UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

v.

MAD FINANCIAL, INC., AKA MEYERS, ARNOLD, AND DAVIDSON, FINANCIAL, INC., CTU, INC., AKA COOPER, THOMAS, AND UNGAR, INC., AND MICHAEL A. DIPPOLITO,

Defendants.

CIVIL ACTION NO. 02-60239
CIV-HURLEY

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

FILED UNDER SEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

I. INTRODUCTION

Since at least April 2001 and up to at least January 2002, defendants MAD Financial, Inc., a.k.a., Myers, Arnold, and Davidson Financial, Inc. ("MAD") and CTU Inc., a.k.a., Cooper, Thomas and Ungar, Inc. ("CTU") (collectively the "corporate defendants") have fraudulently sold foreign currency option contracts to customers nationwide from various locations in Florida. Defendant Michael Dippolito ("Dippolito") is the director of the two corporate defendants. Over the past year, the corporate defendants have solicited and received more than $200,000 from customers by promising extraordinary profits while minimizing the risk of loss. Despite the corporate defendants' claims, no option contracts are purchased; instead the investments are diverted for corporate defendants' and Dippolito's personal expenditures. Unless the Court issues a Restraining Order, defendants will continue their fraudulent sales practices and continue to misappropriate customer funds.

The corporate defendants cold call customers and boast of tremendous, risk free, profits that can be made immediately through investments in foreign currency options on the Eurodollar ("Euro"), Japanese Yen ("Yen") or British Pound ("Pound"). Customers are told that the firm has allegedly pre-purchased blocks of foreign currency option contracts, and since the purchase date, the contracts have already increased in value. Customers invest between $1,300 to $25,000 and are told that they will be charged anywhere from 2 to 2.5% commission on their profits. Customers are told that since they are offered the option contracts at the firm's purported purchase price, they can earn an immediate profit. The corporate defendants further claim that the market conditions for the particular foreign currency option offered by their firm are excellent, and if they invest immediately they can, for example, expect to triple their money. While touting the virtual success of the contracts, defendants fail to adequately disclose the risks involved in trading foreign currency options.

Despite the corporate defendants' representations, no option contracts are ever purchased by defendants. Customers do not earn any profits and never see their money again. Instead, defendants spend customer funds on personal expenses such as clothing, jewelry, hotels, and 1-900 calls. Once a customer has invested, his or her contact with the firm is typically limited to solicitations for further investment. Customer inquires concerning the status of funds already invested are deflected or ignored. The corporate defendants do not operate out of a fixed business location, but instead use cell phones, postal drop boxes, Kinko's fax machines, and other tools to create the appearance of an on going business.

By routinely misrepresenting potential profit and the associated risks of their options contracts, MAD and CTU are violating Commission Regulation Section 4c(b) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 6c(b) (1994) ("Section 4c(b)"), and Commission Regulation 32.9, 17 C.F.R. §32.9 (2001) ("Regulation 32.9"). By misappropriating customer funds, the corporate defendants and Dippolito are violating Commission Regulation Section 4c(b) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 6c(b) (1994) ("Section 4c(b)"), and Commission Regulation 32.9, 17 C.F.R. §32.9 (2001) ("Regulation 32.9"). Because the alleged options contracts offered by the corporate defendants are not consummated on or subject to the rules of a contract market or a derivatives transaction execution facility designated by the Commodity Futures Trading Commission ("The Commission"), MAD and CTU violate Section 4c(b) of the Act and Commission Regulations 32.11 and 33.3(a), 17 C.F.R. §§ 32.11 and 33.3(a) (2001), ("Regulation 32.11") and ("Regulation 33.3"). By failing to make the required disclosures to customers or prospective customers, such as the risks associated with trading options, MAD and CTU further violate Commission Regulation 32.5, 17 C.F.R. § 32.5 ("Regulation 32.5").

To halt defendants' fraud and to preserve the ability to redress the injury suffered by customers, the Commission seeks an *ex parte* statutory restraining order pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 [1] ("Section 6c"), freezing assets of the defendants, and preserving and permitting inspection of defendants' books and records. 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 4c(b) of the Act and Commission Regulations 32.5, 32.9, 32.11, and 33.3.

Without the requested *ex parte* order, defendants will be able to continue to defraud the public, and victims will have little hope of obtaining redress for their injuries. The Commission has filed this motion under seal and without giving notice to defendants in order to ensure that no books or records are destroyed and no assets are hidden.

[1] Section 6c(a) of the Act authorizes the Commodity Futures Trading Commission to bring an action to enjoin violations of the Act or any rule, regulation, or order promulgated thereunder. 7 U.S.C. § 13a-1(a) (1994). Pursuant to Section 6c(a), such actions may be brought in the district where the defendant is found or transacts business, or where the illegal activity occurred, is occurring, or is about to occur. 7 U.S.C § 13a-1(e) (1994).

