UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

COMMODITY FUTURES TRADING COMMISSION,	:	
Plaintiff	:	**CIVIL ACTION NO. 02-61307-civ-gold**
v.	:	
DONALD C. O'NEILL, FRECOM TECHNOLOGY CORPORATION, MOMENTUM TRADING GROUP, LTD., NDT FUND, LLC, ORCA FUNDS, INC., ORCA CAPITAL FUND A, LLC, ORCA MOHAVE A, LLC, ORCA HOPI A, LLC, and SHELALEY HOLDINGS, LLC,	:	
Defendants, and	:	
DANIELLE O'NEILL, NANCY IAGROSSI, and ROBERT O'NEILL,	:	
Relief Defendants.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR STATUTORY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION AND OTHER EQUITABLE RELIEF

I. PRELIMINARY STATEMENT

Starting in January 2001 and continuing through at least July 2002, if not later, Donald O'Neill ("O'Neill"), the individual defendant, operating through a series of companies he owned, controlled or managed, fraudulently solicited off-exchange futures investments totaling least $13 million from at least 29 investors. O'Neill used the defendant companies, some of whose operations were touted as a "hedge fund," to misappropriate a minimum of $10.6 million of investor funds, and used the money for business, personal and luxury expenditures.

Defendants solicited customers to trade primarily foreign currency contracts using private placement memoranda and websites replete with material, flat-out falsehoods. They claimed to have hundreds of millions of dollars under management, although they never came close to attracting or managing those kinds of funds, and touted O'Neill's substantial trading experience with a financial firm that turns out not to exist. They further claimed that defendants had an excellent trading track record, which was untrue.

Defendants also provided customers with materially false and fictitious account statements (including at least one account statement that was entirely fabricated using the "trading" output of a dummy account), and told certain customers that their funds were being traded at two brokerage firms that turn out to be mere corporate accommodation addresses, rather than going concerns. O'Neill even fabricated correspondence from one of the fictitious firms to himself that he later provided to customers.

O'Neill spent at least $5.75 million of the misappropriated funds to finance an extravagant lifestyle that included a nearly-$3 million home for himself and two other houses for his wife and mother-in-law in an exclusive Florida coastal community; several high-end automobiles; more than $900,000 in airplane charters; and junkets to Las Vegas over a period of 45 days (accompanied by business colleagues and a high-priced call girl) that resulted in gambling losses of over $800,000. O'Neill also also wrote sizeable checks to cash and to himself, as well as and to his wife, mother-in-law and brother, each of whom is named as a Relief Defendant. Other misappropriated funds were used to pay salaries, leasing and contracting costs, and other expenses to maintain the charade of a legitimate business operation.

Defendant O'Neill and the corporate defendants, acting as a common enterprise, therefore committed fraud by (1) falsely soliciting retail and other investors to trade foreign currency futures contracts, (2) making false statements relating to those investments, and (3) misappropriating customer funds for personal and other uses. The Defendants have engaged, are engaging or are about to engage in acts and practices which violate Sections 4b(a)(2)(C)(i)-(iii) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 6(b)(a)(2)(C)(i)-(iii) (2001), and Commission Regulation 1.1, 17 C.F.R. §1.1 (2002).

The Commission brings this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2001), to enjoin the unlawful acts and practices of Defendants and to compel their compliance with the Act. Unless 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 set forth below.

To halt defendants' fraud and preserve the ability to redress the injury suffered by customers, the Commission seeks a statutory restraining order pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 ("Section 6c"), freezing assets of the defendants as well as the identified relief defendants who received customer funds or proceeds without providing any bona fide services in exchange; preserving and permitting inspection of defendants' books and records; requiring an accounting for and repatriation of any off-shore funds; and appointing a temporary receiver for defendants. The Commission also seeks an order to show cause why a preliminary injunction should not be issued, pursuant to Section 6c of the Act, prohibiting the defendants from violating Section 4b(a) of the Act and Commission Regulation 1.1.

Urgency of Requested Emergency Relief

This is a matter of some urgency. Defendant O'Neill currently has contracts to sell homes and real property that were partly or entirely purchased with victims' funds, and these properties represent the only significant source of potential restitution funds for investors. The properties are scheduled to go to closing on September 20 and September 25, 2002. Without the requested statutory restraining order, defendant O'Neill will convey the properties to innocent third parties and the sale proceeds most likely will be lost to investors. To prevent the defendants from continuing to defraud the public, and to preserve the only significant assets that may provide redress for customer injuries, the Commission urges that the Court enter the requested statutory restraining order. The Commission has dealt with defendants' counsel during its investigation and has given notice of this filing to defendants.

II. THE PARTIES

Brief descriptions of the parties appear below; more extended descriptions appear in the Parties Appendix.

A. Plaintiff: The 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*. (2001)**,** and the regulations promulgated thereunder. The Commission's principal offices are at Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

B. Defendants: The individual Defendant, Donald Craig O'Neill ("O'Neill") is, or was until lately, a resident of City of Lighthouse Point (Broward County), Florida. The corporate Defendants comprise eight interrelated companies that, together, constitute a common enterprise ("Orca Common Enterprise"). O'Neill has or had control over all the entities of the Orca Common Enterprise. O'Neill and the Orca Common Enterprise are collectively "the Defendants."

