrade, Mischler, and Behr Committed Fraud with Respect to FxTrade Investors F. William Yost, Leonard Rutman, and Ann Boudreaux.**

Beginning no later than February 2004, with Mischler's knowledge and approval, Behr began soliciting investors to provide money to FxTrade. Behr told investors and potential investors, among other things, that FxTrade would use the investors' money to trade foreign currency. Behr told investors and potential investors that they would receive five percent monthly returns on their investments (for an annual return of sixty percent), as had other FxTrade investors. Behr also told investors and potential investors that a standby letter of credit would guarantee their principal; thus, an investment in FxTrade was risk free.

These representations made by Behr concerning promised rates of return and the return of



principal were false. A standby letter of credit for the benefit of FxTrade or its investors never existed. Further, none of the investors Behr brought to FxTrade (which included F. William Yost, Leonard Rutman, and Ann Boudreaux) received all the monthly returns on investment they were promised, and none of them ever received their principal back from FxTrade. At all times, FxTrade lacked the capability to pay investors their promised monthly returns, which was evidenced by, among other things, the losses FxTrade sustained when it traded foreign currency.

Behr made a number of other fraudulent representations and omissions. Behr told Mr. Yost, Mr. Rutman, and Ms. Boudreaux that he had personally invested in FxTrade when, in fact, he never invested in FxTrade. Behr also falsely told these investors that he had investigated and researched FxTrade thoroughly, including examining FxTrade's books and records. Further, Behr misrepresented to Mr. Yost and Ms. Boudreaux that Behr had other clients invested in FxTrade in early 2004. Behr even told Ms. Boudreaux that he had clients who invested in FxTrade and had received their principal back. In this regard, Behr went so far as to set up a telephone conference call between a fictitious satisfied FxTrade investor and Ms. Boudreaux. Finally, Behr never told any investor or potential investor that FxTrade was simply a Ponzi scheme.

Behr also misrepresented many other aspects of FxTrade's business and Mischler's background. He falsely claimed to Ms. Boudreaux and Mr. Yost that Mischler and FxTrade had been in business for years and had traded foreign currency very successfully. In fact, Behr told Mr. Yost that Mischler makes more money trading foreign currency than he knows what to do with and that Mr. Yost should have no concerns regarding the security of his FxTrade investment. Further, Behr falsely told Ms. Boudreaux that FxTrade's clients had invested more than \$22 million with FxTrade.

Mischler communicated with the investors Behr brought to FxTrade as well. Most of Mischler's communications came through Behr. Mischler, however, made fraudulent representations and omissions directly to Mr. Yost and Ms. Boudreaux. Mischler told Mr. Yost that Mischler was making a phenomenal amount of money trading foreign currency by following the trading recommendations of a computer program he designed himself—a point echoed by Behr to both Mr. Yost and Mr. Rutman. Mischler further told Mr. Yost that Mischler and FxTrade had been making a lot of money for a number of investors and that all of Mr. Yost's investment would be invested in foreign currency. In addition, Mischler told Ms. Boudreaux that he would be able to pay her a monthly return of five percent because he has been generating those sort of returns trading foreign currency for several years and that her principal was guaranteed. Finally, Mischler provided FxTrade agreements, falsely promising a guaranteed monthly return and a return of investors' principal within six months, to each of the investors who worked with Behr. All these representations by Mischler were false.

Based on these fraudulent representations and omissions, Mr. Yost, Mr. Rutman, and Ms. Boudreaux invested with FxTrade. Mr. Yost entered into agreements with FxTrade on February 27, 2004 and April 2, 2004 and invested a total of \$144,500. Mr. Rutman entered into an agreement with FxTrade on February 27, 2004 and invested \$100,000. Ms. Boudreaux entered into an agreement with FxTrade on April 1, 2004 and invested \$100,000. As a result of these investments, FxTrade and Mischler received hundreds of thousands of dollars, and Behr received tens of thousands of dollars in commissions from FxTrade.

**4. Defaulting Defendants Fraudulently Solicited at Least Twenty-Two Investors.**

In total, Defaulting Defendants fraudulently solicited and provided FxTrade agreements containing fraudulent profit representations to at least twenty-two different potential investors. Specifically, on behalf of FxTrade and Mischler, Sibbitt fraudulently solicited at least six investors (Ms. Meagher, Ms. Sheehan, Ms. Souza, Nancy Stevens, Ms. Williamson, and Mr. Wilson). Also, on behalf of FxTrade and Mischler, Behr fraudulently solicited at least three investors (Ms. Boudreaux, Mr. Rutman, and Mr. Yost). Further, on behalf of FxTrade and Mischler, Reverie fraudulently solicited at least four investors (Ms. Meagher, Ms. Souza, Ms. Stevens, and Mr. Wilson). In addition, through their broker Vandeveld, FxTrade and Mischler fraudulently solicited at least twelve other investors (George Criel, Patricia Criel, Donna Duffy, Frank Hays, Janet Hays, Thomas Howell, Jerrald Miller, Lyle Miller, Dianne Salam, Varun Soni, Dirk Vandeveld, and Ronald Vandeveld). Finally, Mischler, apparently without an FxTrade agent, fraudulently solicited at least one additional investor (Thomas Broertjes).