II. THE PARTIES

The Plaintiff

Commodity Futures Trading Commission (the "Commission") is an independent federal regulatory agency charged by Congress with the administration and enforcement of the Act, 7 U.S.C. §§ 1, et seq., and the regulations promulgated thereunder, 17 C.F.R. §§ 1, et seq. (2000).

The Defendants

MAD Financial, Inc., aka Meyers, Arnold and Davidson, Inc. ("MAD") is a Florida corporation, which designates, in its certificate of incorporation, its principal place of business as 630 North West 13 St. Apt. 13, Boca Raton, Florida 33486. MAD was administratively dissolved on September 21, 2001, but has solicited customers as recently as January 2002. MAD has never been registered with the Commission in any capacity, nor has it been designated by the Commission as a contract market or a derivatives transaction execution facility for the trading of options on foreign currency or options on foreign currency futures contracts.

CTU, Inc., aka Cooper, Thomas and Ungar, Inc. ("CTU") is a Florida corporation, which designates, in its certificate of incorporation, its principal place of business as 3032 East Commercial Boulevard, Suite 52, Fort Lauderdale, Florida, 33308. CTU has never been registered with the Commission in any capacity nor has it been designated by the Commission as a contract market or a derivatives transaction execution facility for the trading of options on foreign currency or options on foreign currency futures contracts.

Michael Anthony Dippolito ("Dippolito") is the named director of both MAD and CTU, and is the sole registered agent for both firms. His last known address is 630 N. West 13th St., Apt. 13, Boca Raton, Florida, 33480. He has never been registered with the Commission in any capacity.

III. STATEMENT OF FACTS

The Operation of MAD and CTU

Defendants MAD and CTU appear to be interrelated corporations that do not have a fixed business location. As detailed below, customers report that both MAD and CTU utilize the same sales pitches, in that both defendants solicit customers to purchase blocks of pre-purchased foreign currency options to experience guaranteed profits. (Ex. 3 ¶3; 4 ¶3; 5 ¶3; 6 ¶3; 8 ¶3). Unbeknownst to the customers, the corporate defendants utilize various postal drop boxes and unidentified Federal Express pick up stations, and unidentified copying service centers for fax transmissions, in lieu of real offices. (Ex. 1 ¶5, 14, 15, 16; 2 ¶3, 5, 6; 3 ¶16, Attachments J, K, L; 4 ¶8, Attachment B). The postal drop boxes are located in two different areas of Florida: Ft. Lauderdale and Wilton Manners. (Ex. 1 ¶5; 2 ¶3, 5). The address listed in the articles of incorporation as the registered office of CTU is a postal mail drop and serves as the mailing address of MAD. (Ex. 1 ¶5; 2 ¶5; 7 Attachment A; 11). The address listed in the articles of incorporation as the registered office of MAD is the address of a condominium formerly owned by defendant Dippolito. (Ex. 1¶5; 2 ¶6, Attachment E; 10).

The corporate defendants share the same officer and director, solicitation materials, and facsimile number, among other things. (Ex. 1 ¶4, 15; 2 ¶5, 6; 3 Attachment A; 4 Attachment A; 5 Attachment A, B; 6 Attachment A, C; 7 Attachment A, B, C; 8 Attachment A, B; 9 Attachment B, D, E, G, H, I; 11; 12). Michael Dippolito is the only officer and director listed on the incorporation documents for both firms. (Ex. 10; 11). Persons who represent that they are either "partners" or "brokers" from either MAD or CTU solicit customers through telemarketing calls. (Ex. 3 ¶2; 4 ¶2; 5 ¶2; 6 ¶2; 7 ¶2; 8 ¶2; 9¶ 5). Without physical office space, the corporate defendants conduct their business via cell phone and facsimile machine. (Ex. 1 ¶ 14-16; 2 ¶2; 3 ¶16, Attachment J-L).

Account documentation sent to MAD and CTU customers are virtually identical and include the same facsimile number, (954) 351-7017, which is actually a fax number of a Kinko's Copy Center in Ft. Lauderdale, Florida. (Ex. 1 ¶15; 3 ¶16, Attachment A, K; 4 Attachment A; 5 Attachment A, B; 6 Attachment A, C; 7 Attachment A-C; 8 Attachment A, B; 9 Attachment B, D, E, G, H, I). Both firms also provide customers with the same solicitation brochure entitled "Introduction to the New Global Marketplace." (Ex. 3 Attachment A; 7 Attachment A). MAD and CTU also have separate corporate accounts at same bank in Jacksonville, Florida, which Dippolito set up. (Ex. 1 ¶3, 6; 5 Attachment B; 8 Attachment B).