C. Relief Defendants: The relief defendants are three family members of O'Neill's, who acted as gratuitous beneficiaries and custodians of the fraudulently obtained customer funds. None of the defendants or relief defendants are or have ever been registered with the Commission in any capacity.

III. FACTUAL BACKGROUND

A. The Orca Common Enterprise

The Defendants have engaged and may still be engaging in a common scheme orchestrated by O'Neill to solicit investments from customers for the purpose of foreign currency futures trading and then steal the funds. O'Neill is the primary manager, salesman and trader of the scheme. (Declaration of Patricia Gomersall, ¶¶ 5, 10, 13, 55-57)[1] The latest defendant company to be added to the scheme, Shelaley Holdings, has solicited $1.1 million dollars since its formation in April 2002. (Gom. Dec. ¶32, Ex. 10.)

The Orca Common Enterprise consists of the entity Defendants, each of which was controlled, operated and/or managed by O'Neill. (Gom. Dec. ¶5, 10, 13, 55-57.) Orca Funds, one of the entities, was marketed at times as a "hedge fund." (Gom. Dec. ¶29, Ex. 14.) All Orca Common Enterprise entities had either bank or brokerage accounts in their names, and many had both. (Gom. Dec. ¶¶10-21; Exs. 15-16.) O'Neill routinely moved money between and among accounts held in the name of various Orca Common Enterprise entities without regard to corporate niceties. (Gom. Dec. ¶¶56, 58; Exs. 1-8, 15-16.) Each entity operated out of wherever O'Neill was doing business at the time. Other than by signatures on resolutions authorizing aspects of private placement offerings and accounts at banks and brokerage firms, companies in

[1] The Gomersall Declaration is referred to as "Gom. Dec.," its Attachment A as "Att. A," and the exhibits to Attachment A as "Ex. __." References to exhibits, standing alone, refer to the exhibits appended to Attachment A of the Gomersall Declaration.

the Orca Common Enterprise did not approve or authorize corporate actions in a formal fashion. (Gom. Dec. ¶58.)

B. Defendants Fraudulently Solicited Investors

Defendants, sometimes claiming that entities in the Orca Common Enterprise operated as "hedge funds," have solicited customers using a number of techniques, including advertisements on the website www.thestreet.com; relationships with persons employed by Orca Common Enterprise entities; O'Neill's presentations at investor conferences; private placement offering memoranda ("PPMs"); and websites of certain Orca Common Enterprise entities. (Gom Dec. ¶¶24, 29, 39, 41, 43; Exs. 11, 18, 24, 25, 31, 32.) Certain solicitation material, including the PPMs, were rife with fraudulent representations, ranging from huge discrepancies between the amounts Defendants claimed to have under management and the amounts they actually controlled, to flat-out lies about O'Neill's trading track record, professional experience and academic background.

Specifically, on the www.orcafunds.com website, and on account statements provided to customers, O'Neill claimed that he or entities in the Orca Common Enterprise managed either $200 or $300 million in investor funds. (Gom. Dec. ¶40; Exs. 14, 18, 39.) Also in PPMs, O'Neill claimed that he was a highly successful currency trader, such that he "consistently outperformed the leading market indices over the past three years." Further, O'Neill claimed in PPMs to be a highly experienced trader, with a "wealth of international business and global finance expertise" with "several years of trading experience in the hedge/currency environment, … work[ing] with respected trading houses such as Nakamura Security Holdings in Munich … ." Finally, O'Neill claimed to be a graduate of the University of Nebraska, to have lettered on Nebraska's football team, and to have garnered a graduate degree in business organizations from Clemson University. (Gom. Dec. ¶41; Ex. 32.)

All those statements were designed to gain investor confidence by bolstering O'Neill's apparent experience, training and ability to handle the funds of his prospective and existing investors, and all were entirely false. O'Neill had no such trading track record. In fact, he and the Orca Common Enterprise sustained almost a half-million dollar net losses in the limited trading they did undertake for customers. Further, O'Neill had no such business experience. Nakamura was a virtual business address in Munich that O'Neill himself created with the assistance of an overseas business services company. It never operated as a going concern.

Finally, O'Neill had no such education. He attended the University of Nebraska for one year, and neither received a degree nor a letter in any sport. Clemson University does not even offer the degree O'Neill claimed to have received, and states that O'Neill was never a student there. (Gom. Dec. ¶¶ 42, 46-49; Exs. 27-30.)

Through these fraudulent solicitations and others, the defendants collected at least $13 million from at least 29 customers during the period January 1, 2001 through July 2002. (Ex. 39.) The defendants commingled customer funds in numerous bank accounts at First Union National Bank in Florida and in multiple brokerage accounts. The money flowed in large quantities, and frequently, between and among the different financial accounts, usually winding up far from where it was initially supposed to go. (Gom. Dec. 56.)

