UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-80132-CIV-DIMITROULEAS

COMMODITY FUTURES TRADING COMMISSION,

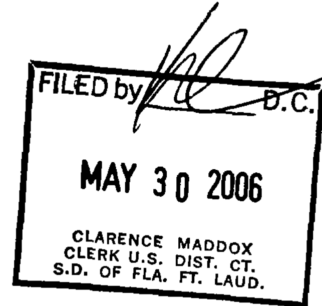
Magistrate Judge Johnson

Plaintiff,

vs.

GIBRALTAR MONETARY CORPORATION, INC., et al.,

Defendants.



FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on for a non-jury trial before the undersigned on August 30, August 31, September 1, September 2, September 6, September 7, September 8, September 9, and September 12, all in the year 2005. The Court has carefully considered the arguments of counsel, the evidence presented,[1] and the testimony of witnesses. The Court has also determined the

[1] Here, there are two Requests for Judicial Notice that were filed subsequent to the close of trial [DEs 274 & 276]. Judicial notice is a means by which adjudicative facts not seriously open to dispute are established as true without the normal requirement of proof by evidence. Fed.R.Evid. 201(a) & (b); see also Fed.R.Evid. 201(a) advisory committee's note (explaining that it is proper to take judicial notice of facts with a "high degree of indisputability" that are "outside the area of reasonable controversy"). Adjudicative facts are facts that are relevant to a determination of the claims presented in a case. Id.; see also Florida Evergreen Foliage v. E.I. Dupont De Nemours & Co., 336 F. Supp. 2d 1239, 1262 n.21 (S.D. Fla. 2004) (holding that adjudicative facts contained within a public document are subject to judicial notice). However, while a court has wide discretion to take judicial notice of facts the "taking of judicial notice of facts is, as a matter of evidence law, a highly limited process." Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir.1997). "The reason for this caution is that the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." Id. In the present requests

Here, even after considering the Objections [DEs 275 & 278] made in opposition to the

credibility of witnesses, and is otherwise fully advised in the premises.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following Findings of Fact and Conclusions of Law. To the extent, if any, that the Findings of Fact as stated may be deemed Conclusions of Law, they shall be considered Conclusions of Law. Similarly, to the extent the matters expressed as Conclusions of Law may be deemed Findings of Fact, they shall be considered Findings of Fact.

FINDINGS OF FACT

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

2. Defendant Gibraltar Monetary Corporation ("Gibraltar") is a Florida corporation that was incorporated in February 2002 by Defendants Jayson Kline ("Kline") and Charles Fremer ("Fremer"). By way of its account executives ("AEs"), Gibraltar solicited members of the public to invest and trade in foreign currency options, and advised its clients as to such trading. Of Gibraltar's two hundred seventy-three clients, only thirteen profited while most others lost their entire investment. Neither Gibraltar nor its employees were registered with the CFTC in any

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Requests for Judicial Notice, the Court will exercise its wide discretion and take note of both Requests. The Court is satisfied that the materials contained within the requests–a summary of legislative activities from the House Agriculture Committee, the text of proposed H.R. 4473, and a complaint and decision issued by the National Futures Association–are adjudicative facts within the meaning of Fed.R.Evid. 201. See Cash Inn of Dade, Inc. v. Metro. Dade County, 938 F.2d1239, 1242-43 (11th Cir. 1991) (holding that a district court can take judicial notice of the proceedings before an administrative or legislative body). Specifically, these adjudicative facts are "not subject to reasonable dispute" and are "capable of accurate and ready determination." See Fed.R.Evid. 201. Accordingly, the Court takes judicial notice of these Requests.

capacity. In addition, neither Gibraltar nor its employees were members of the National Futures Association. Gibraltar maintained its principal place of business at 4700 NW 2nd Avenue, Suite 303, Boca Raton, Florida 33431.[2]

3. Defendant Kline, during the time relevant to this matter, resided in Boca Raton, Florida. Kline invested at least $250,000.00 in Gibraltar, and as a result owned fifty-one percent of Gibraltar's stock. Kline was also the president of Gibraltar. As president, Kline participated in controlling Gibraltar by, *inter alia,* drafting Gibraltar's business plan and signing the Gibraltar-FxCM Introducing Agreement on behalf of Gibraltar. Prior to 2002, Kline was involved in various capacities with a number of companies–including Multivest Options, Inc., Bachus & Stratton Commodities Inc., Commonwealth Financial Group, Inc., and Cromwell Financial Services, Inc.–that were each charged by the CFTC or the NFA with sales solicitation fraud. On November 17, 1993, in an action filed by the CFTC against Bachus & Stratton and Kline, the Honorable James C. Paine entered an order of permanent injunction which prohibited Kline from violating Section 4c(b) of the CEA. That Order, *inter alia*, prohibited Kline from failing to diligently supervise his partners, officers, employees and agents in their handling of commodity interest accounts. Additionally, on December 9, 1993, in an administrative enforcement action against Kline, the CFTC entered a cease and desist order that prohibited Kline from committing commodity options fraud in violation of Section 4c(b) of the CEA.

4. Defendant Fremer, during the time relevant to this matter, resided in Coral Springs, Florida. Fremer was the vice-president of Gibraltar, and supervised the day-to-day operations at

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[2] On June 3, 2005, the Court entered an Order Granting Plaintiff's Motion for Default Judgment [DE 190] against Defendant Gibraltar.

Gibraltar's Boca Raton office. As vice-president, Fremer participated in controlling Gibraltar by, *inter alia*, hiring, terminating and supervising employees, training account executives, managing advertising, implementing sales procedures, and overseeing client solicitation. Prior to 2002, Fremer was involved in various capacities with a number of companies–including, Multivest Options, Inc., International Precious Metals, Corp., and Bachus & Stratton Commodities, Inc.–that were each charged by the CFTC or the NFA with sales solicitation fraud. While working at Gibraltar Fremer was paid approximately $117,337.00.

5. Defendant Thomas Clancy ("Clancy"), during the time relevant to this matter, resided in Sunrise, Florida.[3] Clancy was the compliance officer of Gibraltar. As compliance officer, Clancy was responsible for, *inter alia*, reading the verbal risk disclosure statements to Gibraltar's clients, and administrating the Gibraltar's compliance program. Prior to 2002, Clancy was involved in various capacities with a number of companies–including, Bachus & Stratton Commodities Inc., Commonwealth Financial Group, Inc., and Cromwell Financial Services, Inc.–that were each charged by the CFTC or the NFA with sale solicitation fraud.

6. Defendant Edward Johnson ("Johnson"), during the time relevant to this matter, resided in Wellington, Florida. Johnson was a senior AE with Gibraltar. As senior AE, Johnson would, *inter alia*, speak with clients referred to him by other Gibraltar AEs in an attempt to have those clients invest additional funds. Prior to 2002, Johnson was involved in various capacities with a number of companies–including, Barkley Financial Corp., First Investors Group of Palm

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[3] Clancy entered into a settlement agreement with the CFTC, and as a result testified on behalf of the CFTC at trial. On January 13, 2006, as a result of this settlement agreement, the CFTC and Clancy filed a Consent Order for Permanent Injunction and Other Ancillary Relief [DE 279] against Clancy. The Court will enter this Consent Order by way of a separate order that bears the same date as this Finding of Facts and Conclusions of Law.

Beaches Inc., and Harrington Financial & Energy Advisors–that were each charged by the CFTC or the NFA with sale solicitation fraud. While working at Gibraltar Johnson was paid approximately $63,789.00.

7. Defendant Forex Capital Markets, LLC ("FxCM") began operations in 1999 and is presently the world's largest non-bank futures commission merchant ("FCM") dealing exclusively in retail foreign exchange, otherwise known as Forex. FxCM is registered with the CFTC as a FCM. FxCM functions as a dealer/market-maker, and in that role trades spot Forex and Forex options in principal-to-principal trades opposite counterparties. FxCM conducts these principal-to-principal trades both directly with traders as well as with traders who have an adviser, such as Gibraltar. Despite not having any offices or employees in Florida, FxCM nevertheless does business in Florida.

