

III.

The Commission finds the following:

A. Summary

Beginning in the fall of 2005 and continuing through September 2006 (the "relevant period"), Roane fraudulently operated a commodity pool that invested in commodity futures contracts. Roane, acting as a Commodity Pool Operator ("CPO"), solicited approximately \$780,000 from individuals to invest in the pool. Roane induced prospective participants to invest with him by misrepresenting his past performance and success as a futures trader. Specifically, Roane assured prospective participants that his trading was successful, that he had a trading system that was foolproof, that his trades were 80 to 90 percent profitable, and that he made more winning trades than losing trades. Contrary to his claims, Roane's past trading of commodity futures contracts was overall unprofitable.

Roane lost approximately \$613,500 of the pool participants' funds trading commodity futures contracts in his personal trading account and misappropriated approximately \$166,500, which he primarily used to pay for personal expenses but also to pay back some participants.

Roane failed to register with the Commission as a CPO, as required, failed to operate the commodity pool as a legal entity separate from himself, received pool participant funds in his own name rather than in the name of the pool, commingled pool participant funds with personal funds and failed to provide the required Disclosure Documents to pool participants.

B. Respondent

Robert Lee Roane currently resides in Chester, Virginia. Roane has never been registered with the Commission in any capacity.

C. Facts

During the relevant period, Roane operated a commodity pool and successfully solicited eight individuals to invest a total of \$780,000 in the commodity pool to trade commodity futures. Roane structured the investments in the commodity pool as loans by the participants to him. To evidence the "loans," Roane issued promissory notes and represented that the interest payments due on the notes as well as his compensation would be paid from the profits he made trading commodity futures contracts. Roane did not provide pool participants with any Disclosure Document.

In his solicitations, Roane falsely claimed to be a successful and experienced commodity futures trader. During some of his solicitations, Roane employed a computer with screen shots of charts and represented that the chart was a graphic illustration of his profitable trading strategy. He also characterized his trading system as “foolproof” or a “sure thing” and boasted that he always had more winning trades than losing trades. Roane also claimed to one prospective participant that Roane’s trades were 80 to 90 percent profitable.

In fact, Roane had not been a successful commodity futures trader. Roane’s personal futures trading over approximately a one year period, prior to his operation of the pool, resulted in net losses of approximately \$121,000.

Instead of directing the pool participant funds’ into accounts in the name of the commodity pool, as required, Roane deposited the pool participants’ funds into his personal bank accounts and transferred the majority of the funds into personal futures trading accounts at three registered Futures Commission Merchants in which he traded primarily the Russell 2000 e-mini futures contract. Roane lost approximately \$613,500 trading. Roane used approximately \$28,600 of the remainder of the pool participant funds to repay other participants. Roane also used approximately \$137,900 to pay for his personal expenses.

IV. LEGAL DISCUSSION

A. **Sections 4b (a) (2) (i) and (iii) of the Act: Fraud by Misrepresentations and Misappropriation**

1. **Fraud by Misrepresentations**

Sections 4b(a)(2)(i) and (iii) of the Act provide that it is unlawful:

for any person in or in connection with any order to make, or the making of any contract or sale of any commodity for future delivery, made or to be made, for or on behalf of any other person if such contract for future delivery may is or may be used for [one of the enumerated purposes herein] (i) to cheat or defraud or attempt to cheat or defraud such other person; ... or (iii) to willfully deceive or attempt to deceive such other person by any means whatsoever in regard to such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person.

7 U.S.C. §§ 6b(a)(2)(i) and (iii) (2002).

To prove that a respondent has violated Section 4b(a)(i) and (iii), the Commission must show that: 1) the respondent misrepresented or deceptively omitted certain information regarding commodity futures trading; 2) that the misrepresentation or omission was "material"; and 3) the respondent knew the information was false and calculated to cause harm or recklessly disregarded the truth or falsity of the information (in other words, that he acted with "scienter"). *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,617 at 36,657 (CFTC Mar. 1, 1990); *In re JCC*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,568 (CFTC May 12, 1994), *aff'd sub nom.*, *JCC, Inc. v. CFTC*, 63 F.3d 1557 (11 Cir. 1995); *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002), *cert. denied*, 543 U.S. 1034 (2004).