C. Defendants Sustained Net Losses Trading Customer Funds

Trading only a minority of the funds invested with them, and generally only for short time periods at that, Defendants transferred substantial investor funds into and out of foreign currency futures trading firms such as Hotspot FX, Inc. of New Jersey, Global Futures and Forex, Ltd. of Michigan ("GFT"), Refco Group Ltd., LLC of New York, and Forex Capital Markets, LLC. All of those firms are registered with or affiliated with registrants of the Commission as futures commission merchants ("FCMs"). (Gom. Dec. ¶15.) Defendants also used customer funds to trade securities at Blackwood Securities, a day-trading securities firm no longer in existence, which cleared through Penson Financial, a registered securities broker-dealer in Texas. (Gom. Dec. ¶12-14.) Most funds, however, were either parked at those firms briefly before being sent to non-trading accounts, or were traded for only brief periods. Defendants lost approximately $372,000 trading foreign currency futures contracts, and approximately $115,000 trading securities at Blackwood Securities through Penson Financial. In total, defendants sustained trading losses totaling approximately $487,000. (Gom. Dec. 22; Ex. 9.)

D. Defendants Provided Customers with False and Fabricated Account Statements and with Fictitious Correspondence and Insurance Policies

After investing funds with O'Neill through one or more of the various entities of the Orca Common Enterprise, several customers discovered they were not getting timely account statements that described the status and value of their accounts. Customers reported that getting account statements required numerous telephone calls to O'Neill. (Ex. 19, ¶ 15) Defendants sent some customers false statements, and O'Neill provided at least one customer with a trading

statement that O'Neill had dummied up from a computer run of "trades" in a "demo" account that did not reflect the trading of real funds.[2] (Gom. Dec. ¶44 ;Exs. 25-26.)

O'Neill told certain customers that he was trading with or transferring their funds to a brokerage firm in Germany, Nakamura Securities ("Nakamura"). In fact, Nakamura exists only as a "virtual company" O'Neill established with a corporate hosting company in Munich, as a website that O'Neill registered but never activated, and as e-mail addresses O'Neill established through with Microsoft's free e-mail service, Hotmail. Nakamura was never a going concern. (Gom. Dec. ¶¶46-50; Exs. 27-28.)

O'Neill also provided certain customers with copies of e-mails and letters purportedly sent by Nakamura staff to O'Neill, discussing certain funds transfers and investments. However, O'Neill actually created and sent to himself the purported correspondence from Nakamura, and then provided it to customers to exonerate himself from blame for, and to obfuscate queries about, delays in transferring and returning customer funds and responding to customer inquiries. (Ex. 27.)

O'Neill also provided a phony "insurance policy" to Native American tribal investors, purporting to insure the principal of their investments against fraud, among other things. The policy was ostensibly issued by or through Nakamura. (Ex. 37.)

O'Neill also told at least one customer that his funds were being transferred to Alexus Capital Group, purportedly an Australian financial services company. In fact, Alexus Capital Group is not registered with the Australian authorities, but instead is a purported "shelf company" offered through an Internet corporate hosting company to businesses all over the world in need of a corporate off-shore shell. The hosting company is located in the Pacific island nation of Vanatu. (Gom. Dec. ¶¶50, 51, Ex. 28, 37) O'Neill never transferred any funds to Alexus Capital Group, if it even exists. (Ex. 12.)

E. <u>Defendants Misappropriated At Least $10.6 Million in Customer Funds</u>

O'Neill misappropriated at least $10.6 million of customer funds. (Gom. Dec. ¶36.) Among the customers whose investments wound up feeding O'Neill's wastrel lifestyle were

[2] In fact, defendants' business in the last several months has been nothing but a sham. In forming Orca Funds, one of the entities in the Orca Common Enterprise, O'Neill obtained several dummy or "demo" electronic trading accounts from a forex futures commission merchant, and provided them to Orca Funds' traders as though they were genuine trading interfaces. The traders actively traded those accounts for several months, believing they were trading customer funds, and without knowing that they were trading dummy accounts. (Gom. Dec. 45, Ex. 35.)

family members and friends of his business colleagues, individual investors and two tribes of Native Americans.[3] (Gom. Dec. ¶ 35.)

The Native Americans were particularly hard-hit by the fraud O'Neill perpetrated with the Orca Common Enterprise. The Hopi Tribal Housing Authority, an agency of the Hopi tribe located in New Mexico, and the Fort Mojave tribe located in Arizona, separately invested a total of nearly $10 million with Orca through its purported constituent funds, Orca Mohave and Orca Hopi, between October 2001 and January 2002. We believe O'Neill subsequently sent fictitious account statements to the trading advisor for those tribes, showing that the investments were profitable. In the meantime – although he was, in fact, trading a minority of the invested funds and eventually returned some of the funds to the tribes – O'Neill misappropriated most of the money and converted much of it to personal expenditures. (Gom. Dec. ¶ 33.)
Defendants also misappropriated other customers' funds. For example, one customer invested $50,000 in Orca Capital A January 2002, but no portion of that investment was ever used for investment or trading purposes. Instead, O'Neill converted it all, spending it on payroll, office and personal expenditures, and to provide payments to certain customers. (Gom. Dec. ¶33(c).) Similarly, in June 2002, a customer invested $100,000 through Orca Capital Fund A, and O'Neill converted all of those funds to non-investment, non-trading uses. Defendants sent nearly $60,000 to the Native American tribes, and at least another $25,000 disappeared into payroll, office and O'Neill's personal expenditures. (Gom. Dec. ¶33(d).)