Gibraltar-FxCM Relationship

8. On April 11, 2002, Drew Niv, as managing director of FxCM, and Kline, as president of Gibraltar, executed an Introducing Agreement ("Agreement") between FxCM and Gibraltar. According to this Agreement, Gibraltar was to "identify and refer prospective, suitable counterparties to FxCM for the purpose of entering into transactions in Foreign Exchange." (See FxCM Exhibit 3 at p.1). Under the terms of the Agreement Gibraltar would solicit customers to engage in Forex options transactions with FxCM, and Gibraltar would receive commissions on each transaction placed by one of its referred customers. FxCM would hold Gibraltar's commissions in an account, and periodically release those commissions to Gibraltar. Gibraltar also was to act as a trading advisor to its customers, and was to refer those customers exclusively to FxCM.

9. According to Niv, who is also the CEO of FxCM, it was not FxCM's intention to create an agency relationship when it entered into this Agreement. Gibraltar approached FxCM to inquire whether it would be interested in having Gibraltar operate as a trading agent that would solicit customers to trade options with FxCM. FxCM did not do an investigation into Gibraltar, or its employees, prior to entering into the Agreement. Under the terms of the Agreement, FxCM did not, *inter alia*: (a) control Gibraltar's location; (b) control or supervise the hiring of Gibraltar employees; (c) train, supervise, or discipline Gibraltar employees; (d) control, develop, or supervise the trading strategies of Gibraltar; (e) control, develop, or supervise Gibraltar's marketing practices; (f) share common employees with Gibraltar; or (g) split commissions with Gibraltar.

10. Pursuant to this Agreement, Gibraltar was to ensure that each of its clients received and signed the forms necessary to open a trading account with FxCM. Gibraltar sent each potential client an initial package that contained, *inter alia*, a Risk Disclosure Statement, a Notice to Traders, a Trader Agreement, an FX Agreement, an Account Application Form, and a Limited Power of Attorney form. Customers would send the completed forms back to Gibraltar, but would send their money directly to FxCM. Gibraltar would then forward the completed forms on to FxCM. FxCM would also review these materials to ensure that Gibraltar's customers had completed the forms correctly. The customer qualification standards imposed by these materials were required by FxCM, and Gibraltar had no authority to alter those standards.

11. Each Gibraltar customer received a "Risk Disclosure Statement." In sum, this statement informed Gibraltar's customers of the various risks associated with trading in futures and options. This statement declared, "[i]n light of the risks, you should undertake such

transactions only if you understand the nature of the contracts (and contractual relationships) into which you are entering and the extent of your exposure to risk. Trading in futures and options is not suitable for many members of the public. You should carefully consider whether trading is appropriate for you in light of your experience, objectives, financial resources and other relevant circumstances." (Id. at p. 1.) Moreover, this statement informed potential clients that "[t]ransactions in options carry a high degree of risk. Purchases and sellers of options should familiarize themselves with the type of option (i.e., put or call) which they contemplate trading and the associated risks." (Id.). Each customer was required to sign and date the end of this statement.

12. Each Gibraltar customer was a provided with a form entitled "Notice to Traders." This form stated that "this Agreement Is a Legal Contract, Please Read it Carefully." Paragraph 9 of this Notice states, "FxCM does not control, and cannot endorse or vouch for the accuracy or completeness of any information or advice Trader may have received or may receive in the future from Referring Agent or from any other person not employed by FxCM regarding foreign currency or exchange ("Forex") trading or the risks involved in such trading. If Referring Agent or any other third party provides Trader with information or advice regarding Forex trading, FxCM shall in no way be responsible for any loss to Trader resulting from Trader's use of such information or advice. Trader understands that Referring Agent and many third party vendors of trading systems, courses, programs, research or recommendations are not regulated by a government agency." (See CFTC Exhibit 2 at p. 5; ¶ 9).

13. The contract entered into between Gibraltar's customers and FxCM was entitled "Trader Agreement." Each of Gibraltar's clients was required to sign this contract before they

could open an account at FxCM. Paragraph 15(b) of the Trader Agreement states, "Trader further acknowledges that should Trader grant trading authority or control over Trader's account to a third party ("Trading Agent"), whether on a discretionary or non-discretionary basis, FxCM shall in no way be responsible for reviewing Trader's choice of such Trading Agent nor making any recommendations with respect thereto. Trader understands that FxCM makes no warranties nor representations concerning the Trading Agent, that FxCM shall not be responsible for any loss to Trader occasioned by the actions of the Trading Agent and that FxCM does not, by implication or otherwise, endorse or approve of the operating method of the Trading Agent. If Trader gives Trading Agent authority to exercise any of its rights over Trader's account(s), Trader understands that Trader does so at Trader's own risk." (See CFTC Exhibit 2 at p. 9; ¶ 15(b).)

14. Pursuant to the terms of the FxCM-Gibraltar Agreement, each Gibraltar customer was to sign and return a Limited Power of Attorney form. The Limited Power of Attorney authorized Gibraltar to serve as the trading agent for its customer's trades with FxCM. Among other things, terms of this document state that "FxCM is authorized to follow the instructions of the aforesaid agent [here, Gibraltar] in every respect concerning the undersigned customer's account with FxCM . . . ." (See CFTC Exhibit 2 at p. 18). This document also warned Gibraltar's customers that even though they gave authority to Gibraltar, that they "should be diligent to closely scrutinize what transpires in [their] account[s]." (Id.). Moreover, the Limited Power of Attorney explained that Gibraltar's commission for each "round turn lot" was to be twenty-five percent of the premium not to exceed two-hundred dollars ($200.00). Directly above the signature lines–which required the signatures from Gibraltar's customers as well as a signature from a Gibraltar employee–the Limited Power of Attorney stated "[t]he undersigned agrees that

he/she understands and certified that they have the financial resources to enter this Agreement and that all trading objectives have been explained. The undersigned acknowledges having received, read and understood the foregoing . . . ." (Id.). Even though the express terms of the Limited Power of Attorney authorized Gibraltar to make trading decisions on behalf of its customers, it appears that Gibraltar sought authorization from its customers prior to placing each trade.

Gibraltar's Clients

15. During the course of the trial, seven of Gibraltar's two hundred seventy-three clients testified. These representative clients differed in age, education, wealth, geographic location, and experience trading Forex options. However, the testimony of the clients was consistent with respect to the various material misrepresentations and deceptive omissions of material fact that were made by Gibraltar's AEs. The commonalities amongst the representative customer's testimony concerning the fraudulent tactics of Gibraltar's AEs convinces the Court that similar tactics were a part of each Gibraltar solicitation.

Brook McDonald

16. In July 2002, Brook McDonald–a stay at home mother residing in Spanish Fork, Utah–received a package from Gibraltar after responding to an email advertisement concerning Forex trading. Included in this package was an introduction letter signed by Fremer, as the executive vice-president and general manager of Gibraltar. Fremer's letter stated, "[a]s you read the enclosed account opening and risk disclosure documents, please keep in mind that these cover all types of trading which have varying degrees of liability. Obviously, where you have the potential for a 200% - 300% return or more there are risks and they can be substantial. **Please remember, when purchasing long options, your financial risk is limited to the amount you**

invest." (See CFTC Exhibit 20). Moreover, the letter declared that Gibraltar customer's "documents and funds are sent directly to FxCM, a licensed and regulated [FMC] and all options purchased through [Gibraltar] are cleared through FxCM as well." (Id.). Soon after receiving the initial package, McDonald was contacted by Al Gropman, a Gibraltar AE, who told her that she could double her money by investing with Gibraltar if she invested quickly to take advantage of the rise in the Euro that resulted from the September 11, 2001 terrorist attacks. Later, after making an initial investment with Gibraltar, McDonald's account was transferred to Johnson who repeatedly pressured McDonald to invest more money. Johnson regularly indicated that he had background in trading Forex options, and because of McDonald's inexperience with such trading that he needed to "drive the train." Despite his aggressiveness–which included calling up to three times in a single day–McDonald trusted Johnson, because of his representations that as a senior AE, with years of trading experience, none of his clients ever lost money. Yet, when McDonald's investments started "dive bombing" Johnson offerred her no advice on what strategies she should take with her accounts. Even after purchasing three sets of options through Gibraltar and losing nearly all of the money she invested, Johnson continued to contact McDonald to ask her to invest more money with Gibraltar. When McDonald told Johnson she had no more money to invest, Johnson indicated that he could make her money back and asked McDonald to sell her car. In total, McDonald lost $4,740.00 during July 2002 through her trades placed by Gibraltar.