**C. Defaulting Defendants Misappropriated Investor Funds.**

In addition to the aforementioned fraudulent representations and omissions, Defaulting Defendants misappropriated investor funds. FxTrade trading records reveal that from September 2003 through at least May 2004, FxTrade traded foreign currency futures contracts through two foreign currency trading accounts in its name at Forex Capital Markets, LLC (FXCM), a futures commission merchant (FCM). Although FxTrade received \$1,045,500 from investors, only approximately \$150,000 ever made it into one of these FxTrade foreign currency trading accounts.<sup>4</sup> Of this amount, approximately \$38,000 was lost trading foreign currency and approximately \$91,400

---

<sup>4</sup> In addition, in April 2004, FxTrade and Mischler, through TradeQuest, wired \$50,000 to Advanced Currency Markets, a Swiss FCM, for deposit in a foreign currency trading account.

was withdrawn by Mischler. Given that FxTrade paid its investors a total of \$127,800 and approximately \$267,500 is currently frozen by the Court, approximately \$650,000 remains unaccounted for.

## **CONCLUSIONS OF LAW**

### **A. Federal Rule of Civil Procedure 55(b)(2)**

Federal Rule of Civil Procedure 55(b)(2) provides that judgment by default may be entered by a district court. The grant or denial of a motion for default judgment lies within a district court's sound discretion. *See Brown v. District Attorney General's Office*, 56 F.3d 64, 1995 WL 316567, at \*2 (6<sup>th</sup> Cir. May 24, 1995) (table decision); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1079 (6<sup>th</sup> Cir. 1990) (finding that district court did not abuse its discretion in granting motion for default judgment against *pro se* defendants who failed to comply with plaintiff's court-sanctioned discovery requests). Further, if a district court determines that a defendant is in default, then the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true. *See Fed. R. Civ. Pro. 8(d)* ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."); *Pope v. United States*, 323 U.S. 1, 12 (1944); *Benny v. Pipes*, 799 F.2d 489 (9<sup>th</sup> Cir 1986) (providing that well-pleaded allegations are taken as admitted on default judgment); *Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200 (5th Cir. 1975).

The Court already has entered defaults against each of the Defaulting Defendants. As such, in accordance with Federal Rule of Civil Procedure 55(b)(2), the allegations in the Amended Complaint against Defaulting Defendants will be taken as true for purposes of the CFTC's Application.

## **B. Jurisdiction**

The Court has jurisdiction over the subject matter of this action and Defaulting Defendants pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which authorizes the CFTC to seek injunctive relief against any person whenever it shall appear that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order thereunder. More specifically, the CFTC has jurisdiction over certain foreign currency transactions that are contracts for the sale of a commodity for future delivery, including the transactions alleged in the Amended Complaint. *See* 7 U.S.C. § 2(c)(2)(B).

Venue properly lies with the Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1, in that Defaulting Defendants inhabit and/or transact business in the Western District of Tennessee, and the acts and practices in violation of the Act occurred within this district among other places.

## **C. The Act**

In analyzing the CFTC's Application, the Court must keep in mind a crucial purpose of the Act—"protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived." *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11<sup>th</sup> Cir. 2002). "[C]aveat emptor has no place in the realm of federal commodities fraud. Congress, the CFTC, and the Judiciary have determined that investors must be zealously protected from deceptive statements by brokers who deal in these highly complex and inherently risky financial instruments." *Id.* at 1334. es in violation of the Act occurred within this

district, among other places.

**D. Defaulting Defendants Have Engaged in Fraud in Violation of Section 4b(a)(2)(i) and (iii) of the Act.**

**1. Legal Standard Under Section 4b(a)(2)(i) and (iii) of the Act**

Section 4b(a)(2)<sup>5</sup> of the Act prohibits cheating and defrauding or attempting to cheat or defraud or willfully deceiving or attempting to deceive other persons in connection with commodity futures trading for or on behalf of such persons. More specifically, misappropriating investor funds violates Section 4b(a)(2)(i) and (iii). *See CFTC v. Noble Wealth Data Info. Servs., Inc.*, 90 F. Supp. 2d 676, 687 (D. Md. 2000) (determining that defendants violated Section 4b(a)(2)(i) and (iii) of the Act by diverting investor funds for operating expenses and personal use), *aff'd and adopted in relevant part, Baragosh v. CFTC*, 278 F.3d 319 (4th Cir. 2002); *CFTC v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985) (holding that defendant's misappropriation of customer funds which had

---

<sup>5</sup> Section 4b(a) of the Act provides:

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (A) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (B) determining the price basis of any transaction in interstate commerce in such commodity, or (C) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—(i) to cheat or defraud such other person; (ii) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or caused to be entered for such person any false record thereof; (iii) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or (iv) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling of such person, or become the seller in respect to any buying of such person.