Overall, of the $13 million or so collected by the Orca Common Enterprise, O'Neill and his entities lost about $487,000 trading and refunded approximately $1.9 million to customers. O'Neill therefore misappropriated at least $10.6 million. (Gom. Dec. ¶ 36)

O'Neill used the misappropriated funds for the following personal expenditures, among many other purposes: three trips to Las Vegas between January and March 2002, during which O'Neill lost nearly $900,000 gambling; a down payment of approximately $1 million and subsequent monthly mortgage payments on the $3 million house he purchased in the exclusive Lighthouse Point neighborhood of Broward County, Florida and shared with Relief Defendant Danielle O'Neill; at least $800,000 in private jet charters; frequent cash gifts of $5,000, $10,000

[3] The Fort Mohave tribe may be an "eligible contract participant" ("ECP") within Section 1a(12) of the Act, 7 U.S.C. §1a(12) (2001), and the tribe's investments therefore may arguably be outside the Commission's jurisdiction. For the present, the Commission offers these facts to illustrate the egregiousness of defendants' actions in a fraudulent scheme over which the Commission has clear jurisdiction through other, non-ECP customers.

and $20,000 to Relief Defendants Danielle O'Neill, Nancy Iagrossi, Robert O'Neill, friends and others; and personal goods and services, some of which he gave to or shared with Relief Defendant Danielle O'Neill, including clothing, vacations, expensive cars, a JetSki, and watches; and online wine auctions, online gambling enterprises, call girls and a mistress. (Gom. Dec. ¶34)

F. O'Neill Controlled All The Orca Common Enterprise Entities

O'Neill is a director, officer and/or manager of every company in the Orca Common Enterprise. He signed and directed the signing of company checks, authorized wire transfers, signed correspondence and concocted phony correspondence to customers, solicited and dealt with customers, ordered computer trading interfaces from forex futures commission merchants, hired and fired staff, opened, closed and traded forex accounts and directed the expenditure of the investors' proceeds. (Gom. Dec.¶ .)

IV. ARGUMENT

Given the substantial evidence that the defendants fraudulently sold and may still be selling illegal foreign currency futures, the Commission requests that the court enter an immediate statutory restraining order, on notice, against the defendants pursuant to Section 6c of the Act. Immediate statutory relief is required to: (1) locate, identify, and freeze assets of the defendants and relief defendants so that they can be preserved for restitution should the Commission prevail on the merits, and (2) preserve the defendants' books and records and provide the Commission with access to them so that the extent of the defendants' misconduct can be determined. A preliminary injunction is necessary to prevent the defendants from further violating the Act pending a trial in this matter.[4]

A. Section 6c Of The Act Authorizes the Court To Grant The Requested Relief

Section 6c(a) of the Act acknowledges that "the destruction of books and records and the dissipation of customer funds" may occur in instances such as these, and authorizes courts to issue the requested relief "to prevent possible removal or destruction of potential evidence or other impediments to legitimate law enforcement activities and to prohibit movement or disposal

[4] Several courts of the Eleventh Circuit have previously entered emergency statutory restraining orders and injunctive relief at the request of the CFTC and other federal agencies. *See, e.g., CFTC v. MAD Financial, Inc.*, 2002 WL 1972063 (slip. op.) (S.D. Fla. April 8, 2002); *CFTC v. International Currency Strategies, Inc.*, Civil Action No. 01-8350 (S.D. Fla Apr. 23, 2001); *CFTC v. Garbe*, Case No. 01-8329 (S.D.Fla Apr. 18, 2001); *CFTC v. James*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,611 (N.D.Ga Apr. 16, 1999); *CFTC v. Stephens*, Case No. 1:00-CV-0184-4 (M.D. Ga Oct. 24, 2000).

of funds, assets, and other property which may be subject to lawful claims of customers." H.R. Rep. No. 97-565, at 53-54, 93 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3902-03, 3942. Such relief will "ensure that the court maintains jurisdiction over [the defendants'] assets, in order to allow the court the opportunity to determine later whether disgorgement of illegally acquired profits is appropriate." *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 679 (S.D.N.Y. 1979). An order prohibiting the destruction of records and granting the Commission access to inspect and copy records will allow the Commission to identify the defendants' assets, and determine the identity of any other victims of the defendants' scheme. Such relief will "preserve the status quo while an investigation is conducted to clarify the sources of various funds." *Id.,* 484 F. Supp.at 678 (S.D.N.Y. 1979).

An asset freeze is also appropriate where, as in this case, the Commission seeks disgorgement and restitution. *See CFTC v. Trending Cycles for Commodities, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,013 at 23,970 (S.D. Fla. Mar. 17, 1980); *see also SEC v. Unifund Sal*, 910 F.2d 1028, 1041 (2d Cir. 1990) (finding that a district court may order an asset freeze so as "to facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation is established at trial").