17. No one from Gibraltar adequately explained to McDonald that: (1) there was a chance that her options would expire worthless; (2) current events were already factored into the price of Forex options; (3) nearly all Gibraltar investors were losing money on their investments; (4) several employees of Gibraltar–including Johnson, Kline, Fremer and Clancy–had worked for

investment firms that were sanctioned for sales fraud; and (5) a permanent injunction and CFTC cease and desist order had previously been entered against Kline that enjoined him from, *inter alia*, committing commodities fraud. According to McDonald, if she had known this information she would not have invested with Gibraltar.

18. Prior to investing through Gibraltar, McDonald completed the materials she received in Gibraltar's initial package. Included in this package were an account application form, a risk disclosure statement, and a limited power of attorney. By McDonald's own admission she did not read all the materials, nor did she have a complete understanding of the documents, prior to signing and returning these forms to Gibraltar. McDonald, however, was aware that by signing and returning those documents she had indicated that she read, understood and agreed to the content of those materials. McDonald did understand that the limited power of attorney form appointed Gibraltar as her trading agent in trades with FxCM. Moreover, McDonald admitted that any consequences stemming from her failure to read these documents should be attributed to her.

19. On May 3, 2004, in response to a CFTC request for information, McDonald drafted a letter to the CFTC regarding her trading experiences with Gibraltar and FxCM. In that letter, McDonald expressed her dissatisfaction with Johnson's treatment. McDonald described Johnson's behavior as being aggressive when it came to obtaining money for investments, but turning quickly disinterested with her account once the money was invested. The letter also voices displeasure with FxCM over the apparent sale of McDonald's husband's personal information to other companies. However, in that letter, McDonald does not express any

dissatisfaction with FxCM in regards to her trading, nor does she indicate any confusion between the roles played in her trades by FxCM and Gibraltar.

John Stephenson

20. In July 2002, John Stephenson–the president of an environmental consulting/contracting company residing in Golden, Colorado–was contracted by a Gibraltar employee who wanted him to open an account with Gibraltar. The Gibraltar employee, who was possibly Fremer, told Stephenson that any investment in Forex options through Gibraltar would double as a result of strength of the Euro at that time. Moreover, Stephenson was informed that other Gibraltar customers were making 200% to 300% returns on their investments. Shortly thereafter, Gibraltar sent a package of materials to Stephenson that included newspaper articles and graphs concerning the potential returns available when investing in Forex options. Based upon the information he received from Gibraltar, as well as some independent research, Stephenson decided to invest $10,000.00 in Forex options through Gibraltar. In total, Stephenson lost $9,667.00 during August and September 2002 through his investments with Gibraltar.

21. No one from Gibraltar adequately informed Stephenson as to the following: (1) the meaning of the account opening documents and risk disclosure forms; (2) that most of Gibraltar's customers were losing money trading Forex options; (3) several employees of Gibraltar–including Johnson, Kline, Fremer and Clancy–had worked for investment firms that were sanctioned for sales fraud; or (4) a permanent injunction and CFTC cease and desist order had previously been entered against Kline that enjoined him from, *inter alia*, committing commodities fraud.

According to Stephenson, if he had known this information he would not have invested with Gibraltar.

22. Prior to investing through Gibraltar, Stephenson completed the materials he received in Gibraltar's initial package. Included in this package were an account application form, a risk disclosure statement, and a limited power of attorney. Although Stephenson read and signed these documents, he admits that he did not fully comprehend every provision contained in the materials. Stephenson, however, was aware that by signing and returning those documents he had indicated that he read, understood and agreed to the content of those materials. Moreover, Stephenson did understand that by signing the limited power of attorney form that he was giving Gibraltar the power to make trades on his behalf.

23. Stephenson did not fully understand the role that FxCM played in his trades. However, Stephenson believed that Gibraltar and FxCM were working together. Stephenson contacted FxCM directly only twice. The first time Stephenson contacted FxCM was to inquire about how to access his online trading account, which was operated by FxCM. The second time he contacted FxCM for tax advice on how to write-off the loses he suffered through trading Forex options.

Bartkowski's Testimony

24. In May 2002, John Bartkowski–a retired school administrator and college professor residing in Moses Lake, Washington–was initially contacted by Gropman who wanted him to open an account with Gibraltar. Gropman advised Bartkowski that Gibraltar's business was to make its customers immense profits based upon the rising value of the Euro in relationship to the dropping value of the U.S. dollar. Shortly after this call Gropman sent a package of materials to

Bartkowski in the mail. Included in these materials were claims that for every $.01 movement in the foreign currency market Gibraltar customers could make $1,000.00 in profit. Bartkowski also received the same introduction letter as McDonald, in which Fremer wrote that customers could earn 200 to 300% profits and that all documents and funds would be sent to FxCM, "a licensed and regulated Futures Commissions Merchant," that would also clear all options purchased by Gibraltar. Based upon these representations, Bartkowski believed that the investment opportunity with Gibraltar was "too good to pass up." As such, Bartkowski invested $5,000.00 dollars with Gibraltar hoping to make money based upon the rising price of the Euro. However, despite the original representations from Gibraltar that the Euro was increasing in value, Fremer purchased put options for Bartkowski that would make money only if the Euro decreased in value. After purchasing these options, the Euro continued to rise in value, causing Bartkowski to lose $4,375.00.

25. No one from Gibraltar adequately informed Bartkowski as to the following: (1) the meaning of the account opening documents and risk disclosure forms; (2) that most of Gibraltar's customers were losing money trading Forex options; (3) that current events, such trends in the value of currency, were already factored into the price of Forex options; (4) that several employees of Gibraltar–including Johnson, Kline, Fremer and Clancy–had worked for investment firms that were sanctioned for sales fraud; or (5) a permanent injunction and CFTC cease and desist order had previously been entered against Kline that enjoined him from, *inter alia*, committing commodities fraud. According to Bartkowski, if he had known this information he would not have invested with Gibraltar.

26. Prior to investing through Gibraltar, Bartkowski completed the materials he received in Gibraltar's initial package. Included in this package were an account application form, a risk disclosure statement, and a limited power of attorney. Although Bartkowski read and signed these documents, he admits that he did not fully comprehend every provision contained in the documents. Bartkowski believed that by completing these documents Gibraltar would be able to produce returns that conformed with the claims made by Gibraltar about profits available in trading Forex options. By signing these materials, moreover, Bartkowski was trusting that Gibraltar would not take advantage of him.

27. On March 6, 2003, Bartkowski drafted a letter to the Florida Department of Financial Services regarding his trading experiences with Gibraltar. In that letter, Bartkowski expressed his dissatisfaction with Fremer's purchase of put options, especially in light of the information he received from other Gibraltar AEs that the Euro was increasing in value. According to the letter, Bartkowski believed that Gibraltar was a fraudulent organization that had deceived and duped him. In this letter, Bartkowski does not mention FxCM.

Rosie Brady

28. In May 2003, Rosie Brady–a manager for a medical device manufacturer residing in Murrieta, California–received a call from Patrick Meaney, a Gibraltar AE, who wanted her to open an account with Gibraltar. Meaney advised Brady that she could make between 200% and 300% returns on her investment, and that other Gibraltar customers were making a lot of money based on similar investments. Although Brady was told that there were risks associated with trading Forex options, Meaney lead her to believe that it was far more likely that she would make, rather than lose, money. Brady was also informed that the then-impending war between Iraq and

the United States would cause an upswing in the currency markets, which she could take advantage of if she traded with Gibraltar. Suspecting that Gibraltar might be a "boiler room." Brady questioned Meaney about whether Gibraltar was legitimate, and was told she should have no such concerns since Gibraltar was regulated. Having no prior experience trading options Brady, nevertheless, decided to invest $5,000.00 in Forex options based upon Meaney's advice. Brady testified that she was relying upon Meaney's advice with her investment, and her investments lost nearly all their value. Brady became upset and demanded to speak with Meaney's supervisor. Meaney put Brady in contact with Fremer who explained to her–for the first time–that the options she purchased had an expiration date. Moreover, Fremer informed Brady that in order to make money the Euro had to decrease in value before the her options expired. In total, Brady lost $4,920.00 in trading with Gibraltar during May and June 2003.