The Fraudulent Sales Practices

The corporate defendants solicit customers through cold calls, in which they claim that customers will realize extraordinary profits immediately by investing in pre-purchased foreign currency option contracts, specifically in the Yen, the Pound or the Euro. (Ex. 1 ¶2, 7; 3 ¶ 2, 3, 5, 7; 4 ¶2,3, 5-7; 5 ¶2, 3, 5, 7, Attachment D pg. 9-10; 6 ¶2-5, 7-13; 8 ¶2-4, 6-9). These claims generally fall within two categories: 1) the options contracts have already appreciated in value, and 2) the contracts are also poised to move dramatically in value due to known market conditions. (Ex. Id.; 9 ¶5). The corporate defendants' cold calls attempt to create a sense of urgency by requesting that customers invest immediately before this allegedly promising, but fleeting, opportunity passes them by. (Ex. Id.). Customers who initially decline to invest are subsequently informed in follow-up calls of the profits missed and are "pitched" again to invest. (Ex. 3 ¶3, 5, 6, 7, 9; 4 ¶5, 6; 5 ¶5, 7, 8; 6 ¶5, 8; 8 ¶6-8). Underscoring the time sensitivity of the investment, customers are faxed detailed wiring instructions and are told to wire their funds to the firm's bank accounts. (Ex. 3 ¶6; 4 ¶3; 5 ¶8; 6 ¶7; 7 ¶3; 8 ¶5; 9 ¶7). The following are examples of the fraudulent solicitations.

In late November 2001, a customer was told that CTU had purchased 26 blocks of Euro call options, each block containing 700 option contracts. The corporate defendants' telemarketer told the customer that the value of each block of options had already increased from the purchase price of $14,000 paid by CTU to over $43,000. As part of a purported special promotion, CTU offered to sell a block of options at CTU's purchase price of $14,000, allowing customers to lock in more than $29,000 in appreciation immediately. After making the purchase, the customer was encouraged to hold the option contracts open because the value was guaranteed to increase. Based on telemarketer's representations, the customer purchased the 700 call options contracts on the Euro and had instructed the telemarketer to wire the profits to the customer immediately. The customer never received any funds from the corporate defendant. (Ex. 3).

Another customer had been solicited by CTU for over several months. He initially declined an offer to invest in 10 pre-purchased Euro options through which CTU claimed the customer would receive an immediate profit of $19,256. After this initial refusal, the corporate defendants called the customer and told him that he had "missed out" on huge profits and that everyone who had invested in the Euro options made money. The corporate defendants offered the customer another opportunity to invest in pre-purchased call options on the Yen that had increased from the original price of $16,000 to $35,256. The customer purchased the 20 put option contracts on the Yen and instructed the defendants to send him the profits immediately; however, no funds were ever remitted to the customer. (Ex. 5).

In response to an inquiry from a customer as to why he was being offered such a generous investment opportunity, corporate defendants' telemarketer responded that it was a one-time promotion from the firm to generate new business and obtain new clients. The telemarketer also claimed that most of the firm's accounts are worth over a million dollars so it was not much of a strain to offer a small amount of winning contracts in order to generate lucrative long-term clients. (Ex. 4 ¶4).

Some customers were told that the proposed investment was poised to increase dramatically in percentage and dollar value. For example, a customer was told to invest $17,000 in option contracts on the Euro because he would triple his investment. (Ex. 8 ¶4). Another customer was urged to invest $50,000 in option contracts for the Pound since the investment would earn $189,000. (Ex. 6 ¶13). Accompanying this memo are declarations from customers describing the fraudulent conduct of the defendants. (Ex. 3-9).

The Corporate Defendants Fail to Adequately Advise Customers of Risks

The corporate defendants significantly downplay the risk of loss in trading foreign currency options through emphasis on claims that market conditions will have a positive effect on prices, statements about trading techniques as a way to limit loss, and insider knowledge. (Ex. 3 ¶7; 4 ¶2; 5 Attachment D pg. 3; 7 ¶6; 8 ¶8). The corporate defendants fail to explain to customers verbally or in the printed material that the greatest risk involved with trading foreign currency options is that the customers could lose their entire investment. (Ex. 1 ¶2; 3-9; 3 Attachment A; 7 Attachment A). Generally, the corporate defendants emphasize that the investment is risk free and that the customer will make a guaranteed profit immediately on the initial investment since the value of the pre-purchased block of options has already increased. (Ex. 1 ¶2, 7; 3 ¶ 2, 3, 5, 7; 4 ¶2,3, 5-7; 5 ¶2, 3, 5, 7, Attachment D pg. 9-10; 6 ¶2-5, 7-13; 8 ¶2-4, 6-9). The corporate defendants use actual market news to convince customers that quick and substantial returns can be achieved by investing without delay.[2] (Ex. Id.; 9 ¶5). For instance, one customer was told that call options on Euro futures contacts were guaranteed to increase in value due to the fact that the European Union was going to adopt the Euro as its official currency. (Ex. 3 ¶7). Another customer was told to expect high returns on call options on Euro futures contracts because the U.S. Government was lowering interest rates. (Ex. 9 ¶5). These "guarantees" and "expectations" in effect suggest that risk is non-existent or minimal.