7 U.S.C. § 6b(a)(2).

been entrusted to her for trading violated Section 4b(a) of the Act). A violation of Section 4b(a)(2)(i) and (iii) of the Act also exists when the CFTC demonstrates a misrepresentation, misleading statement, or a deceptive omission on the part of a defendant, made with scienter, that is material. *See R.J. Fitzgerald & Co.*, 310 F.3d at 1329; *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 446-47 (D.N.J. 2000). While what constitutes a misrepresentation, misleading statement, or a deceptive omission is a fairly evident factual matter (especially in light of the facts of this case), slightly greater explanation is needed to determine when a defendant acts with scienter and when a misrepresentation, misleading statement, or deceptive omission is material.

Scienter may be established by showing that: (1) the defendant knew his misrepresentations or omissions were false and calculated to cause harm; or (2) the defendant made the representations with a reckless disregard for their truth or falsity. *See CFTC v. Noble Metals*, 67 F.3d 766, 774 (9<sup>th</sup> Cir. 1995) (providing that scienter exists when defendants act intentionally or with "careless disregard"); *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988) (holding that recklessness is sufficient to satisfy scienter requirement); *CFTC v. Savage*, 611 F.2d 270, 283 (9<sup>th</sup> Cir. 1979) (holding that knowledge cannot be precluded by ignorance brought about by willfully or carelessly ignoring the truth). The CFTC "need not show that defendants acted with an evil motive or an intent to injure[;] rather, recklessness is sufficient to satisfy the scienter requirement." *Rosenberg*, 85 F. Supp. 2d at 448 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976)).

A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *R.J. Fitzgerald*, 310 F.3d at 1328 (internal quotation omitted); *Rosenberg*, 85 F. Supp. 2d at 447. "When the language of a solicitation obscures the important distinction between the possibility of substantial profit and the probability it will be

earned, it is likely to be materially misleading to customers." *In re JCC, Inc.*, No. 89-4 [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,576 n.23 (CFTC May 12, 1994). Accordingly, misrepresentations regarding profit potential are material and constitute fraud with respect to futures transactions under Section 4b(a)(2)(i) and (iii) of the Act. *See, e.g., CFTC v. United Investor Group, Inc.*, 440 F. Supp. 2d 1345, 1358 (S.D. Fla. 2006) (finding material defendant's "misrepresentations and omission concerning his trading record, the potential for huge profits and his own level of trading experience [which] created the false impression that he had vast expertise in commodities trading, that profits were guaranteed and that the only risk variable was whether the customer was willing to act quickly enough to make the trade"); *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1160 (S.D.N.Y. 1979) (involving misrepresentations regarding profitability of investment); *CFTC v. Crown Colony Commodity Options, Ltd.*, 434 F. Supp. 911, 919 (S.D.N.Y. 1977) (involving misrepresentations concerning profit potential); *CFTC v. J.S. Love & Assocs. Options, Ltd.*, 422 F. Supp. 652, 655 (S.D.N.Y. 1976) (involving misrepresentations concerning profit potential and the trading experience of account executives).

## **2. Defaulting Defendants Violated Section 4b(a)(2)(i) and (iii) of the Act.**

Defaulting Defendants violated Section 4b(a)(2)(i) and (iii) of the Act. First, Defaulting Defendants failed to deposit most of the investor funds in FxTrade forex trading accounts. In fact, approximately \$650,000 of the \$1,045,500 invested by FxTrade investors remains unaccounted for. This misappropriation of investor money clearly violates of Section 4b(a)(2)(i) and (iii).

Defaulting Defendants also violated Section 4b(a)(2)(i) and (iii) by falsely representing to the investors and prospective investors, among other things, the extraordinary rates of return FxTrade investors enjoyed, the investments into FxTrade supposedly made by Defaulting



Defendants or their family members, the capital put into FxTrade by its owners, the foreign currency trading experience of those running FxTrade, the existence of a standby letter of credit that allegedly made the investments risk free, and the historical performance of FxTrade, as well as FxTrade's very existence (it was not formed until at least two weeks after "the company" first received investor funds). Moreover, each Defaulting Defendant failed to tell FxTrade investors and prospective investors about the true nature of FxTrade's operation—namely, that it was a Ponzi scheme. Had the FxTrade investors known of the true nature of these misrepresentations and omissions, they would not have invested their funds with Defaulting Defendants; as a result, the misrepresentations and omissions of Defaulting Defendants clearly were material.