29. No one from Gibraltar adequately informed Brady as to the following: (1) the meaning of the account opening documents and risk disclosure forms; (2) that close to 95% of Gibraltar's customers were losing money trading Forex options; (3) that publically known events, such as the impending war, were already factored into the price of an option, or (4) that there was a limited chance that her options would produce returns, and there was a greater chance that those options would expire worthless. According to Brady, if she had known this information she would not have invested with Gibraltar.

30. Prior to investing through Gibraltar, Brady completed the materials she received in Gibraltar's initial package. Included in this package were an account application form, a risk disclosure statement, and a limited power of attorney. Although Brady read and signed these documents, she admits that she did not fully comprehend every provision contained in the

documents. Brady, however, was aware that by signing and returning those documents she had indicated that she read, understood and agreed to the content of those materials. Brady mentioned that she did not fully understand these documents to Meaney, but she signed the documents anyway because she wanted to proceed with the investment.

Leroy Lackey

31. In July 2002, Leroy Lackey–a real estate developer residing in Bowling Green, Kentucky–received a call from Gropman who wanted him to open an account with Gibraltar. Gropman informed Lackey–who had several years of investment experience, including with commodities–that Gibraltar had a "good group" of traders that understood the currency market as a result of extensive experience. Lackey was also told for every $.01 movement in the foreign currency market Gibraltar customers could make $1,000.00 in profit. After sending a package of information, Gropman called again and told Lackey that FxCM was a large regulated entity that would hold all money invested, and that FxCM would not trade unless it received express permission. Based upon this statement Lackey conducted research on FxCM, which included reading the information contained on FxCM's website. Once Lackey decided to invest with Gibraltar, supervision of his account was transferred to Johnson who Gropman labeled a very experienced AE. Johnson told Lackey that the Euro was going to move, and that it was essential that he make an investment immediately to take advantage. Lackey indicated that he relied heavily upon the recommendations made by Gibraltar in deciding whether to trade. In total, Lackey lost $9,595.00 on trades placed by Gibraltar between August and December 2002.

32. No one from Gibraltar adequately informed Lackey as to the following: (1) the meaning of the account opening documents and risk disclosure forms; (2) that there only a 20% to 35% chance of breaking even with the options he was purchasing; (3) that despite assertions to the contrary, Johnson had only three and a half years of experience trading; (4) that several employees of Gibraltar–including Johnson, Kline, Fremer and Clancy–had worked for investment firms that were sanctioned for sales fraud; or (5) a permanent injunction and CFTC cease and desist order had previously been entered against Kline that enjoined him from, *inter alia*, committing commodities fraud. According to Lackey, if he had known this information he would not have invested with Gibraltar.

33. Prior to investing through Gibraltar, Lackey completed the materials he received in Gibraltar's initial package. Included in this package were an account application form, a risk disclosure statement, and a limited power of attorney. Although Lackey read and signed these documents, he admits that he did not fully comprehend every provision contained in the documents. Lackey, however, was aware that by signing and returning those documents he had indicated that he read, understood and agreed to the content of those materials. Before making his first investment, Lackey also spoke with Clancy, Gibraltar's compliance officer, who tape-recorded their conversation. During this conversation, Lackey told Clancy that he understood and accepted the risks associated with trading Forex options. However, prior to speaking with Clancy, Gropman instructed Lackey that he should only answer yes or no while being recorded by Gibraltar's compliance officer.

34. Subsequent to his investments with Gibraltar, Lackey called FxCM to inquire whether he could trade directly with FxCM using the account that was created when Gibraltar acted as his

trading agent. A FxCM representative told Lackey he would have to open a new account to trade directly. Lackey also requested a form to revoke the power of attorney he had previously signed that made Gibraltar his trading agent.

Mike Adams

35. In June 2002, Mike Adams–a retention counselor for the Navy residing in Norfolk, Virginia–received a call from Gropman who wanted him to open an account with Gibraltar. Gropman informed Adams that could "make a lot of money" by investing in foreign currency, and told him about how current events will have a future impact on the value of the Euro. However, Gropman told Adams that he would have to invest immediately to take advantage of the increase in the Euro's value. Gropman faxed Adams a newspaper article about the Euro, which explained what causes the Euro to increase in value. Adams was told that several Gibraltar customers had tripled their money through such investments. Gropman became increasingly more aggressive with each conversation, and began questioning whether Adams was an investor or "a fence sitter." Adams also received the same introduction letter as McDonald and Bartkowski, in which Fremer wrote that customers could earn 200% to 300% profits and that all documents and funds would be sent to FxCM, "a licensed and regulated Futures Commissions Merchant," that would clear all options purchased by Gibraltar. Adams believed that his investment would be safer because FxCM was licensed and regulated. Eventually, in July 2002, Gropman called to tell Adams that they needed to trade immediately, so Adams invested $5000.00. After making money on his first trade, Adams called Gibraltar to tell them he wanted to withdraw his money, but Adams was told that if he really wanted to make big money he would reinvest. Adams agreed to reinvest his money because Gropman had made him money on his first trade. However, on the subsequent

trade Adams lost all his profits. In total, Adams lost $4,320.00 investing through Gibraltar during July 2002.

36. No one from Gibraltar adequately informed Lackey as to the following: (1) the meaning of the account opening documents and risk disclosure forms; (2) that most likely the options he purchased would expire worthless; (3) that most of Gibraltar's customers were losing money; (4) that several employees of Gibraltar–including Johnson, Kline, Fremer and Clancy–had worked for investment firms that were sanctioned for sales fraud; or (5) a permanent injunction and CFTC cease and desist order had previously been entered against Kline that enjoined him from, *inter alia*, committing commodities fraud. According to Lackey, if he had known this information he would not have invested with Gibraltar.

37. Prior to investing through Gibraltar, Adams completed the materials she received in Gibraltar's initial package. Included in this package were an account application form, a risk disclosure statement, and a limited power of attorney. By Adams' own admission he did not have a complete understanding of the documents prior to signing and returning these forms to Gibraltar. However, when Adams sought to have his questions answered Gropman told Adams to simply sign the documents, return them to Gibraltar, and then they could go over his questions. In fact, Gropman told Adams that there was no need to read the entire risk disclosure statement, because it was too long. After completing and returning the forms to Gibraltar, Adams attempted to raise his questions again, but Gropman told Adams not to worry because Gibraltar was going to make him money. Gropman did, however, tell Adams that he had to increase the amount of liquid assets listed on his forms if he wanted to trade. After Gropman told Adams not to worry about changing this information, because it was simply standard paperwork, Adams increased his

liquid assets from $50,000.00 to $100,000.00. Before making his first investment, Adams also spoke with Clancy, Gibraltar's compliance officer, who tape recorded their conversation. During this conversation, Adams told Clancy that he understood and accepted the risks associated with trading Forex options. Adams also told Clancy that he had not been coached on how to fill out the documents, and that he was not trading as the result of promises of profit. However, prior to speaking with Clancy, Gropman instructed Lackey that he should only answer yes or no while being recorded by Gibraltar's compliance officer. Gropman also told Adams to tell Clancy that he was not coached on how to answer questions.

Eugene Robinson

38. In May 2002, Eugene Robinson–a retired sales planner residing in Irving, Texas–was contacted by Luis Arenas, a Gibraltar AE, who wanted him to open an account with Gibraltar. Arenas told Robinson that for every $.01 movement in the Euro currency market Gibraltar customers could make huge profits of 200% to 300% of their investment. Arenas sent Robinson articles from the *New York Times* that compared the current economic circumstances between the United States and the Europe. Based upon these articles and Arenas' claims, Robinson agreed to trade with Gibraltar. Sometime after depositing an initial $10,000.00 with Gibraltar Robinson's account was transferred to Johnson. Johnson reiterated to Robinson that the United States market was weaker than the Euro market. Robinson relied upon Johnson's professional advice, believing that Johnson was an experienced AE, when investing additional money after losing his initial investment through trades. Johnson told Robinson that addition money was needed to place him in a "more profitable trading position." Johnson also told Robinson that to increase his

risk range on the risk disclosure form so more money could be invested. In total, Robinson lost $18,772.50 placing trades through Gibraltar between June and August 2002.