If any warning of risk is given it is only mentioned in passing and is coupled with false statements. (Ex. 5 Attachment D pg. 3; 7 ¶5; 9 ¶4). One customer was told that, while profits were not guaranteed, his investment would be safe because MAD allegedly monitored each customer's position with computers that automatically sold the contracts if their value fell more than 10%. (Ex. 7 ¶6). The corporate defendants also told the customer that MAD minimized risk by holding the options for a short period of time, and that his family members had invested and were doing quite well. (Ex. 7 ¶7).

In another instance, a MAD telemarketer told a customer he would make him a millionaire because MAD had access to insider information because the employee's father is a member of the Chicago Board Options Exchange. (Ex. 8 ¶8).

Lack of Investment Information and Account Documentation

In order to disguise their misappropriation of customer funds, corporate defendants fail to send initial and/or periodic account statements. (Ex. 3 Attachment A; 4 Attachment A; 5 Attachment A, B; 6 ¶13, Attachment A, C, D; 7 ¶3, Attachment A; 8 ¶5, 9, Attachment A, B; 9 ¶7-10, 14, Attachment B, D, E, G-I). Most customers report receiving an "Account Summary" or "Preliminary Confirmation" document and wiring instructions that are faxed to customers within minutes of deciding to invest, or prior to investing. (Ex. 3 ¶6, 7; 4 ¶3; 5 ¶8; 6 ¶7; 7 ¶3; 8 ¶4; 9 ¶7). The "Account Summary" and "Preliminary Confirmation" documents do not show from whom the foreign currency options are supposedly being purchased. (Ex. 3 Attachment A; 4 Attachment A; 5 Attachment A, B; 6 ¶13, Attachment A, C, D; 7 ¶3, Attachment A; 8 ¶5, 9, Attachment A, B; 9 ¶7-10, 14, Attachment B, D, E, G-I). While some customers are verbally

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[2] *See Bishop v. First Investors Group*, [1996-1998 Transfer Binder] Comm. L. Rep. (CCH) ¶27,004 at 44,841 (1997 WL 138832 at *7) (CFTC Mar. 26, 1997) (concluding that it is fraudulent to omit fact that market already factors in public, well-known information into the price of an option). *See also CFTC v. Sidoti*, 179 F.3d 1132, 1135-36 (11th Cir. 1999) (affirming district court finding of fraud where firm's salespersons misrepresented the profitability of options trading by "falsely telling customers certain market conditions or seasonal trends almost guaranteed profits.").

informed that the option contracts are traded in the "foreign exchange market" through Coin Bank, a foreign bank located in Yugoslavia, no written confirmation of that activity is provided. (Ex. 3 ¶7; 4 ¶7; 5 ¶9, Attachment D pg. 5; 6 ¶13; 7 ¶6). In fact, some customers never receive any account documentation from MAD or CTU. (Ex. 8 ¶9). Some of the customers who inquired about account opening documents were told that the accounting department would contact them at a later date. (Ex. Id.).

The MAD/CTU Money Trail Does Not Lead to Investment in Foreign Currency Options

The corporate financial records do not show any purchases of option contracts for foreign currency, but instead confirm that defendants have misappropriated customer funds. (Ex. 1 ¶3, 8-13). Investing customers are instructed to wire their funds to the defendants' bank account at a Jacksonville branch of the First Union National Bank of Florida. (Ex. 3 Attachment A; 7 Attachment A). These funds are then supposedly deposited in a corporate bank account.[3] (Ex. 5 ¶8; 5 Attachment D pg. 3-5, 7; 6 ¶7; 7 ¶11; 8 ¶10; 9 ¶7). Generally, upon receipt of customers' funds, the corporate defendants contact the customer to confirm receipt of the funds and inform the customer that they have allegedly made a profit, and in some instances to solicit a further investment. (Ex. 3 ¶14; 6 ¶10-12; 7 ¶3; 8 ¶10). Customer requests that the corporate defendants wire back the profits are invariably rejected. One customer, after being promised that the funds were wired, was later told that there had been a problem with the wire. (Ex. 4 ¶10). Other customers were promised that the funds were en route, although those customers never received funds. (Ex. 3 ¶15; 5 ¶10; 8 ¶11). Other times the corporate defendants refused to wire back profits unless the customer invested additional funds. (Ex. 6 ¶12-14). Typically, unless the customer makes a further investment the customer's calls and messages go unanswered. (Ex. 3 ¶18; 4 ¶11; 5 ¶12; 6 ¶14; 7 ¶11; 8 ¶11; 9 ¶15).