Also, because customer funds may have been funneled offshore, the proposed restraining order requires the defendants to provide an accounting of and repatriate their foreign-held assets. *See SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673 (D.D.C. 1995) (promoters of investment scheme held in contempt for failure to disclose location and disposition of investor funds and for failure to repatriate funds collected from investors which had been sent overseas).

The defendants also should be required to provide the Commission with signed consent forms that will enable the Commission to obtain full disclosure of foreign financial information. "An order to compel defendants to sign a consent form is a permissible method of obtaining that discoverable information in a civil context, provided that the form of the consent does not abrogate defendants' Fifth Amendment or due process rights." *SEC v. College Bound, Inc.*, 155 F.R.D. 1, 2 (D.D.C. 1994) (citations omitted). The consent form attached to the proposed Order filed with this motion contains identical language to a foreign asset consent form approved by the Supreme Court in *Doe v. United States*, 487 U.S. 201, 205-06 (1988).

Immediate access to the defendants' business premises is appropriate. Because defendants operated or operate a common scheme under the names of different corporations, the

Commission requests unfettered access to the current business premises of defendants, regardless of whether business currently is being conducted there under the names of the constituent Orca Common Enterprise entities or some other name. In order to effectuate service on all parties, as well as obtain and view records, the Commission requests that the Preliminary Injunction hearing be scheduled for the week of September 30, 2002, or at such other time as the Court deems appropriate.[5]

B. The Evidence Meets The Standard For Entry Of A Statutory Restraining Order And A Preliminary Injunction

Unlike private actions for equitable relief, a Commission action for injunctive relief is a creature of statute. The injunctive relief contemplated in Section 6c of the Act is remedial in nature and designed to prevent injury to the public, afford redress to aggrieved persons, and deter future violations. Therefore, restrictions ordinarily associated with private litigation, such as proof of irreparable injury or inadequacy of other remedies, are inapplicable. *See CFTC v. IBS, Inc*., 113 F. Supp. 2d 830, 848 (W.D.N.C. 2000); *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978); *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979), *cert. denied*, 442 U.S. 921 (1971); *SEC v. Princeton Economic Int'l.*, 73 F. Supp.2d 420, 422 (S.D.N.Y. 1999) (court's analysis applied to SEC and CFTC, co-plaintiffs that were simultaneously moving for injunctions). The Court has "broad discretion" to grant such statutory relief, including an asset freeze and temporary receivership, when presented with "[a] prima facie case of illegality." *Muller*, 570 F.2d at 1300; *SEC v. First Fin. Group*, 645 F.2d 429, 438 (5th Cir. 1981).

The Commission is entitled to injunctive relief upon a *prima facie* showing that a violation has occurred and that there is "a reasonable likelihood that the wrong will be repeated." *SEC v. Unique Financial Concepts, Inc.*, 196 F.3d 1195, 1199 n.2 (11th Cir. 1999); *Kemp v. Peterson*, 940 F.2d 110, 113 (4th Cir. 1991); *CFTC v. Hunt*, 591 F.2d at 1220. Upon a showing that the Act has been violated, irreparable injury may be presumed. *See Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984), *cert. denied sub nom.,* 469 U.S. 882 (1984) (finding presumption of irreparable injury in statutory enforcement action);; *SEC v. R.J. Allen & Assoc., Inc.*, 386 F. Supp. 866, 875 (S.D. Fla. 1974) (no showing of irreparable injury required where statute requires only a proper showing of need for injunctive relief). Past misconduct is "highly suggestive of the likelihood of future violations." *See Hunt*, 591 F.2d at 1220; *CFTC v.*

[5] The statutory restraining order is not subject to the provisions of Rule 65. Accordingly, there is no 10-day expiration period, and the restraining order remains in effect until further order of the Court.

MAD Financial, Inc., 2002 WL 1972063 (slip. op.) (S.D. Fla. April 8, 2002) ("likelihood of future violations of the Commodity Exchange Act can be inferred from Defendants' past illegal conduct"); *CFTC v. Heritage Cap. Ad. Svcs.* [1982-1984 Transfer Binder] Comm. Fut. L. Rep. ¶ 21,627 at 26,385 (N.D. Ill. Nov. 8, 1982).

Here, the evidence presented to the Court by means of declarations and exhibits provides a sufficient *prima facie* showing that a violation of the Act has occurred. As such, the Commission is entitled to a statutory restraining order and further injunctive relief.

C. The Commission Has Jurisdiction Over Defendants' Foreign Currency Transactions

1. The Parties are Within the Commission's Jurisdiction

Defendants' acts violated Section 4b(a) of the Act, 7 U.S.C. § 6b(a), involving fraud in or in connection with orders for future delivery of foreign currency to members of the general public who are not eligible contract participants under the Act. Section 2(c)(2)(B) of the Commodity Exchange Act, 7 U.S.C. § 2(c)(2)(B) (2001), provides that the Commission shall have jurisdiction over foreign currency contracts, so long as (a) the futures contract is "offered to, or entered into with, a person that is not an eligible contract participant" (i.e., retail customers), and (b) the counter-party to the futures contract, or the person offering to be the counter-party, is not a regulated entity, as defined in the Act.