39. No one from Gibraltar informed Robinson as to the following: (1) the meaning of the account opening documents and risk disclosure forms; (2) that most of Gibraltar's customers were losing money; (3) that Johnson had only three and a half years of experience trading; (4) that several employees of Gibraltar–including Johnson, Kline, Fremer and Clancy–had worked for investment firms that were sanctioned for sales fraud; (5) a permanent injunction and CFTC cease and desist order had previously been entered against Kline that enjoined him from, *inter alia*, committing commodities fraud. According to Robinson, if he had known this information he would not have invested with Gibraltar.

40. Prior to investing through Gibraltar, Robinson completed the materials he received in Gibraltar's initial package. Included in this package were an account application form, a risk disclosure statement, and a limited power of attorney. Robinson contends that he read and understood these documents prior to signing and returning them to Gibraltar.

41. In August 2002, after losing most of the money he invested through Gibraltar, Robinson called FxCM to complain about Gibraltar, and, specifically, Johnson's management of his account. Robinson informed Brad Shulman, an FxCM compliance officer, that he believed his account was mismanaged by Johnson. For example, Robinson told Shulman that Johnson's trading choices were ill-advised, because Johnson was recommending trades with strike prices that were beyond the realm of possibility based upon the valuation of the Euro at that time. Shulman was also informed Shulman that told Johnson that he wanted to stop trading on or about

July 22, 2002, but that Johnson did not sell Robinson's options until August 28, 2002; as a result of this delay Robinson's account dropped from approximately $2,670.00 to $1,270.00.

42. Subsequent to his trading experience with Gibraltar, Robinson opened up another Forex trading account with FxCM through Premierefx LLC, a trading advisor. As of the date of his testimony, Robinson's second account with FxCM remained open.

Utah Investigation

43. In 2002, the Utah Department of Commerce commenced an investigation into Gibraltar. As part of the investigation Jude Densly, then a securities compliance investigator at the Utah Department of Commerce, responded to a Gibraltar email purporting to be an interested customer by the name of Kim Jenkins. Shortly after responding to that email Patrick McCarthy, a Gibraltar AE, called to speak with Jenkins regarding trading Forex options through Gibraltar. During this conversation McCarthy stated that the foreign currency market thrives off of volatility, and suggested that it was a great time to enter the market because of current increased marketplace volatility. As an example of this volatility, McCarthy suggested that the Japanese and United States currency values were greatly overvalued, and that the Euro was positioned to explode in value because it was in fact undervalued. McCarthy indicated that the Euro's value would increase greatly because England's Prime Minister had declared an intention to adopt the Euro, which could have the effect of increasing the Euro's value as much as eight cents in a single day. McCarthy also stated that a $.01 movement in the Euro could lead to $1000.00 in profit on an investment. McCarthy further indicated that the Euro was going to greatly increase in value because the markets of Japan and the United States were dismal and were expected to perform in a similar manner for a very long time. According to McCarthy, the United States dollar was at a

fifteen year high, but was greatly overrated. McCarthy stated that the United States dollar's value had fallen for each of the past eight weeks, and analysts predicted that its value would continue to decrease. Based upon this positive forecast of the Euro, McCarthy stated "that the sooner you can get involved in this marketplace the better it's going to be for you." (See CFTC Exhibit 68 at p. 39).

44. McCarthy explained during this conversation that trading in Forex involves risks; including the risk that the options could expire worthless. However, McCarthy stated "I won't let that happen but that's a possibility, okay? Obviously when you have an opportunity to made two, three, four hundred percent potential [profits], there is going to be risk." (Id. at p. 22). McCarthy also said "bear in mind that I will not let your option expire worthless." (Id.). McCarthy further stated that "I'm not here to watch my clients lose money. My clients make money. All my clients are making money right now. They're all very happy actually. I got clients that are up 180% in the last few weeks." (Id. at pp. 22-23).

Gibraltar's Compliance Officer

45. Clancy, Gibraltar's compliance officer, testified on behalf of the CFTC in this matter. Kline hired Clancy to become Gibraltar's compliance officer. In this role, Clancy administered Gibraltar's compliance procedures, which included tape recording conversations with customers to ensure that the customers understood the risks associated with trading Forex options. According to Clancy, Gibraltar exclusively referred its customers to FxCM. Moreover, Gibraltar would apply FxCM's customer qualification standards in order to produce customers that were satisfactory to FxCM. As part of this task Gibraltar would distribute FxCM's account opening materials, and supervise the customer's completion of these materials. Gibraltar would collect

these account opening materials, and forward these materials to FxCM. Included with FxCM's materials, Gibraltar also included an introductory letter stating that FxCM was a registered and regulated company. Clancy testified that Gibraltar referenced FxCM's registered and regulated status to make customers more relax about placing trades through Gibraltar.

46. Clancy also placed trades for Gibraltar's customers with FxCM. According to Clancy, he would call FxCM's order desk, and give an FxCM employee the client's number, quantity of purchase, and month of expiration. The FxCM employee would respond with a strike price, and most of the time he would accept the price offered without making a counter-offer. Clancy testified that Gibraltar would select the expiration date of the options, while the customers were responsible for selecting the quantity of options to purchase.

47. If Gibraltar's customers complained to FxCM, Clancy confirmed that these complaints would be directed back to Gibraltar. For example, on March 3, 2002, a compliance offer at FxCM emailed Clancy stating that FxCM had received complaints about Gibraltar's practices. In that email FxCM's employee wrote, "[a]s you recall, we have already discussed the need for you guys to monitor your marketing advertising methods, and I feel that I must re-emphasize this. As these complaints reflect on the way we do business. I must now ask you to give me a written description of the kind of advertising/marketing methods you are using, include a copy of any material you may use." (See CFTC Exhibit 30). Though Clancy does not remember receiving this particular email, he stated that it was his belief that such complaints were referred to Fremer.

48. Clancy also testified as to the operations of Gibraltar. According to Clancy, Fremer was in charge of the day-to-day operations of Gibraltar. In this role, Fremer was responsible for

preparing Gibraltar's solicitations materials, developing sales presentations, hiring employees, training staff, and paying employees. Clancy stated that Johnson was a senior AE with Gibraltar, who managed referred accounts from other AEs in order to get customers to invest additional money. The AEs were each supplied with a compliance script that they were to use in their solicitation of potential customers. Although a script existed, Clancy testified that it did not contain valuable disclosures, such as informing the customers of the probability of their options expiring worthless. Moreover, Clancy said that many AEs did not follow the script.

CONCLUSIONS OF LAW

1. Jurisdiction in the United States District Court for the Southern District of Florida is proper pursuant to Section 6c(a) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 13a-1(a), which authorizes the CFTC to seek injunctive relief against any registered entity or other person whenever it appears that the registered entity or person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the CEA or any rule, regulation, or order thereunder.

2. Venue is proper in the United States District Court for the Southern District of Florida pursuant to Section 6c(e) of the CEA, 7 U.S.C. § 13a-1(e) because the Defendants are found in, inhabit, or transact business in this District, and the acts and practices alleged to be in violation of the CEA and the CFTC Regulations occurred within this District, among other places.

3. The evidence at trial consisted mostly of testimony by seven customers of Gibraltar, one state securities compliance officer, one CFTC investigator, two representatives of FxCM, two expert witnesses, and Defendants Clancy, Kline, Fremer and Johnson. One of the most telling aspects of the trial was testimony, or lack thereof, by Defendants Kline, Fremer and Johnson.

These Defendants would rarely answer a question, electing instead to invoke their Fifth Amendment right against self incrimination. In a civil action, such as this, a court is permitted to make adverse inferences about a party that refuses to testify in response to probative evidence offered against it. Mitchell v. U.S., 526 U.S. 314, 327 (1999). Accordingly, in this matter, the Court will make such adverse inferences against Defendants Kline, Fremer and Johnson where appropriate.

Liability of Gibraltar's AEs, in particular Johnson, for Fraud

4. The CEA, 7 U.S.C. § 6c(b), provides that, "no person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as, an 'option' . . . contrary to any rule, regulation, or order of the [CFTC] prohibiting any such transaction or allowing any such transaction under such terms and conditions as the [CFTC] shall prescribe. Any such order, rule, or regulation may be made only after notice and opportunity for hearing, and the [CFTC] may set different terms and conditions for different markets." Id.