Records for the corporate defendants' bank accounts - covering the period from April 2001 through January 2002 - show that defendants deposited over $200,000 into their accounts. (Ex. 1 ¶10). For that same period, the records do not show any purchases of foreign currency options. (Ex. 1 ¶11, 13). In fact, disbursements from the accounts are used to purchase cars, furniture, chat room time and other personal expenses. (Ex. 1 ¶11, 12). Dippolito, the only authorized signatory on the corporate accounts, paid out approximately $108,000 in checks to

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[3] The amount allegedly charged per option contract varies from $250 to $900 per option contract and customers are charged anywhere from 2 to 2.5% commission on their profits.

himself from the corporate accounts. (Ex. 1 ¶9, 11). The records also show that Dippolito used ATM machines to withdraw an additional $19,900 from the corporate accounts. (Ex. 1 ¶11). In addition, Dippolito spent over $6,000 of customer funds on psychic and sex hotlines, and made other numerous charges for hotels, clothing stores, and jewelry. (Ex. Id.).

Two customers, who were unable to wire money, sent a check via Federal Express to a "special payment address." (Ex. 3 ¶12, 13, 16, Attachment C, D, E, K, E; 4 ¶8, Attachment B, 12, Attachment C). When the customers failed to receive the profits they were promised, they contacted Federal Express to confirm delivery of their check and learned that the "special mailing address" was actually a Federal Express pick up station in Florida. (Ex. 3 ¶16; 4 ¶8, Attachment B). After further inquiries, the customers separately discovered that their checks, which were payable to CTU, were not deposited by the firm at First Union but were instead signed by Dippolito and cashed at "Budmart," a local check-cashing agency in Florida. (Ex. 1 ¶ 7; 3 ¶17, Attachment E; 4 ¶8, Attachment C).

IV. ARGUMENT

Whenever it appears that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of the Act or any rule, regulation, or order promulgated thereunder, Section 6c of the Act empowers a district court to issue an *ex parte* restraining order freezing the defendants' assets and prohibiting any person from destroying the defendants' books and records or denying Commission agents access to the defendants' books and records. Given the substantial evidence that the defendants fraudulently sell illegal foreign currency options, the Commission requests that the court enter an immediate *ex parte* statutory restraining order against the defendants pursuant to Section 6c of the Act.

Immediate *ex parte* statutory relief is required to: (1) locate, identify, and freeze assets of the defendants so that they can be preserved for restitution should the Commission prevail on the merits; (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; and 3) to take control of, and provide the Court with an assessment of, the defendants' business operations and to marshal assets for potential redress. A preliminary injunction is necessary to prevent the defendants from further violating the Act pending a trial in this matter.

A. Section 6c of the Act Authorizes the Court to Grant the Requested Relief Ex Parte

Recognizing that notice to defendants may "result in the destruction of books and records and the dissipation of customer funds," Section 6c(a) of the Act authorizes courts to issue the requested relief *ex parte* in order "to prevent possible removal or destruction of potential evidence or other impediments to legitimate law enforcement activities and to prohibit movement or disposal 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." <u>CFTC v. Morgan, Harris & Scott, Ltd.</u>, 484 F. Supp. 669, 679 (S.D.N.Y. 1979).

An asset freeze is appropriate where, as in this case, the Commission seeks disgorgement and restitution. *See* <u>CFTC v. Trending Cycles for Commodities, Inc.</u>, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,013 at 23,970 (S.D. Fla. Mar. 17, 1980). 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 foreign banks that require such consent before releasing 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).

Additionally, 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 the victims of the defendants' scheme. Such relief will "preserve the status quo while an investigation is conducted to clarify the sources of various funds." CFTC v. Morgan, Harris & Scott, 484 F. Supp. 669, 678 (S.D.N.Y. 1979).

Finally, due to the nature and pervasiveness of the defendants' fraudulent activities and the importance of locating and marshalling assets and documents before the defendants have an opportunity to hide them, the Commission requests that the parties be granted expedited discovery for the limited purpose of locating the defendants' assets.[4]

B. *The Evidence Meets the Standard for Entry of an* Ex Parte *Restraining Order*

Unlike private actions for equitable relief, a Commission action for injunctive relief is a creature of statute.[5] 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,

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[4] The Southern District of Florida has afforded the CFTC *ex parte* relief on several occasions. See, e.g., CFTC v. World Banks Foreign Currency Traders, INC., Case No. 01-7402-CIV-SEITZ (S.D. Fla. Aug. 24, 2001) (freezing assets, prohibiting destruction of and allowing access to documents, appointing a receiver, and providing expedited discovery upon showing of fraud and failure to make proper disclosures); see also six other freeze orders from this District attached in the Commission's Appendix.