Defaulting Defendants made these fraudulent representations and omissions with scienter. FxTrade, Mischler, and Sibbitt knew that the representations made to Ms. Williamson and Ms. Sheehan regarding FxTrade were false. Likewise, FxTrade, Mischler, Sibbitt, and Reverie knew that the representations made to Ms. Meagher, Ms. Souza, Ms. Stevens, and Mr. Wilson regarding FxTrade were false. In addition, FxTrade, Mischler, and Behr knew that the representations made to Mr. Yost, Mr. Rutman, and Ms. Boudreaux regarding FxTrade were false. Also, FxTrade and Mischler knew that the representations made to Mr. Criel, Ms. Criel, Ms. Duffy, Mr. Hays, Ms. Hays, Mr. Howell, Mr. Jerrald Miller, Mr. Lyle Miller, Ms. Salam, Mr. Soni, Mr. Dirk Vandeveld, Mr. Ronald Vandeveld, and Mr. Broertjes were false. Moreover, each of the Defaulting Defendants knew or should have known that the representations contained in the FxTrade investor agreements, which were provided to at least twenty-two FxTrade investors or prospective investors, were false. Finally, Defaulting Defendants knew they were omitting highly material facts to investors and potential investors. As such, Defaulting Defendants' actions involve "highly unreasonable omissions

or misrepresentations that involve not merely simple or inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading [investors] which is either known to the [Defaulting] Defendant[s] or is so obvious that the [Defaulting] Defendant[s] must have been aware of it." *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678 (11<sup>th</sup> Cir. 1988).

## **E. Remedies**

### **1. Permanent Injunction Against Defaulting Defendants**

Pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, the CFTC has made a showing that Defaulting Defendants have engaged in acts and practices which violate Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii). Unless restrained and enjoined by this Court, there is a reasonable likelihood that Defaulting Defendants will continue to engage in the acts and practices alleged in the Amended Complaint and in similar acts and practices in violation of the Act. Based on the conduct described above, the Court enters a permanent injunction against Defaulting Defendants enjoining them from:

- (1) engaging, directly or indirectly, in any activity that violates Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii), including, but not limited to, the following:
  - a. misrepresenting the profit potential of futures trading;
  - b. misappropriating customer funds;
  - c. misrepresenting the existence of a futures trading account;
  - d. omitting material facts necessary to make other facts disclosed not misleading to customers; and
  - e. omitting or downplaying the risks involved in futures trading.
  
- (2) engaging, directly or indirectly, in any activity related to trading in any commodity, as that term is defined in Section 1a(4) of the Act, 7 U.S.C. § 1a(29);

- a. trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29);
  - b. engaging in, controlling or directing the trading for any commodity interest account for or on behalf of any other person or entity, whether by power of attorney or otherwise;
  - c. soliciting or accepting any funds from any person in connection with the purchase or sale of any commodity interest;
  - d. entering into any commodity interest transactions for his own personal account, for any account in which he has a direct or indirect interest and/or having any commodity interests traded on his behalf; and
  - e. engaging in any business activities related to commodity interest trading.
- (3) applying for registration or seeking exemption from registration with the CFTC in any capacity or engaging in any activity requiring registration or exemption from registration, except as provided for in CFTC Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9), and acting, directly or indirectly, as a principal, officer, director, supervisor, agent, or employee of any person registered, required to be registered or exempted from registration, unless such exemption is pursuant to CFTC Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9).

**2. Restitution**

**a. The Court Has Authority to Order Restitution.**

The Court's authority to order restitution is ancillary to the Court's authority to order injunctive relief under Section 6c of the Act, 7 U.S.C. § 13a-1. This authority is founded on the well-established legal principle articulated by the Supreme Court in *Porter v. Warner Holding Co.*:

Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader power and more flexible character than when a private controversy is at stake. Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case."

328 U.S. 395, 398 (1946) (citations omitted).

The Court reaffirmed this principle in *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 296 (1960), where it found that the district court had jurisdiction to order an employer to reimburse employees for lost wages in a suit by the Secretary of Labor to restrain violations of the Fair Labor Standards Act. "[T]he comprehensiveness of [the court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable reference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* at 291 (quoting *Porter*, 328 U.S. at 398).

The Sixth Circuit has followed these principles in granting broad equitable powers to district courts. *See United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 760-761 (6<sup>th</sup> Cir. 1999). "Restitution and disgorgement are part of the courts' traditional equitable authority." *Id.* at 760. "Absent a clear command by Congress that a statute providing for equitable relief excludes certain forms of such relief, [the Sixth Circuit] will presume the full scope of equitable powers may be exercised by the courts." *Id.* at 761; *see also Division No. 1, Detroit, Bhd. of Locomotive Eng'rs v. Consolidated Rail Corp.*, 844 F.2d 1218, 1226 (6<sup>th</sup> Cir. 1988) (stating that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction") (alteration in original) (citation omitted).