5. CFTC regulations, 17 C.F.R. §§ 32.9(a) & (c), make it "unlawful for any person directly or indirectly: (a) [t]o cheat or defraud or attempt to cheat or defraud any other person . . . [or] (c) [t]o deceive or attempt to deceive any other person by any means whatsoever; in or in connection with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction."[4] Id.

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[4] These CFTC regulations are applicable to off-exchange foreign currency transactions, since Congress took no affirmative steps to deprive them of their effect when passing the Commodities Futures Modernization Act of 2000. See CFTC v. G7 Advisory Servs., LLC, 406 F. Supp. 2d 1289, 1297-98 (S.D. Fla. 2005).

6. To establish liability for violations of regulations addressing fraud, the CFTC has "the burden of proving three elements: (1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality." CFTC v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1328 (11th Cir. 2002).

Misrepresentations, Misleading Statements, and Deceptive Omissions

7. Whether a misrepresentation, misleading statement, or a deceptive omission occurs "depends on the 'overall message' and the 'common understanding of the information conveyed.'" Id. at 1328. Given that the investing public is fixated upon the risk-reward relationship when evaluating a business opportunity, if an overall message overemphasizes profit potential and downplays risk of loss, then the statement is deemed a misrepresentation or misleading. Id. at 1329 (holding that statements to customers that profits of 200% to 300% were expected constitute misrepresentations and misleading statements); see also FTC v. Tashman, 318 F.3d 1273, 1275 (11th Cir. 2003). Moreover, claiming that the movement of the cash price of a commodity produces a directly proportional increase in the value of an option based on that price is misleading and deceptive, because it is rare that such a proportional increase occurs. See R.J. Fitzgerald & Co., 310 F.3d at 1331 (holding that it is impermissible to suggest that profits on options on futures contracts are proportionally related to the cash market); see also CFTC v. Commonwealth Fin. Group, 874 F. Supp. 1345, 1352 (S.D. Fla. 1994). A party may also be liable for misrepresentations or misleading statements when it links profit expectations on commodities to known or expected events. R.J. Fitzgerald & Co., 310 F.3d at 1330; see also CFTC v. Wilshire Inv. Mgmt. Corp., 407 F. Supp. 2d 1304, 1310 (S.D. Fla. 2005). Lastly, misstatements about the trading record and experience of a firm or broker are deemed fraudulent,

since prior success and experience are factors that a reasonable investor would consider important when deciding whether to invest through a particular firm or broker. Commonwealth Fin. Group, 874 F. Supp. at 1353-54.

8. Here, the evidence demonstrates that Gibraltar and its employees repeatedly made misrepresentations and misleading statements. In particular, Johnson and other Gibraltar AEs made, *inter alia*, the following misrepresentations and misleading statement to Gibraltar customers: (1) that Gibraltar customers could obtain 200% to 300% returns on their investments in a short period of time; (2) for every $.01 movement in the foreign currency market Gibraltar customers could make $1,000.00 in profit;[5] (3) political conditions, such as the September 11, 2001 terrorist attacks and the then-expected war with Iraq, would affect the foreign currency markets in a manner that would increase the likelihood that Gibraltar's customers would realize profits; (4) that most other Gibraltar customers were profiting from their investments; and (5) that as a result of Gibraltar's, and/or Johnson's, extensive trading experience none of Gibraltar's clients lost money; when in fact Johnson only had three and a half years experience trading options and the vast majority of Gibraltar's clients were losing money. The Court finds that these statements constitute fraudulent misrepresentations in violation of the CEA.

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[5] The individual Defendants argued at trial that the actual statement made by Gibraltar employees was that a $.01 movement in the option premium would result in a $1000 profit, and that this statement is in fact true. The Court notes, however, that the individual Defendants failed to provide convincing evidence that it was this statement–rather than the above misleading statement–that Gibraltar employees made to customers. Moreover, the testimony from several customers, coupled the adverse inference taken from the individual Defendants refusal to testify in response the probative evidence offered that the misleading statement was made, contradicts the Defendants' argument. Therefore, after weighing the evidence presented, the Court finds that the above misleading statement was made to Gibraltar customers on several occasions.

9. A party may also violate the CEA by failing to disclose material information. As such, if a party does not inform potential customers that a significant percentage of its customers are losing money, then that party is liable for committing a deceptive omission. R.J. Fitzgerald & Co., 310 F.3d at 1333. The failure to disclose dismal results to customers is deemed particularly deceptive when a party emphasizes exaggerated statements of profit potential. Wilshire Inv. Mgmt. Corp., 407 F. Supp. 2d at 1310-11. A party may also be liable for a deceptive omission if it fails to disclose previous regulatory violations to its customers and potential customers. See CFTC v. Wellington Precious Metals, Inc., et al., No. 85-3565-Civ-ATKINS, 1988 U.S. Dist. Lexis 17381, **21-22 (S.D. Fla. July 12, 1988); see also CFTC v. Wall Street Underground, Inc., et al., 281 F. Supp. 2d 1260, 1270 (D. Kan. 2003).

10. Here, in addition to making fraudulent misrepresentations, Johnson and other Gibraltar AEs deceptively omitted facts when soliciting customers. For example, during solicitations Johnson and other Gibraltar AEs failed to disclose that nearly ninety-five percent of Gibraltar's customers lost most if not all of their investments. Though at the time there may have been no way to ascertain the exact percentage of customers that were losing money, the AEs must have been aware that the vast majority of Gibraltar's clients were losing money. However, instead of disclosing the dismal losses suffered by Gibraltar customers, Gibraltar's AEs repeatedly exaggerated the amount of profits earned by other Gibraltar customers when soliciting potential customers. Moreover, they failed to disclose that employees of Gibraltar–including Johnson and Clancy–were previously employed at firms that had been charged with fraud. Even though these Gibraltar employees may not have personally been subject to these previous fraud investigations, the Court finds that a reasonable investor would have considered this information to be material.

Lastly, Gibraltar AEs failed to disclosed that a district court previously entered a permanent injunction and the CFTC had issued a cease and desist order against Gibraltar's president–i.e., Kline–for violating the CEA by committing fraud in connection with commodity options. Not only did the AEs fail to disclose that Kline had been found liable for violating the CEA, but they also failed to disclose that as a result of these previous violations Kline had been permanently enjoined from engaging in such activities. Surely, a reasonable investor would have considered these omitted facts important when deciding whether to invest with Gibraltar.

11. Based upon the above misleading statements and deceptively omitted facts, the Court concludes that overall message presented by Johnson and other Gibraltar AEs was misleading and designed to deceive individuals into investing their money with Gibraltar. The presence of risk disclosure statements does not change this conclusion. R.J. Fitzgerald & Co., 310 F.3d at 1329-30 (holding that the presence of general risk disclosure language does not preclude liability when the overall message is clearly misleading or deceptive). As such, the Defendants are not immunized from liability simply because Gibraltar's customers: signed risk disclosure forms, agreed verbally to the risks associated in investing, or made the ultimate decision on whether or not to place a trade. In this case, such measures were superficial attempts to shield Gibraltar and its employees from liability rather than genuine attempts to inform customers of material information about the risks involved with trading Forex options.

12. For example, customers testified that prior to being taped for the verbal risk disclosures by Gibraltar's compliance officer, employees of Gibraltar coached the customers on how to correctly answer the risk disclosure questions. Moreover, Gibraltar repeatedly downplayed any risks that were mentioned in favor of overemphasizing potential profits of 200%

to 300%. As such, while Defendants argued that these tapes prove that the customers understood and assumed the risks, in reality the overall message received by the customers was that they should not worry about the risks involved with investing.

13. In fact, these risk disclosure statements may have even had the effect of contributing to the deceptive nature of the overall message presented to customers. For example, a Gibraltar cover letter, which was signed by Fremer and sent to potential customers, stated: "[o]bviously, where you have the potential for a 200% - 300% return or more there are risks and they can be substantial." Risk disclosure statements such as this one make the risk appear attractive by implying that profits are made possible by the presence of the risk. Moreover, such risk disclosure statements obscure the distinction between the possibility of earning such returns with the probability that such returns will be earned. R.J. Fitzgerald & Co., 310 F.3d at 1330. As such, even considering all the risk disclosure statements and the frequency in which they were given, the overall message presented by Gibraltar to its customers was misleading and in violation of the CEA. To allow Gibraltar and its employees to hide behind such inadequate risk disclosure methods would serve to circumvent the purpose of the CEA and the CFTC regulations. Wilshire Inv. Mgmt. Corp., 407 F. Supp. 2d at 1310-11.