[5] The statutory restraining order is not subject to the provisions of Rule 65 of the Federal Rules of Civil Procedure. Accordingly, there is no 10-day expiration period, and the restraining order remains in effect until further order of the Court. *See* CFTC v. Sigma, Inc., slip op. at 7-8, Civ. No. 95-1598-C, (D. N.J. May 19, 1995), attached in the Commission's appendix.

Inc., 113 F. Supp. 2d 830, 848 (W.D.N.C. 2000); 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); CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir. 1979), *cert. denied*, 442 U.S. 921 (1971); CFTC v. Muller, 570 F.2d 1296, 1300 (5th Cir. 1978). 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 1211, 1220 (7th Cir. 1979), *cert. denied*, 442 U.S. 921 (1979). 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.,* Windrush Partners, Ltd. v. Metro Fair Housing Svcs., 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. 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 record of fraud and sale of illegal options, demonstrated through sworn declarations and a summary of bank records submitted with this motion, provides ample evidence warranting preliminary injunctive relief against future violations.[6]

1. Defendants Have Engaged in Fraud in Violation of Section 4c(b) of the Act and Commission Regulation 32.9

The corporate defendants have violated and are violating Section 4c(b) of the Act and Commission Regulation 32.9 by making fraudulent claims regarding the profitability and risk associated with the foreign currency option contracts they sell to members of the public. The

[6] "At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is 'appropriate given the character and objectives of the injunctive proceeding.'" Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995) (quoting Asseo v. Pan American Grain Company, 805 F.2d 23, 26 (1st Cir. 1986).

corporate defendants also violate 4c(b) of the Act and Regulation 32.9 because they have misappropriated customer funds. 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 similar anti-fraud provision of the Act, Section 4b(a) [7], reliance by customers is irrelevant); In re Staryk, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206, at 45,802-13 (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 between applicable Commission Regulation and Section 4b(a) of the Act); 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 of similar anti-fraud provision of the Act, Section 4b(a)), *aff'd sub nom., JCC, Inc. v. CFTC*, 63 F.3d 1557 (11th Cir. 1995).

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 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), *aff'd in rel. part* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,515 at 47,374 (CFTC Dec. 4, 1998) (discussing scienter requirement of 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) *aff'd in part, vacated in part,* CFTC v. Baragosh, 2002 WL 80159 (4th Cir. (Md.) (Jan. 22, 2002); 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)).

[7] Section 4b(a) of the Act, 7 U.S.C. § 6b(a) (1994), addresses fraud in connection with futures contracts.

In general, all manner of omissions and misrepresentations of material fact regarding futures and options transactions violate the antifraud provisions of the Act and Regulations, including omissions and misrepresentations concerning the likelihood of profit, the risk of loss, and other matters that a reasonable investor would consider material to his investment decision. *See e.g.,* JCC, Inc., et al. v. Commodity Futures Trading Commission, 63 F.3d 1557, 1571 (11th Cir. 1995) (misrepresentations concerning the likelihood of profits and risk of loss); CFTC v. U.S. Metals Depository Co., 468 F. Supp. 1149, 1161 (S.D.N.Y. 1979) ("glowing" representations concerning market expectations and likelihood of profit misrepresentations regarding profitability of investment); CFTC v. Crown Colony Commodity Options, Ltd., 434 F. Supp. 911, 916-18 (S.D.N.Y. 1977) (misrepresentations concerning profit potential and failure to execute customer orders); 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); In re Rosenthal, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,221, at 29,175-76(CFTC June 6, 1984) (misrepresentations regarding risk of loss, quoting deceptively low commission figures, misinforming customers that fee was imposed by law or by exchange, and minimizing importance of foreign currency fluctuations on value of option).

MAD and CTU's failure to purchase any option contracts constitutes sufficient evidence for a finding of liability. (Ex. 1 ¶7, 11, 13). In addition, MAD and CTU's solicitation tactics are also sufficient for a finding of liability. MAD and CTU repeatedly misrepresent the potential for profit and the risk of loss by assuring customers that the firm has purchased option contracts, which have increased in value and are merely reselling those contracts to the customer at a guaranteed profit. (Ex. 1 ¶2, 7; 3 ¶ 2, 3, 5, 7; 4 ¶2,3, 5-7; 5 ¶2, 3, 5, 7, Attachment D pg. 9-10; 6 ¶2-5, 7-13; 8 ¶2-4, 6-9). Customers are falsely assured that market conditions are about to drive up the value of the particular option contract for sale, thereby allowing a fast-acting investor to achieve additional substantial profits from the options investment. (Ex. Id.; 9 ¶5). The corporate defendants falsely minimize the risk of loss by claiming that the 10% stop-loss and close attention to market fluctuations will allow them to liquidate the customer's position at precisely the right time. (Ex. 5 Attachment D; 7 ¶5).