Likewise, district courts have followed these same principles in allowing the CFTC to seek restitution on behalf of defrauded investors. *See United Investors Group, Inc.*, 440 F. Supp. 2d at 1359 ("The Court has authority to order restitution as ancillary equitable relief.") (internal quotation omitted); *CFTC v. Commercial Hedge Servs., Inc.*, 422 F. Supp. 2d 1057, 1060 (D. Neb. 2006) (holding that law is well settled that court has authority to order restitution under the ancillary relief

provision in 7 U.S.C. § 13a-1); *Wilshire*, 407 F. Supp. 2d 1304, 1314 (S.D. Fla. 2005); *CFTC v. Midland Rare Coin Exch., Inc.*, 71 F.Supp.2d 1257, 1264 (S.D. Fla. 1999) (holding that the CFTC may seek restitution in order to compensate victims of fraud). This Court, thus, has complete authority to issue ancillary equitable relief, including, but not limited to, ordering Defaulting Defendants to make full restitution to every one of their investors who invested funds as a result of violations of the Act by Defaulting Defendants and their cohorts, plus pre- and post-judgment interest. *See United Investors Group, Inc.*, 440 F. Supp. 2d at 1359-60 (determining that defendant must pay pre- and post-judgment interest on restitution award).

**b. The Amount of Restitution is \$917,700.**

An award of restitution in this case is appropriate to compensate the victims of Defaulting Defendants' fraud. Defaulting Defendants used fraudulent solicitations to entice members of the public to become investors. These investors relied upon these misrepresentations to their detriment. In total, Defaulting Defendants' investors lost \$917,700.

Because each of the Defaulting Defendants participated in a scheme to defraud these investors, the Defaulting Defendants and defendant Romano<sup>6</sup> shall be jointly and severally liable for the restitution award, provided that the joint and several liability of each Defaulting Defendant is capped at the amount of restitution listed below for that person or entity:

FxTrade	\$917,700
Mischler	\$917,700
Sibbitt	\$500,000
Behr	\$326,500
Reverie	\$406,000

These restitution-amount caps represent the total amount invested in FxTrade by investors who dealt with a particular Defaulting Defendant in the course of the fraudulent conduct alleged in the Amended Complaint. Further, the foregoing caps are separate and not cumulative. As such, should the specified restitution-amount cap be satisfied for any individual Defaulting Defendant, that individual Defaulting Defendant is thereafter released fully from making any further restitution. The satisfaction of the restitution-amount cap by any individual Defaulting Defendant, however, will not be credited toward satisfaction of the restitution obligation of any other Defaulting Defendant, except to the extent that the total remaining unpaid restitution amount is less than any particular Defaulting Defendant's restitution obligation.

In addition, Defaulting Defendants should be required to pay pre-judgment interest on the

---

<sup>6</sup> On April 24, 2007, the Court entered its Order for Entry of Default Judgment, Permanent Injunction, and Ancillary Equitable Relief Against Defendant Lee N. Romano II (DE # 331), which found that Romano is jointly and severally liable with FxTrade, Mischler, and Sibbitt for the \$125,000 invested in FxTrade by Ms. Williamson and Ms. Sheehan.

restitution amount (beginning from the date the particular investor provided money to Defaulting Defendants to the date of this Order) to be paid at the then prevailing underpayment rate established by the Internal Revenue Service pursuant to 26 U.S.C. § 6621 and post-judgment interest (which shall begin accruing on the date of this Order) to be paid at the then prevailing Treasury Bill rate pursuant to 28 U.S.C. § 1961. All restitution payments (including all pre-judgment interest) shall be immediately due and owing as of the date of this Order.

**c. A Monitor Shall Be Appointed to Effect Payment by Defaulting Defendants and Distributions to Defaulting Defendants' Investors.**

To effect payment by Defaulting Defendants and distribution to Defaulting Defendants' investors, the Court appoints Daniel A. Driscoll of the National Futures Association (NFA) (or whomever else may be selected within the NFA) as Monitor (Monitor). The Monitor shall collect restitution payments from Defaulting Defendants, compute pro-rata allocations to injured FxTrade investors identified in the FxTrade Investor List (attached as Exhibit 1 to this Order), and make restitution distributions consistent with this Order. Defaulting Defendants shall submit restitution payments, made out to "FxTrade Restitution Fund," and sent by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order, to:

Daniel A. Driscoll, Monitor  
National Futures Association,  
200 W. Madison Street, #1600  
Chicago, Illinois 60606-3447

under a cover letter that identifies the paying Defaulting Defendant and the name and docket number of the proceeding. The paying Defaulting Defendant simultaneously shall transmit a copy of the cover letter and the form of payment to:

Office of Cooperative Enforcement  
Division of Enforcement  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

The Monitor shall oversee Defaulting Defendants' restitution obligation and shall make periodic distributions of funds to investors as appropriate. Based upon the amount of funds available, the Monitor may defer distribution until such time as he deems a distribution to be cost-efficient and otherwise appropriate. Restitution payments shall be made in an equitable fashion as determined by the Monitor to the individuals contained on the FxTrade Investor List and to any other FxTrade investor upon sufficient proof of his or her investment in FxTrade. Omission from the FxTrade Investor List shall in no way limit the ability of any investor to seek recovery from Defaulting Defendants or any other entity or person. Further, the amounts contained in the FxTrade Investor List shall not limit the ability of any investor to prove that a greater amount is owed from Defaulting Defendants or any other entity or person, and nothing herein shall be construed in any way to limit or abridge the rights of any investor that exist under state or common law. In addition, because the Monitor is not being specially compensated for these services, and these services are outside the normal duties of the Monitor, he shall not be liable for any action or inaction arising from his appointment as Monitor, other than actions involving fraud.