Scienter

14. "For purposes of fraud or deceit in an enforcement action, scienter is established if Defendant intended to defraud, manipulate, or deceive, or if Defendant's conduct represents an extreme departure from the standards of ordinary care." Id. at 1328. The scienter element may be satisfied when a "Defendant's conduct involves 'highly unreasonable omissions or misrepresentations . . . that present a danger of misleading [customers] which is either known to

the Defendant or so obvious that Defendant must have been aware of it." Id. (quoting Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001). Defendants have been found to possess the requisite level of scienter if they attract customers by (1) suggesting that profits are linked to trends and/or historical highs, (2) indicating that the market could be timed to generate large profits, and (3) inflating profit expectations when downplaying the risks involved. Id.

15. Here, Johnson and other Gibraltar AEs acted with scienter when repeatedly making misrepresentations, misleading statements, and deceptively omitting facts. As described above, Gibraltar's AEs repeatedly made statements that indicated that: (1) profits were linked to trends in the market that resulted from the September 11, 2001 terrorist attacks and the then impending Iraq war; (2) large profits were possible if customers entered the market immediately to take advantage; and (3) exaggerated potential profits while greatly downplaying the potential risks involved in trading. Such statements are so outrageous that Johnson and other Gibraltar AEs must have known that they were misleading their customers, or, at the very least, that there was a high probability of harm. Therefore, the Court finds that Johnson and other Gibraltar AEs acted with the necessary scienter.

Materiality

16. "A representation or omission is 'material' if a reasonable investor would consider it important in deciding whether to make an investment." Id. at 1328-29. "Exaggerated statements of profit potential and suggestions that current conditions offer unique opportunities to profit would undoubtably heavily influence a reasonable investor's decision to invest." Id. at 1311-12. Moreover, dismal results experienced by other customers and the truth about a broker's experience would be considered important when deciding whether to invest, because prior results

and experience are important considerations for the reasonable investor. Commonwealth Fin. Group, 874 F. Supp. at 1353-54.

17. As such, each of the above misrepresentations and omissions would have been material to the reasonable investor. As several of the Gibraltar customers testified, these misrepresentations and omissions by Johnson and other Gibraltar AEs contained information that would have influenced them not to invest with Gibraltar. Moreover, for those customers that did not testify, the Court finds that the reasonable investor would also have found these statements and omissions to be material. In particular, the Court finds that the exaggerated statements of profit potential, combined with their comments about how the current market conditions would offer the opportunity to profit, would undoubtably have influenced a reasonable investor. Wilshire Inv. Mgmt. Corp., 407 F. Supp. 2d at 1311-12. Moreover, it is difficult to imagine how a potential customer would not find it material that the majority of current customers were in fact losing money on most of, if not all, of their trades. This is especially true, when the Defendants not only omitted the dismal losses of their customers, but at the same time affirmatively told potential customers that most, if not all, of Gibraltar's customers were experiencing substantial returns on their trades. Also, the Court finds that a reasonable investor would most certainly have considered the previous regulatory violations of Gibraltar's employees, especially the CFTC cease and desist order entered against Kline, an important factor in deciding whether to use Gibraltar's services. Lastly, it goes without saying that a reasonable investor would have considered it material to know that it is a $.01 movement in the option premium, rather than in the foreign currency market, that has the potential to result in a $1,000.00 profit. See R.J. Fitzgerald & Co.,

310 F.3d at 1331. In sum, it cannot be seriously disputed that these misstatements and omissions were material to Gibraltar's customers.

Liability of Fremer and Kline as Controlling Persons

18. The CEA, 7 U.S.C. § 13c(b), provides that "[a]ny person who, directly or indirectly, controls any person who has violated any provision of this chapter or any of the rules, regulations, or orders issued pursuant to this chapter may be held liable for such violation in any action brought by the [CFTC] to the same extent as such controlled person. In such action, the [CFTC] has the burden of proving that the controlling person did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation." Id. A fundamental purpose of this Section, "is to allow the [CFTC] to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the [CEA] directly on such individuals as well as on the corporation itself." JCC, Inc. v. CFTC, 63 F.3d 1557, 1567 (11th Cir. 1995). The liability imposed under this Section is known as "controlling person" liability. See Wilshire Inv. Mgmt. Corp., 407 F. Supp. 2d at 1312.

19. The CFTC bears the burden of demonstrating "controlling person" liability. CFTC v. Midland Rare Coin Exch., Inc., 71 F. Supp. 2d 1257, 1265-66 (S.D. Fla. 1999). To prove "controlling person" liability the CFTC must demonstrate that the: (1) corporation violated the CEA; (2) defendants "directly or indirectly" controlled the corporation; and (3) defendants failed to act with good faith, or knowingly induced the acts that constitute the violations. CFTC v. Baragosh, 278 F.3d 319, 330 (4th Cir. 2002). This "controlling person" standard is satisfied when an individual has actual or constructive knowledge of the activities that constitute the violation and allows them to continue. Commonwealth Fin. Group, Inc., 874 F. Supp. at 1357.

For "controlling person" liability the focus is upon the power to control not whether that power is actually exercised. In re First Nat'l Trading Corp., CFTC Docket Nos. 90-28 & 92-17, 1994 CFTC LEXIS 216, at * 32 (CFTC July 20, 1994) ("It is [the Defendant's] power that matters, not whether he exercised it by actually participating in or benefitting from the illegal acts.").

20. As discussed above, the Court has found that Gibraltar and its employees violated Section 6c(b) and CFTC Regulations 32.9(a) & (c). Moreover, Gibraltar did not maintain a reasonably adequate system of internal supervision, which demonstrates that Fremer and Kline did not act in good faith. Monieson v. CFTC, 996 F.2d 852, 860 (7th Cir. 1993) (holding that a person fails to act in good faith if he does not maintain a reasonably adequate system of internal supervision, or fails to use reasonable diligence in enforcing such a system). It is evident that Gibraltar lacked an adequate system of supervision, or at the very least failed to use diligence in enforcing any system of supervision, as evidenced by the pervasive fraud discussed above, the sham verbal risk disclosure procedure that accompanied each customer solicitation, and the adverse inference permitted against Fremer and Kline based upon their refusal to testify in response to the probative evidence presented that supports the conclusion that Gibraltar did not maintain an adequate system of supervision. As such, the remaining issue is whether Kline and/or Fremer directly or indirectly controlled Gibraltar when these violations occurred.

21. The evidence presented convinces the Court that Kline and Fremer not only had the power to control Gibraltar, but that these Defendants actually exercised their control during the relevant time period. Kline gave an initial capital contribution of $250,000.00 to finance the start up Gibraltar, which made him the majority shareholder of the company. In addition, Kline had signature authority over Gibraltar's financial accounts–including bank, American Express, and

charge accounts. Kline also made personnel decisions on behalf of Gibraltar, such as hiring Clancy to be Gibraltar's vice-president and compliance officer. Kline served as president of Gibraltar. Notably, while acting as Gibraltar's president, Kline entered into a contractual agreement with FxCM whereby Gibraltar agreed to introduce its customers to FxCM. These facts are sufficient to demonstrate that Kline not only had the power to control Gibraltar, but that he actually did utilize that control.

22. As to Fremer, the uncontroverted evidence demonstrates that he had the authority to, and did, control Gibraltar. Fremer was Gibraltar's vice-president and managing director. In fact, Fremer stipulated that he controlled the day-to-day operations of Gibraltar. In that role, *inter alia*, Fremer prepared Gibraltar's solicitations materials, developed sales presentations, hired employees, trained staff, and paid employees. Fremer also had signature authority over Gibraltar's bank and American Express accounts. Based upon this evidence the Court finds that Fremer is liable as a "controlling person" of Gibraltar.

Liability of FxCM Pursuant to Regulation 1.2

23. Congress enacted the Commodities Futures Modernization Act of 2000 ("CFMA"), the most recent amendment to the CEA, in order "to clarify the jurisdiction of the [CFTC] over certain foreign exchange transactions." G7 Advisory Servs., LLC, 406 F. Supp. 2d at 1295. The CFMA granted jurisdiction over all off-exchange foreign currency transactions involving non-eligible contract participants, except when the counterparty to the transaction is, *inter alia*, a futures commissions merchant ("FCM"). 7 U.S.C. § 2(c)(2)(B)(ii). However, under the CFMA, even if a FCM or an affiliate of a FCM is involved as a counterparty, the CFTC has jurisdiction to regulate transactions to ensure that they comply with Sections 6b, 6c(b), 15 and 13b of the CEA.