O'Neill and the Orca Common Enterprise defendants have solicited, accepted funds for, and purportedly entered into commodity futures transactions without seeking required designation from the Commission as a contract market. Many, if not most, of the customers solicited by defendants were not eligible contract participants, and are therefore retail customers.[6] (Ex. 18, ¶ 26; Ex. 19, ¶ 18; Ex. 24, ¶19; Ex. 25, ¶10.) Defendants are not regulated entities or exempt financial institutions as defined in the Act and consequently are not proper counterparties for retail forex transactions. (Gom. Dec. ¶ 54.) *See* section 2(c)(2)(B) of the Act, 7 U.S.C. §2(c)(2)(B) (2001). O'Neill and the Orca Common Enterprise therefore have violated Section 4b(a) of the Act and Commission Regulation 1.1.

[6] Defendants marketed certain Orca Common Enterprise businesses as "hedge funds," targeting wealthy investors. As noted in fn. 3, above, some customers may be eligible contract participants and therefore not retail customers.

2. The Foreign Currency Contracts are Futures Within the Commission's Jurisdiction

When determining whether foreign currency contracts are futures contracts, "[t]he transaction must be viewed as a whole with a critical eye toward its underlying purpose." *CFTC v. Co Petro*, 680 F.2d 573 at 581 (9th Cir. 1982). Despite the absence of a bright-line test, in *CFTC v. Wellington Precious Metals, Inc.*, et al., 1988 U.S. Dist. LEXIS 17381 (S.D. Fla. July 12, 1988), the court was faced with the determination of whether the metals contracts marketed by Wellington amounted to futures contracts. The Wellington contracts required the customer to make a down payment for a quantity of metal at a price specified at the time of the "purchase," for delivery when the customer paid the balance. The Wellington contracts were sold as a means to speculate on price increases in silver, and customers were not required to take delivery but could, instead, enter into offsetting transactions. Addressing the jurisdictional issue, the court held that a futures contract has the following characteristics: it is an agreement or contract to buy or sell a specified commodity, for delivery in the future, at a price determined when the contract is entered, and obligates both parties to fulfill the contract at the specified price. The court further noted that the contract may be fulfilled either through payment of the balance due and delivery of the commodity, or through offset, and that it is entered primarily to assume (speculate) or shift (hedge) the risk of price change in a commodity, without actually transferring ownership of the commodity." *Wellington*, 1988 U.S. Dist. LEXIS 17381 at *24. The court held that the Wellington contracts were futures contracts. Id. at *24-25. *See also*, *CFTC v. Midland Rare Coin Inc.*, 71 F. Supp. 2d, 1257 (S.D. Fla. October 20, 1999) (applying the same six characteristics of a futures contract identified in *Wellington*).

Under the factors enunciated by the *Wellington* court, the Orca Common Enterprise contracts are futures contracts: they are for the purchase of a specific currency; the agreement is for future – as opposed to immediate or deferred – delivery (when the balance is paid off); the price is established at the time the contract is entered into; both the customer and the Orca Common Enterprise are obligated to fulfill the terms at that price; customers may enter into offsetting transactions and fulfill their obligations; and the customers enter into the contracts primarily to speculate without taking possession of the currency.

The Orca Common Enterprise contracts fit the criteria of futures contracts as set forth by other courts as well. Applying a similar, holistic approach, other federal courts have arrived at

similar conclusions: contracts entered into by the general public for purposes of speculation and under which delivery is not anticipated are futures contracts. *See, e.g., CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 772-73 (9th Cir. 1995) (futures contracts allow investors to hedge against price changes, provide that a specific quantity at a specific price will be "delivered" to the buyer at a specific date, and allow the purchaser to enter into offsetting transactions as means to avoid taking delivery); *Co Petro*, 680 F.2d at 578-81 (contracts that were "speculative ventures" with no expectation of delivery were futures contracts). More recently, the U.S. District Court for the District of Maryland held that a futures contract is:

> a contract for the purchase or sale of a commodity for delivery in the future at a price established at the time the contract is initiated . . . [and] may be fulfilled through offset, cancellation, cash settlement or other means to avoid delivery, and is entered into primarily to hedge or speculate upon price changes in the commodity without transferring ownership of the commodity.

CFTC v. Noble Wealth Data Info. Servs., Inc., 90 F. Supp.2d. 676, 688 (D. Md. March 20, 2000).

As is the case with many illicit foreign currency trading operations, the Defendants claim to sell "spot" contracts. The Commission and the courts, however, have "not hesitated to look behind whatever self-serving labels the instruments might bear." *In re First Nat'l Monetary Corp*., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,698 at 30,974 (*citing CFTC v. National Coal Exch., Inc*., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,424 at 26,054 (W.D. Tenn. 1982)). The contracts offered and sold by the Defendants are not "spot" transactions designed to effect the delivery of actual currency, and no evidence exists that delivery occurred.