### **3. Civil Monetary Penalties**

Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1), provides that "the [CFTC] may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation [of the Act] a civil penalty." For the time period at issue in the case at bar, the civil monetary penalty shall be "not more than the greater of \$120,000 or triple the



monetary gain to such person for each such violation." CFTC Regulation 143.8(a)(1)(ii), 17 C.F.R. § 143.8(a)(1)(ii).

"In determining how extensive the fine for violations of the Act ought to be, courts and the [CFTC] have focused upon the nature of the violations." *Noble Wealth Data*, 90 F. Supp. 2d at 694. In this regard, the CFTC has stated:

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

*CFTC v. Emerald Worldwide Holdings, Inc.*, 2005 WL 1130588, \*11 (C.D. Cal. Apr. 19, 2005) (citing *In re GNP Commodities, Inc.*, [1990-92 Transfer Binder] Com. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (CFTC 1992)) (citations omitted).

This case warrants imposition of substantial civil monetary penalties against Defaulting Defendants. See *United Investors Group, Inc.*, 440 F. Supp. 2d at 1361 (determining that, among other things, "the gravity of the offenses, the brazen and intentional nature of the violations, [and] the vulnerability of the victims" justified "imposition of a substantial and meaningful [civil monetary penalty]"). Defaulting Defendants repeatedly lied to investors and misappropriated the vast majority of the \$1,045,500 of FxTrade investor funds. This fraudulent conduct constitutes serious violations

of the Act that strike at the core of the Act's regulatory system. *See In re Premex*, [1987-90 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at 34,890-91 (CFTC Feb. 17, 1988) ("[C]onduct that violates core provisions of the Act's regulatory system—such as manipulating prices or defrauding customers—should be considered very serious.").<sup>7</sup>

Defaulting Defendants fraudulently solicited and provided FxTrade agreements containing fraudulent profit representations to at least twenty-two different investors and potential investors. Specifically, on behalf of FxTrade and Mischler, Sibbitt fraudulently solicited at least six investors (Ms. Meagher, Ms. Sheehan, Ms. Souza, Ms. Stevens, Ms. Williamson, and Mr. Wilson). Also, on behalf of FxTrade and Mischler, Behr fraudulently solicited at least three investors (Ms. Boudreaux, Mr. Rutman, and Mr. Yost). Further, on behalf of FxTrade and Mischler, Reverie fraudulently solicited at least four investors (Ms. Meagher, Mr. Souza, Ms. Stevens, and Mr. Wilson). In addition, through their broker Vandeveld, FxTrade and Mischler fraudulently solicited at least twelve other investors (Mr. Criel, Ms. Criel, Ms. Duffy, Mr. Hays, Ms. Hays, Mr. Howell, Mr. Jerrald Miller, Mr. Lyle Miller, Ms. Salam, Mr. Soni, Mr. Dirk Vandeveld, and Mr. Ronald Vandeveld). Finally, Mischler, apparently without an FxTrade agent, fraudulently solicited at least one additional investor (Mr. Broertjes).

Although Defaulting Defendants made numerous fraudulent representations to each of these investors and potential investors, for purposes of assessing civil monetary penalties, this Court shall

---

<sup>7</sup> Additionally, in late January 2005, Defaulting Defendants admitted to engaging in contemptuous conduct during this action. *See* Consent Order Regarding Plaintiff's Motion for Contempt, Immediate Compliance with Court Orders, and Sanctions (DE# 75). Further, FxTrade's and Mischler's continuing contemptuous conduct led to the unlawful withdrawal of nearly \$200,000 in what were supposed to be frozen investor funds during late 2005 and much of 2006. This conduct was the subject of the CFTC's Second Motion for Contempt, Immediate Compliance with Court Orders, and Sanctions (DE #237).

treat each deceived investor and potential investor as a single violation of Section 4b(a)(2)(i) and (iii) of the Act. See *United Investors Group, Inc.*, 440 F. Supp. 2d at 1361 (deciding to treat defendant's dealings with each of the testifying customers as a single violation of the Act and determining that a \$120,000 civil monetary penalty was a reasonable penalty assessment for each of the five testifying customers—for a total civil monetary penalty of \$600,000). Accordingly, Defaulting Defendants shall be assessed civil monetary penalties as follows:

FxTrade—\$2,640,000 (\$120,000 \* 22 investors)

Mischler—\$2,640,000 (\$120,000 \* 22 investors)

Sibbitt—\$720,000 (\$120,000 \* 6 investors)

Behr—\$360,000 (\$120,000 \* 3 investors)

Reverie—\$480,000 (\$120,000 \* 4 investors)

All civil monetary penalties assessed against Defaulting Defendants shall be immediately due and owing as of the date of this Order. Further, post-judgment interest, calculated in the same manner as post-judgment interest on restitution, as discussed above, shall begin accruing as of the date of this Order.