Customers are not provided with any risk disclosure documents prior to investing. (Ex. 1 ¶2, 7; 3 ¶ 2, 3, 5, 7, Attachment A; 4 ¶2,3, 5-7; 5 ¶2, 3, 5, 7, Attachment D pg. 9-10; 6 ¶2-5, 7-13; 8 ¶2-4, 6-9). Moreover, customers are either provided incorrect account statements or none at all. (Ex. 6 ¶11, Attachment C; 8 ¶9). Eventually, the customers are cut off from the defendants after investing, and never recover their investments or the alleged profits. (Ex. 3 ¶18; 4 ¶11, 12; 5 ¶12; 6 ¶14; 7 ¶11, 12; 8 ¶11, 12; 9 ¶15).

Defendants MAD, CTU, and Dippolito have also violated Section 4c(b) of the Act and Commission Regulation 32.9 by misappropriating customer funds. Misappropriation of customer funds constitutes "willful and blatant" fraudulent activity, which violates the anti-fraud provisions of the Act and Regulations. CFTC v. Noble Wealth Data Information Services, Inc., 90 F.Supp.2d 676, 687 (D.Md. 2000); CFTC v. Cheung, No. CIV. 5598(RPP), 1994 WL 5831689, at *1-2 (S.D.N.Y. Oct. 21, 1994) (preliminary injunction granted against defendant who embezzled and converted customer funds); CFTC v. Clothier, 788 F.Supp. 490, 492 (D. Kan. 1992) (a violation of Section 4o of the Act includes the fraudulent misappropriation of customers' funds entrusted to broker for trading purposes); CFTC v. Skorupskas, 605 F.Supp. 923, 932 (E.D. Mich. 1985) (defendants defrauded customers by soliciting investor funds for trading and then not trading those funds); In re Lincolnwood Commodities, Inc., [1982-1984 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 21,986 at 28,255 (1984) (Commission affirmed holding that defendant violated Section 4b when he "diverted to his own use funds entrusted to him by or on behalf of his customers"); CFTC v. Muller, 570 F.2d 1296, 1300-01 (5th Cir. 1978) (preliminary injunction affirmed where CFTC made a prima facie showing that defendant had misappropriated customer funds in violation of the Act). The corporate defendants took in over $200,000 in customer funds that were deposited in a corporate bank account. (Ex. 1 ¶10). For the period of April 2001 through January 2002, no funds were disbursed from these accounts for the purchase of customers' options. (Ex. 1 ¶11, 13). However, $108,000 was paid out to Dippolito, $19,900 was withdrawn from ATMs, and over $6,000 was spent for psychic and sex hotlines. (Ex. 1 ¶9, 11). Further, there were charges for hotel rooms, clothing, and jewelry. (Ex. 1 ¶11). Additionally, customer funds were misappropriated, in that the funds were not placed in CTU's corporate account at First Union National Bank, but rather cashed by Dippolito at a local check cashing company. (Ex. 1 ¶ 7; 3 ¶17, Attachment E; 4 ¶8, Attachment C). Defendants also misappropriated funds, when they failed to return profits upon demand by customers, which allegedly were earned. (Ex. 3 ¶18; 4 ¶11, 12; 5 ¶12; 6 ¶14; 7 ¶11, 12; 8 ¶11, 12; 9 ¶15). After confirming to customers that their profits would be wired, the customers never received any funds. (Ex. Id.).

Therefore MAD, CTU, and Dippolito violated Section 4c(b) of the Act and Commission Regulation 32.9.

2. The Corporate Defendants Have Solicited and Sold Options Contracts in Violation of Section 4c(b) of the Act and Commission Regulations 32.11 and 33.3

The Commodity Futures Modernization Act of 2000 ("CFMA") clarified the Commission's jurisdiction over retail foreign currency agreements, contracts, and transactions, and provides that jurisdiction extends to options on physical currencies.[8] Section 2(c)(2)(B)(ii) of the Act describes the "retail" nature of the customer that brings a foreign currency agreement, contract or transaction within the Commission's jurisdiction. The Commission has jurisdiction if the option on foreign currency is offered or entered into with a retail customer (i.e., not an "eligible contract participant"),[9] and as long as the counter-party, or the person offering to be the counter-party, is not one of six enumerated entities.[10]

The Commission clearly has jurisdiction over defendants' solicitation and acceptance of funds in connection with the purported foreign currency transactions. The corporate defendants have solicited and obtained funds from members of the retail public who do not constitute eligible contract participants. (Ex. 1 ¶20). The corporate defendants' bank records reveal that the corporate defendants have accepted the customer funds, have not used those funds to invest in any foreign currency (hereinafter "Forex") transaction, and have not transferred funds to any counter-party to any Forex options transaction. (Ex. 1 ¶7, 11, 13). While the corporate defendants sometimes claim the counter-party is a bank supposedly located in Yugoslavia, the

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[8] Section 2(c)(2)(B) of the Act, as amended by the CFMA, states, "This Act applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction in foreign currency that – (i) is a contract of sale of a commodity for future delivery (or an option on such a contract) or an option (other than an option executed or traded on a national securities exchange . . .)."