The scienter requirement is met when "highly unreasonable omissions or misrepresentations [are made] ... that present a danger of misleading [customers] which is either known to the Defendant[s] or so obvious that Defendant[s] must have been aware of it." *R.J. Fitzgerald*, 310 F.3d at 1328. A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *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 Indus. Inc. v. Northway, Inc.*, 426 U.S. 438,449 (1976)); *Hirk v. Agri-Research Counsel Inc.*, 561 F.2d 96, 103-04 (7th Cir. 1977) (defendants violated Section 4b of the Act by making misrepresentations about the profitability of their commodity trading when soliciting customers).

Roane made affirmative material oral misrepresentations regarding his trading ability and his trading results by claiming he was a successful and experienced trader. Roane's misrepresentations were material, and he acted with scienter because he knew that he had an unsuccessful trading record and that his representations to the contrary were false. Therefore, through his fraudulent solicitations, Roane violated Section 4b(a)(2)(i) and (iii) of the Act.

2. Fraud by Misappropriation

Misappropriation of pool participant funds violates Sections 4b(a)(2)(i) and (iii) of the Act. *CFTC ex rel. Kelley v. Skorupskas*, 605 F.Supp. 923, 932 (E.D. Mich. 1985) (defendant violated Section 4b(a) of the Act by misappropriating customer funds entrusted to her for trading commodity futures contracts); *CFTC v. Weinberg*, 287 F.Supp. 2d. 1100, 1106 (C.D. Cal. 2003) (commodity trading advisor ("CTA") violated Section 4b(a)(i) and (iii) of the Act by misappropriating investor funds); *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,315 (CFTC July 19, 1999), *aff'd in relevant part sub nom.*, *Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000) (respondents violated Section 4b by surreptitiously retaining money in their own bank accounts that should have been traded on behalf of participants).

Roane used certain of the pool participant funds to pay personal expenses and to make payments to other participants. Accordingly, Roane misappropriated pool participant funds in violation of Sections 4b(a)(2)(i) and (iii) of the Act.

**B. Section 4o(1) of the Act:
Fraud by CPOs, CTAs and Their Associated Persons**

Section 4o(1) of the Act makes it unlawful for a CPO, by using the mails or any means or instrumentality of interstate commerce, directly or indirectly (a) to employ a device, scheme or artifice to defraud pool participants, or (b) to engage in a transaction or course of business that operated as a fraud or deceit upon pool participants. 7 U.S.C. § 6o(1) (2002). This section of the Act applies to all CTAs, CPOs and their APs whether registered, required to be registered, or exempt from registration. *Skorupskas*, 605 F.Supp. at 932. Although scienter must be proved to establish violations of Sections 4b and 4o(1)(A) of the Act, it is not necessary to prove scienter to establish a violation of Section 4o(1)(B) of the Act. See *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cir. 1988). *Accord In re Kolter*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,262 (CFTC Nov. 8, 1994) (Commission cited *Messer* for this proposition with approval).

By operating a business in the nature of an investment trust, syndicate or similar form of enterprise and by soliciting, accepting or receiving funds for the purpose of trading commodity futures or options, Roane was acting as a CPO. Section 1(a)(5) of the Act, 7 U.S.C. §1(a)(5) (2002). See, e.g., *Slusser*, ¶27,701 at 48,310 (respondent acted as a CPO when it accepted investment funds from individual investors who deposited funds in respondent's bank account for the purpose of trading in a commodity pool); *SEC v. Princeton Econ. Int'l*, 73 F. Supp. 2d 420, 424 (S.D.N.Y. 1999) (defendant acted as a CPO by commingling proceeds derived from sale of notes to customers in a commodity pool).

The same fraudulent conduct that violates Section 4b(a), the fraudulent solicitations and misappropriation set forth above, also violates Section 4o(1). *Skorupskas*, 605 F. Supp. at 932-33. Accordingly, Roane violated Section 4o(1) of the Act.