Many if not most of the Orca Common Enterprise customers are retail investors; none takes delivery of or intends to take delivery of foreign currency, and none has the means or reason to acquire physical foreign currency. The customers who purchase these contracts have no commercial need for the foreign currency. Instead, customers enter into these contracts to speculate and profit from anticipated price fluctuations in the markets for these currencies. Customers do not anticipate taking and do not take delivery of the foreign currencies they purchase. *See Co Petro*, 680 F.2d at 529 (contracts sold for speculative purposes with no expectation of delivery are futures contracts not spot contracts) and *Noble Metals Int'l*, 67 F.3d 766 (where there is no legitimate expectation that customers will take delivery, the contracts are futures contracts).

D. O'Neill's Controlling Person Liability

O'Neill is liable for violations by all the entities of the Orca Common Enterprise pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), because he controls each of those entities and either knowingly induced, directly or indirectly, their violations or has not acted in good faith in connection with their violations. "A fundamental purpose of Section 13(b) is to allow the Commission to reach behind the business entity to its controlling individual and to impose liability for violations of the Act directly on such individual as well as on the entity itself." *In re Glass & Guttman*, [1996-98 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,337 (CFTC 1998); *see also In re Apache Trading Corp*., [1992-94 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,251 at 38,794 (CFTC 1994). Controlling person liability attaches if a person possesses the ability to control the activities upon which primary liability is predicated, even if that ability was not exercised. *See Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993). "Knowing inducement" includes any "actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue." *In re Spiegel,* [1987-90 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103 at 34,767 (CFTC 1988).

O'Neill is a controlling person of all the entities in the Orca Common Enterprise. He acts as a director, officer or member of every entity except Shelaley, for which his wife is the sole managing member of record. Even there, however, Shelaley gave O'Neill exclusive power of attorney to manage its funds, which was the only business that Shelaley conducted. O'Neill has been and is responsible for managing the day-to-day operations of each entity, and directly misappropriated funds from the Orca Common Enterprise for himself and others. As such, O'Neill is liable as a controlling person of each of the Orca Common Enterprise Defendants for their violations of Section 4b(a) of the Act, 7 U.S.C. §6b(a).

E. The Defendants Engaged In Fraud In Violation Of Section 4b(a) Of The Act And Commission Regulation 1.1

Defendants have violated and are violating Section 4b(a) of the Act, 7 U.S.C. §6b(a), and Commission Regulation 1.1, 17 C.F.R. §1.1, in or in connection with the sale of foreign currency futures contracts, in that they cheated and defrauded customers by misappropriating customer funds, solicited customer investments by willfully making material misrepresentations, and willfully deceived customers about material aspects of the operation of the Orca Common Enterprise. The Commission establishes a violation of its anti-fraud provisions when it

demonstrates that: (1) defendants made misrepresentations or deceptive omissions; (2) the misrepresentations were made with scienter; and (3) the misrepresentations are material. *CFTC v. Commonwealth Financial Group, Inc.*, 874 F. Supp. 1345, 1354-55 (S.D. Fla. 1994) (in an enforcement proceeding under antifraud provision Section 4b(a), reliance by customers is irrelevant); *Hammond v. Smith Barney Harris Upham & Co.* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC Mar. 1, 1990) (scienter is a necessary element of proof for a violation Section 4b(a)), *aff'd sub nom., JCC, Inc. v. CFTC*, 63 F.3d 1557 (11th Cir. 1995); *In re Staryk*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,701, at 43,923-24 (CFTC June 5, 1996), *aff'd in rel. part,* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,515 at 47,374 (CFTC Dec. 4, 1998) (outlining requirements for options fraud under Section 4c(b) of the Act and noting parallels with Section 4b(a) of the Act).

Scienter may be established by showing that: (1) the defendants knew their misrepresentations were false and calculated to cause harm; or (2) the defendants made the representations with a reckless disregard for their truth or falsity. *CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 774 (9th Cir. 1995); *see also Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677-80 (11th Cir. 1988) (discussing scienter requirement of parallel commodity pool antifraud provision Section 4o of the Act, 7 U.S.C. § 6o); *Staryk* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,701, at 43,926 (CFTC June 5, 1996) (discussing scienter requirement of parallel options antifraud provision Section 4c(b) of the Act).

A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *CFTC v. Noble Wealth Data Info. Services, Inc.*, 90 F. Supp.2d 676, 686 (D. Md. 2000); *Sudol v. Shearson Loeb Rhoades, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 at 31, 119 (CFTC Sept. 30, 1985) (citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). Inasmuch as these statements affect the customer's likelihood of achieving profits, there is every reason to believe that a reasonable investor would consider such statements important in making an investment decision. All manner of misrepresentations have been deemed material. *See, e.g., CFTC v. J.S. Love & Assocs. Options, Ltd.*, 422 F. Supp. 652, 655 (S.D.N.Y. 1976) (misrepresentations concerning profit potential and the trading experience of account executives were material).

As discussed in more detail above, the defendants baldly misrepresented facts about O'Neill's track record and the trading experience, as well as about the amount of funds under management when soliciting investors for transactions in foreign currency futures. Further, defendants misrepresented that customer funds had been invested with legitimate companies when in fact those companies were phony. O'Neill and the Orca Common Enterprise therefore violated acted with scienter in making material misrepresentations in or in connection with the sale of foreign currency futures contracts, in violation of Section 4b(a) of the Act and Commission Regulation 1.1.