[9] Section 1a(12)(A)(xi) of the amended Act defines an eligible contract participant as either (1) an individual who has total assets in excess of ten million dollars ($10,000,000.00), or (2) an individual who has total assets in excess of five million dollars ($5,000,000.00) and who enters the transaction to manage the risk associated with the asset he owns or liability incurred, or reasonably likely to be owned or incurred by the individual.

[10] Section 2(c)(2)(B)(ii) provides that those six financial entities are: (1) a financial institution; (2) a broker or securities dealer or futures commission merchant; (3) an associated person of a broker or dealer; (4) an insurance company; (5) a financial holding company; and (6) an investment bank holding company. In addition, pursuant to Section 2(c)(2)(C), the Commission has jurisdiction over fraudulent options and futures transactions where the retail customer's counter-party is a futures commission merchant ("FCM") or its affiliate. In this instance the defendants are not FCMs or an affiliate.

corporate defendants never establish customer positions with any entity. (Ex. Id.). Moreover, even if the corporate defendants acted as the purported counter-parties, they would not be qualified to act as a counter-party to any retail Forex options transaction because the corporations do not qualify as one of the six regulated entities under Section 2(c)(2)(B)(ii) of the Act, 7 U.S.C. § 2(c)(2)(B)(ii). Moreover, the corporate defendants have not been designated as a contract market for the sale of foreign currency futures or options contracts. (Ex. 1 ¶18; 13; 14).

Section 4c(b) of the Act and Regulation 32.11 prohibit the solicitation or acceptance of funds or orders in connection with the purchase or sale of any commodity option unless conducted on or subject to the rules of a contract market or foreign board of trade. Similarly, Regulation 33.3(a) states that it is unlawful for any person to enter into, to offer to enter into, to confirm execution of, or to maintain a position in, any commodity option unless the commodity option is traded on or is subject to the rules of a designated contract market.

As detailed above, the corporate defendants, by soliciting and accepting funds or orders in connection with the purchase or sale of foreign currency options not conducted on or subject to the rules of a contract market or foreign board of trade, have violated Section 4c(b) of the Act and Regulation 32.11. In addition, by entering into, offering to enter into, confirming the execution of, or maintaining a position in foreign currency options, the corporate defendants have violated Section 4c(b) of the Act and Regulation 33.3(a).

3. The Corporate Defendants Have Violated the Disclosure Requirements of Commission Regulation 32.5

Commission Regulation 32.5 requires that a person soliciting or accepting an order for an options transaction shall deliver to the customer or prospective customer a disclosure statement. That statement must include, among other things, a brief description of the transaction (including the duration of the options offered and a list of elements comprising the purchase price), a description of all costs that may be incurred by the customer if the option is exercised, an explanation concerning the necessary rise or fall in the price of the contract underlying the option in order for the customer to profit, and a specific, boldfaced statement concerning the risk of loss. None of this information appears in the documentation that the defendants furnish to customers in connection with the sale of foreign currency options. (Ex. 3 Attachment A; 7 Attachment A-C). MAD and CTU have therefore violated Commission Regulation 32.5.

C. Liability of the Corporate Defendants

1. The MAD/CTU 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).

Here, the two corporations, MAD and CTU, operate as a common enterprise. As mentioned previously, both firms list Michael Dippolito as the sole director, send brochures and account documents to customers that are identical, use the same addresses, fax numbers and sales pitch. (Ex. 1 ¶4, 15; 2 ¶5, 6; 3 Attachment A; 4 Attachment A; 5 Attachment A, B; 6 Attachment A; 7 Attachment A-C; 8 Attachment A, B; 9 Attachment B, D, E, G, H, I; 10; 11).

Both firms utilize the same banking facility, which Dippolito set up. (Ex. 1 ¶9). Both firms also employ mail drops that were obtained by Dippolito. (Ex. 1 ¶14; 2). There does not appear to be any meaningful distinction between MAD and CTU. Therefore, these two corporations are engaged in a common enterprise and are jointly and severally liable for violations of Section 4c(b) of the Act and Commission Regulations 32.5, 32.9, 32.11, and 33.3.

V. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court grant Plaintiff's motion for an *ex parte* 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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