**C. Section 4m(1) of the Act:
Failure to Register as a CPO**

Section 4m(1) of the Act provides that it is unlawful for any CPO, unless registered under the Act, to make use of the mails or any instrumentality of interstate commerce in connection with its CPO business. 7 U.S.C. § 6m(1) (2002).

Roane, acting as a CPO, accepted funds from pool participants for purposes of investing in a pool. Roane transferred those funds through interstate commerce by wire from his personal bank account to commodity trading accounts opened in his name and maintained at three FCMs. See *CFTC v. Wall St. Underground, Inc.*, 281 F.Supp.2d

1260, 1270 (D. Kan. 2003) (CTAs used mails and other instrumentalities of interstate commerce by making extensive use of telephones, facsimile transmissions and emails in the course of marketing their trading systems). Thus, Roane violated Section 4m(1) of the Act by using an instrumentality of interstate commerce while failing to register with the Commission as a CPO.

**D. Commission Regulation 4.20(a):
Failure to Operate a Pool as a Separate Legal Entity**

Commission Regulation 4.20(a)(1) provides that a “commodity pool operator must operate its pool as an entity cognizable as a legal entity separate from that of the pool operator.” 17 C.F.R. §4.20(a)(1) (2007). Roane failed to create the pool as a separate legal entity and thus violated Commission Regulation 4.20(a)(1).

**E. Commission Regulation 4.20(b):
Accepting Pool Funds in Other Than in the Pool’s Name**

Commission Regulation 4.20(b) provides that all funds received by the CPO from existing or prospective pool participants “must be received in the pool’s name.” 17 C.F.R. §4.20(b) (2007). Roane received funds from existing or prospective participants by personal check made payable to him, which he deposited into his personal bank account. Accordingly, Roane violated Commission Regulation 4.20(b).

**F. Commission Regulation 4.20(c):
Commingling Pool Funds**

Commission Regulation 4.20(c) states that “No commodity pool operator may commingle the property of any pool that it operates or that it intends to operate with the property of any other person.” 17 C.F.R. §4.20(c) (2007). Roane deposited pool participants’ funds into bank accounts in the name of Roane. Roane commingled these pool funds with his own and thus violated Commission Regulation 4.20(c).

**G. Commission Regulation 4.21(a):
Failure to Provide Disclosure Documents**

Commission Regulation 4.21(a) provides that each commodity pool operator registered or required to be registered must deliver or cause to be delivered to a prospective participant of a pool that it operates or intends to operate a Disclosure Document for the pool by no later than the time it delivers to the prospective participant a subscription agreement for the pool. 17 C.F.R. §4.21(a) (2007). Roane failed to provide a Disclosure Documents to any of his prospective pool participants and thus violated Commission Regulation 4.21(a).

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondent violated Sections 4b(a)(2)(i) and (iii), 4o(1), and 4m(1) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii), 6o(1), 6m(1) (2002), and Commission Regulations 4.20(a)-(c) and 4.21(a), 17 C.F.R. §§4.20(a)-(c) and 4.21(a) (2007).

VI.

OFFER OF SETTLEMENT

Respondent has submitted the Offer in which he, without admitting or denying the findings herein:

- A. Acknowledges service of the Order;
- B. Admits jurisdiction of the Commission with respect to the matters set forth in this Order and, for any action or proceeding brought or authorized by the Commission based upon violations of or for enforcement of the Order;
- C. Waives service and filing of a complaint and notice of hearing, a hearing, all post-hearing procedures, judicial review by any court, any objection to the staff's participation in the Commission's consideration of the Offer, any claim of Double Jeopardy based on the institution of this proceeding or the entry of any order imposing a civil monetary penalty or other relief, and all claims which he may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 et seq. (2007), relating to, or arising from, this action;
- D. Stipulates that the record basis on which this Order is entered consists solely of this Order, including the findings in this Order;
- E. Consents, solely on the basis of the Offer, to entry of this Order that:
 - 1. makes findings, including findings that Roane violated Sections 4b(a)(2)(i) and (iii), 4o(1) and 4m(1) of the Act and Commission Regulations 4.20(a)-(c) and 4.21(a);
 - 2. orders Roane to cease and desist from violating Sections 4b(a)(2)(i) and (iii), 4o(1) and 4m(1) of the Act and Commission Regulations 4.20(a)-(c) and 4.21(a);