Defaulting Defendants shall pay their civil monetary penalties by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order made payable to the Commodity Futures Trading Commission and sent to

Commodity Futures Trading Commission  
Division of Enforcement  
Att'n: Marie Bateman—AMZ-300  
DOT/FAA/MMAC  
6500 S. MacArthur Boulevard  
Oklahoma City, Oklahoma 73169

If payment by electronic transfer is chosen, contact Marie Bateman at 405-954-6569 for instructions.

Each Defaulting Defendant shall accompany payment of the civil monetary penalty with a cover letter that identifies the Defaulting Defendant and the name and docket number of the proceeding.

Each Defaulting Defendant shall simultaneously transmit a copy of the cover letter and the form of payment to:

Office of Cooperative Enforcement  
Division of Enforcement  
Commodity Futures Trading Commission  
Three Lafayette Centre, 1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

#### **4. Attorney's Fees**

Defaulting Defendants have been ordered to pay the CFTC attorney's fees for their respective and repeated discovery misconduct. Because Defaulting Defendants have failed to pay any of these amounts, they shall be required to do so as part of this Order. The amount of attorney's fees each of the Defaulting Defendants previously has been ordered to pay is as follows:

FxTrade—\$297

Mischler—\$2,790

Sibbitt—\$3,247

Behr—\$800

Reverie—\$297

Defaulting Defendants shall submit payments regarding these attorney's fees sanctions in the same manner that they submit payments regarding civil monetary penalties as set forth in the immediately preceding section of this Order.

#### **F. Miscellaneous Provisions**

**Order of Payments:** Defaulting Defendants' obligations to pay restitution, civil monetary penalties, and attorney's fees sanctions are all due and owing as of the date of this Order. Should a Defaulting Defendant, however, not be able to satisfy all these obligations at the same time, payments from that particular Defaulting Defendant shall first be used to satisfy the restitution obligation for that particular Defaulting Defendant. After a Defaulting Defendant's restitution obligation is satisfied fully, then the payments for that Defaulting Defendant shall be applied to satisfaction of the civil monetary penalty. Only after full satisfaction of a Defaulting Defendant's restitution and civil monetary penalty obligations shall that Defaulting Defendants' payments be applied to the attorney's fee sanctions.

**Notification of Financial Institutions:** The CFTC shall provide each of the financial institutions identified in this paragraph (and any other financial institution which may have any assets of Defaulting Defendants as of the date of this Order) with a copy of this Order. Within thirty (30) days of receiving a copy of this Order, each of the financial institutions identified in this paragraph is specifically directed to liquidate and release any and all funds held by Defaulting Defendants in any account as of the date of the entry of this Order, whether the account is held singly or jointly with another Defaulting Defendant or by a Defaulting Defendant in any other capacity, and to convey by wire transfer to an account designated by the Monitor, any and all funds contained in those accounts, less any amounts required to cover the banks' reasonable and outstanding administrative or wire transfer fees. The transfer of such funds represents an offset to Defaulting Defendants' aggregate joint and several restitution obligations. At no time during the liquidation, release, and/or wire transfer of these funds pursuant to this Order shall Defaulting Defendants be afforded any access to, or be provided with, any funds from these accounts.

Defaulting Defendants, as well as all banks and financial institutions affected by this Order, shall cooperate fully and expeditiously with the CFTC and the Monitor in the liquidation, release, and wire of any of Defaulting Defendants' funds. The accounts to be liquidated, released, and transferred include those held at the following financial institutions:

FxTrade/TradeQuest	Forex Capital Markets
, Inc.	SunTrust Bank
	AmSouth Bank
Mischler	Forex Capital Markets
	AmSouth Bank
	SunTrust Bank
Sibbitt/Reverie	Parkway Bank & Trust Co.

**Equitable Relief:** The equitable relief provisions of this Order shall be binding upon Defaulting Defendants and any person who is acting in the capacity of officer, agent, employee, servant, or attorney of Defaulting Defendants, and any person acting in active concert or participation with Defaulting Defendants, and those equitable relief provisions that relate to restitution shall be binding on any financial institutions listed above or on any other entity holding frozen funds or assets of the Defaulting Defendants, who receives actual notice of this Order by personal service or otherwise.

**Notices:** All notices required to be given to the CFTC or the NFA by any provision in this Order shall be sent certified mail, return receipt requested, as follows: Notice to CFTC: Attention -

Director of Enforcement, Commodity Futures Trading Commission, Division of Enforcement, 1155 21<sup>st</sup> Street N.W., Washington, DC 20581; Notice to NFA – Daniel Driscoll, National Futures Association, 200 W. Madison St., #1600, Chicago, IL 60606-3447.