F. Liability of Defendants

1. O'Neill and the Orca Common Enterprise

When determining whether a common enterprise exists, courts look to a variety of factors, including: common control, *Sunshine Art Studios, Inc. v. FTC*, [1973-2 TRADE CASES ¶ 74,610], 481 F.2d 1171, 1175 (1st Cir. 1973), *Waltham Precision Instrument Co. v. FTC*, [1964 TRADE CASES ¶ 70,992], 327 F.2d 427, 431 (7th Cir.), *cert. denied,* 377 U.S. 992 (1964); the sharing of office space and officers, *Zale Corp. and Corrigan-Republic, Inc. v. FTC,* 473 F.2d 1317*,* 1320 (5th Cir. 1973); *Delaware Watch Co. v. FTC*, [1964 TRADE CASES ¶ 71,106], 332 F.2d 745, 746 (2d Cir. 1964); whether business is transacted through 'a maze of interrelated companies,' *Delaware Watch*, 332 F.2d at 746; the commingling of corporate funds and failure to maintain separation of companies, *SEC v. Elliott*, 953 F.2d 1560, 1565 n. 1 (11th Cir. 1992); unified advertising, *Zale Corp*., 473 F.2d at 1320; and evidence which "reveals that no real distinction existed between the Corporate Defendants," *Jordan Ashley*, 1994-1 TRADE CASES (CCH) ¶ 70,570 at 72,035; *FTC v. Wolf*, 1996 WL 812940, *7 (S.D. Fla. Jan. 31, 1996). As a common enterprise, these defendants are jointly and severally liable for the acts of the common scheme. *Id.* at *8. *See also CFTC v. Noble Wealth Data Information Services, Inc.*, 90 F. Supp. 2d 676, 691 (D. Md. 2000) (concluding that when two firms were formed as successors to original corporation, and the successors were operated by the same individuals and used the same marketing materials as one another, all three firms were jointly and severally liable for violations of the Act).

The individual entity defendants operated as a common enterprise. Defendants generally employed the same types of sales solicitations for foreign currency futures. They used similar solicitation documents, similar websites, commingled funds liberally and transferred funds

among corporate accounts indiscriminately. They failed to maintain corporate separation. There is no meaningful distinction among the entity defendants. (Gom. Dec.¶ ¶ 55,56.) Therefore, these corporations are engaged in a common enterprise and are jointly and severally liable for violations of Section 4b(a) of the Act and Commission Regulation 1.1.

2. Relief Defendants

A relief defendant is a person or entity who (i) has received ill-gotten funds or proceeds, and (ii) does not have a legitimate claim to those funds. *CFTC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998). A relief defendant may either be a gratuitous beneficiary of the proceeds from the principal defendants' fraud or merely the custodian of the principal defendants' assets. *CFTC v. Hanover Trading Co.,* 34 F. Supp.2d 203, 207 (S.D.N.Y. 1999). In either case, the relief defendants have not performed any bona fide services for the funds or provided fair value for the assets and consequently have no cognizable ownership interest in the funds or assets. *CFTC v. IBS, Inc.*, 113 F. Supp. 2d 830 at 855 (W.D.N.C.). A court may freeze the assets of a relief defendant. *SEC v. Heden*, 51 F. Supp.2d 296, 299 (S.D.N.Y. 1999).

Danielle O'Neill, Nancy Iagrossi and Robert O'Neill are gratuitous beneficiaries and custodians of customer funds, since they received and may still possess substantial funds, property or proceeds from the sale of assets deriving from the Orca Common Enterprise. (Ex. 15, ¶__.) "The paradigmatic nominal defendant is a 'trustee, agent, or depositary. . .[who is] joined purely as a means of facilitating collection.'" *SEC v. Collello*, 139 F.3d at 674 (9th Cir. 1998). Since the funds sent to those Relief Defendants are proceeds of the Orca Common Enterprise's violations, they should not be permitted to retain these funds. *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187 (4th Cir. 2002)(concluding that district court with subject matter jurisdiction over underlying enforcement action has authority to recover tainted funds traced to relief defendants).

G. <u>Appointment of a Receiver</u>

Whether a receiver shall be appointed in a preliminary injunction is a matter within the discretion of the court, and is appropriate where, as in this case, it is necessary to protect the public interest. *Morgan, Harris,* 484 F. Supp. at 677. *Cf. SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972) (courts repeatedly have upheld the appointment of receivers to effectuate the purposes of the federal securities laws). The appointment of a receiver is necessary to identify defendants' assets and prevent diversion or waste of the defendants' assets

to the detriment of customers. Id. The receiver can investigate the defendants' activities and ascertain the defendants' financial status and the identity of investors. *CFTC v. American Metal Exch. Corp.*, 693 F. Supp. 168, 196(D.N.J., 1988).

V. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court grant Plaintiff's motion for a statutory restraining order and an order requiring defendants to show cause why a preliminary injunction should not be issued.

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Respectfully submitted,

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