3. orders Roane to pay restitution to pool participants, in accordance with Schedule A attached to the Offer, in the amount of Five Hundred and Fifty-Five Thousand Three Hundred and Twenty-Five Dollars (\$555,325), plus prejudgment interest of Fifty-Three Thousand Seven Hundred and Ninety-One Dollars (\$53,791) and post judgment interest;
4. orders Roane to pay a civil monetary penalty in the amount of One Hundred and Thirty Thousand Dollars (\$130,000), plus post judgment interest;
5. orders Roane permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29), for his own account, for any account in which he has a direct interest or indirect interest, or for any other account, and all registered entities shall refuse him all privileges; and
6. orders Roane to comply with his undertakings consented to in the Offer and set forth below in Section VII of this Order.

VII.

Accordingly, IT IS HEREBY ORDERED THAT:

1. Roane shall cease and desist from violating Sections 4b(a)(2)(i) and (iii), 4o(1) and 4m(1) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii), 6o(1), and 6m(1) (2002), and Commission Regulations 4.20(a)-(c) and 4.21(a), 17 C.F.R. §§ 4.20(a)-4.20(c) and 4.21(a) (2007).

2. Roane shall pay restitution to pool participants in the amount of Five Hundred and Fifty Five Thousand Three Hundred and Twenty Five Dollars (\$555,325), plus pre-judgment and post-judgment interest (the "restitution obligation"), equaling the amount of funds Roane fraudulently obtained from the pool as described herein. Pre-judgment interest shall amount to Fifty-Three Thousand Seven Hundred and Ninety One Dollars (\$53,791). Post-judgment interest shall accrue beginning on the date of entry of this Order, and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order, pursuant to 28 U.S.C. § 1961. Roane shall pay the restitution obligation as set forth in Schedule A attached to the Offer.²

² One of the pool participants obtained a judgment against Roane for recovery of his pool participant funds and therefore is not included on Schedule A.

3. Roane shall pay a civil monetary penalty of One Hundred and Thirty Thousand Dollars (\$130,000), plus post-judgment interest, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (the "civil monetary penalty obligation").

4. Roane shall pay this civil monetary penalty obligation by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
Attn: Marie Bateman – AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, Oklahoma 73169
Telephone: 405-954-6569

If payment is to be made by electronic funds transfer, Roane shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Roane shall accompany payment of the penalty with a cover letter that identifies Roane and the name and docket number of the proceedings. Roane shall simultaneously transmit copies of the cover letter and the form of payment to the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, and the Chief, Office of Cooperative Enforcement, at the same address.

5. All payments by Roane pursuant to this Order shall first be applied to satisfaction of his restitution obligation. After satisfaction of the restitution obligation, payments by Roane pursuant to this Order shall be applied to satisfy Roane's civil monetary penalty obligation.

6. Roane is permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29), for his own account, for any account in which he has a direct interest or indirect interest, or for any other account, and all registered entities shall refuse him all privileges.

7. Roane shall comply with the following conditions and undertakings as specified:

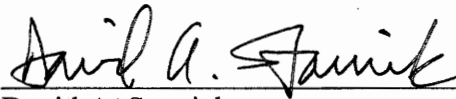
(a) Roane shall never apply for registration or claim exemption from registration with the Commission in any capacity, and shall never engage in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9), or act as a principal, agent, officer or employee of any person registered,

required to be registered, or exempted from registration, except as provided for in Regulation 4.14(a)(9), 17 C.F.R § 4.14(a)(9) (2007).

(b) Roane agrees that neither he nor any of his agents, employees, or representatives under his authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order, or creating, or tending to create, the impression that the Order is without factual basis; provided, however, that nothing in this provision affects Roane's: (i) testimonial obligations; or (ii) right to take appropriate factual or legal positions in other proceedings to which the Commission is not a party. Respondent shall undertake all steps necessary to assure that all of the agents, employees and representatives under his authority or control understand and comply with this agreement.

The provisions of this Order shall be effective as of this date.

By the Commission.



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: January 24, 2008