**Continuing Jurisdiction of this Court:** This Court shall retain jurisdiction of this cause to assure compliance with this Order and for all other purposes related to this action.

**DECRETAL PROVISIONS**

In light of the foregoing, it is **ORDERED** and **ADJUDGED**:

1. The **INJUNCTIVE RELIEF** requested in the CFTC's Amended Complaint is **GRANTED** as outlined above.

2. The CFTC is awarded a judgment of **RESTITUTION** against Defaulting Defendants in the total amount of \$917,700, plus pre-judgment interest (beginning from the date the particular investor provided money to Defaulting Defendants) to be paid through the date of this Order at the prevailing underpayment rate established by the Internal Revenue Service (pursuant to 26 U.S.C. § 6621) plus post-judgment interest to be paid on the resulting total restitution obligation from the date of this Order until it is paid in full at the Treasury Bill rate prevailing on the date of this Order (pursuant to 28 U.S.C. § 1961). Defaulting Defendants shall be jointly and severally liable for the restitution award, provided that the joint and several liability of each such person or entity is capped at the amount of restitution listed immediately below for the particular person or entity:

FxTrade        \$917,700

Mischler       \$917,700

Sibbitt	\$500,000
Behr	\$326,500
Reverie	\$406,000

All restitution payments (including all pre-judgment interest) shall be immediately due and owing as of the date of this Order.

As set forth above, the Monitor shall collect restitution payments from Defaulting Defendants and distribute any funds paid to restitution (including pre- and post-judgment interest) for the period beginning with the date of entry of this Order and continuing until distribution of the complete restitution obligation called for by this Order. Defaulting Defendants shall submit restitution payments, made payable to "FxTrade Restitution Fund," to:

Daniel A. Driscoll, Monitor,  
National Futures Association,  
200 W. Madison Street, #1600  
Chicago, Illinois 60606-3447

under a cover letter that identifies the paying Defaulting Defendant and the name and docket number of the proceeding. The paying Defaulting Defendant simultaneously shall transmit a copy of the cover letter and the form of payment to

Office of Cooperative Enforcement  
Division of Enforcement  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

3. The CFTC is awarded the following **CIVIL MONETARY PENALTIES:**



FxTrade	\$2,640,000
Mischler	\$2,640,000
Sibbitt	\$720,000
Behr	\$360,000
Reverie	\$480,000

All civil monetary penalties shall be immediately due and owing as of the date of this Order. Further, Defaulting Defendants shall pay post-judgment interest on the civil monetary penalties from the date of this Order until the civil monetary penalties are paid in full, at the rate provided in 28 U.S.C. § 1961.

Defaulting Defendants shall pay their civil monetary penalties by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order made payable to the Commodity Futures Trading Commission and sent to:

Commodity Futures Trading Commission  
Division of Enforcement  
Att'n: Marie Bateman—AMZ-300  
DOT/FAA/MMAC  
6500 S. MacArthur Boulevard  
Oklahoma City, Oklahoma 73169

If payment by electronic transfer is chosen, contact Marie Bateman at 405-954-6569 for instructions. Each Defaulting Defendant shall accompany payment of the civil monetary penalty with a cover letter that identifies the Defaulting Defendant and the name and docket number of the proceeding. Each Defaulting Defendant shall simultaneously transmit a copy of the cover letter and the form of payment to:

Office of Cooperative Enforcement  
Division of Enforcement

Commodity Futures Trading Commission  
Three Lafayette Centre, 1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

4. The Defaulting Defendants once again are ordered to pay previously assessed **ATTORNEY'S FEES** sanctions to the CFTC for Defaulting Defendants' respective and repeated discovery misconduct. Because Defaulting Defendants have failed to pay any of these amounts, they shall be required to do so as part of this Order. The amount of attorney's fees each of the Defaulting Defendants previously has been ordered to pay is as follows:

FxTrade—\$297

Mischler—\$2,790

Sibbitt—\$3,247

Behr—\$800

Reverie—\$297

Defaulting Defendants shall submit payments regarding these attorney's fees sanctions in the same manner that they submit payments regarding civil monetary penalties as set forth in the immediately preceding section of this Order.

5. Defaulting Defendants shall not transfer or cause others to transfer funds or other property to the custody, possession, or control of any other person for the purpose of concealing such funds or property from the Court, the CFTC, the Monitor, or any other officer that may be appointed by the Court to monitor the payment of Defaulting Defendants' restitution, civil monetary penalty, or attorney's fees obligations.

This Court shall retain jurisdiction of this case to assure compliance with the Order and for all other purposes related to this action.

**IT IS SO ORDERED** this 27th day of September, 2007.

s/Bernice B. Donald  
BERNICE B. DONALD  
U.S. DISTRICT COURT JUDGE