Id. § 2(c)(2)(c). As such, the CFTC has jurisdiction over off-exchange foreign currency transactions when the counterparty is an FCM to the extent that transaction violates any rule, regulation or order of the CFTC. See id. § 6c(b).

24. As stated above, CFTC regulations 32.9(a) & (c), make it "unlawful for any person directly or indirectly: (a) [t]o cheat or defraud or attempt to cheat or defraud any other person . . . [or] (c) [t]o deceive or attempt to deceive any other person by any means whatsoever; in or in connection with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction." 17 C.F.R. §§ 32.9(a) & (c). Moreover, CFTC regulation 1.2 creates vicarious liability for a principal for the acts of its agent.[6] Id. § 1.2 ("The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust, within the scope of his employment or office, shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust as well as of such official, agent, or other person."). Therefore, if the CFTC can establish an agency relationship, then a principal would be liable for those misrepresentations, misleading statements, or a deceptive omissions of an agent that violate CFTC regulation 32.9(a) & (c).[7]

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[6] CFTC regulation 1.2, like CFTC regulations 32.9(a) & (c), is applicable to off-exchange foreign currency transactions, since Congress took no affirmative steps to deprive it of its effect when passing the CFMA. G7 Advisory Servs., LLC, 406 F. Supp. 2d at 1297-98.

[7] FxCM argues that the vicarious liability provision of the CEA, 7 U.S.C. § 2(a)(1)(B), should not be applicable to off-exchange foreign currency transactions when a FCM acts as the counterparty, because the CFMA only extends the CFTC's authority over such transactions to enforce compliance with Sections 6b, 6c(b), 15 and 13b of the CEA. According to FxCM, since Section 2(a)(1)(B) was not made applicable to such off-exchange foreign currency transactions by the CFMA, there exists no authority to find FxCM vicariously liable for the other Defendants' violations of the CEA. While FxCM is correct that the CFMA did not make the vicarious liability provision of the CEA applicable to off-exchange foreign currency transaction where a FCM is acting as a counterparty; FxCM overlooks the fact that CFTC regulation 1.2–which the CFMA

25. CFTC regulation 1.2 provides respondeat superior and general principal-agent standards for imposing liability on principals for the acts of their agents.[8] Clayton Brokerage Co. v. CFTC, 794 F.2d 573, 581 (11th Cir. 1986). As such, vicarious liability exists pursuant to this regulation if the CFTC can demonstrate that (1) any of the Defendants were acting as FxCM's agent when they violated CFTC regulations 32.9(a) or 32.9(c), and (2) the actions of those agents were within the scope of the agency relationship. Guttman v. CFTC, 197 F.3d 33, 39 (2d Cir. 1999). To create an agency relationship a principal may either authorize or ratify the actions of the agent, or create the appearance that the agent's actions were authorized. Rosenthal & Co. v. CFTC, 802 F.2d 963, 966 (7th Cir. 1986). However, an entity operating as an introducer of customers to a FCM will not be treated as an agent for vicarious liability purposes if the relationship is one of "independent business entities." Reed v. Sage Group, Inc., et al., CFTC Docket No. 85R-312, 1987 CFTC LEXIS 161, at *23-26 (CFTC Oct. 14, 1987). In essence, agency hinges upon whether the introducing entity and FCM are independent businesses or whether the introducing entity is a *de facto* branch office of the FCM.

26. In this context, whether one is an agent for another depends on an assessment of the totality of circumstances. Stoler & Co. v. CFTC, 855 F.2d 1288, 1292 (7th Cir. 1988). When

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does make applicable to such transactions by giving the CFTC the authority to enforce Section 6c(b) of the CEA–adopts an identical vicarious liability standard to that found in Section 2(a)(1)(B). As such, under these circumstances, vicarious liability may be imposed pursuant to CFTC regulation 1.2.

[8] When a statute and regulation contain virtually identical language, the interpretation of the statute guides the interpretation of the regulation. See JCC, Inc., 63 F.3d at 1561 (applying the same vicarious liability standards under the CEA and CFTC regulation 1.2). As such, the Court will utilize interpretations of Section 2(a)(1)(B) when analyzing the whether vicarious liability exists pursuant to regulation 1.2.

analyzing the issue of agency the CFTC has avoided developing formulas or identifying dispositive factors in favor of making analogies to previous cases. Neal Webster, et al., v. John Joseph Aiello, et al., CFTC Docket No. 98-ROO5, 98-R009, 98-R010, 98-R075, 1999 CFTC LEXIS 26; Comm. Fut. L. Rep. (CCH) ¶ 27,578, at *89 (CFTC Feb. 1. 1999). Whether agency exists depends solely upon objective manifestations rather than subjective understandings. Id. at *90. These objective manifestations can take the form of either express agreements or course of conduct between the parties. Id. Here, there is no evidence that the parties had an express agreement to create an agency relationship.[9] Therefore, the Court must examine whether the course of conduct between the parties created an implied agency relationship.

27. The CFTC relies upon both actual and apparent authority theories to support its argument that an implied agency relationship existed between Gibraltar and FxCM. Implied actual authority is established when "the course of dealing between the agent and principal or the nature of the duties that the alleged agent is assigned by the alleged principal suggests that the agent possesses authority to act in some representative capacity for the principal." Buckner v. Refco, Inc., et al., CFTC Docket No. 00-R122, 2001 CFTC LEXIS 53, at *4 n.10 (CFTC April 25, 2001). To demonstrate the existence of implied actual authority a party must provide evidence that: (1) the purported agent and purported principal acquiesced to the relationship, (2) the purported principal gave sufficient support to the purported agent, and (3) the purported principal exercised sufficient control over the purported agent. Id. at * 97-98 (holding that acquiescence, support and control are relevant factors for determining whether implied actual

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[9] The Court recognizes that a contractual relationship existed between Gibraltar and FxCM. That contract, however, expressly states that Gibraltar and its employees should not be deemed to be agents of FxCM. (See, e.g., FxCM Exhibit 2 ¶ 16).

authority exists; and noting that control is prohibitive of agency even if not dispositive of the issue); see also Whetstone Candy Co., Inc. v. Kraft Foods, Inc., 351 F.3d 1067, 1077 (11th Cir. 2003). Under this standard, an entity is considered autonomous–and thus not an agent–even if it: (1) supplies the FCM's account-opening documents to customers, (2) explains how to complete the account-opening documents, (3) collects account opening documents and sets up an account at the FCM for the customers, (4) represents that its trades will be through the FCM, and (5) the FCM benefits from its relationship with the introducing entity. Webster, 1999 CFTC LEXIS, at *89-114.

28. Here, considering each of the factors set out above and the record as a whole, the Court cannot conclude that the parties' course of conduct created implied actual authority by FxCM over Gibraltar. First, the CFTC has failed to demonstrate that either Gibraltar or FxCM acquiesced to the creation of an agency relationship. For example, the record contains no evidence that the FxCM authorized or condoned the use of its name by Gibraltar, nor that Gibraltar indicated to potential clients that it was FxCM's agent. See Goldstein v. James T. McKerr & Co., et al., CFTC Docket No. R81-757-81-816, 1985 CFTC LEXIS 547, at *6-7 (CFTC April 12, 1985). Second, the CFTC failed to offer sufficient evidence that FxCM provided Gibraltar with the degree of support necessary for establishing an actual agency relationship. For example, there was no evidence that FxCM provided Gibraltar with market and research reports, manuals used in day-to-day business operations by Gibraltar, or customer leads. Reed, 1987 CFTC LEXIS 161, at *29-30. Lastly, FxCM exercised far less control over Gibraltar than in other circumstances where the purported agent was determined to have been acting autonomously rather than as an agent of the purported principal. See Lachmund v. ADM

Investor Servs., Inc., 191 F.3d 777, 783 (7th Cir. 1999) (citing Violette v. First Options of Chicago, Inc., No. 95-R128, 1997 WL 71438, at *3 (CFTC Feb. 20, 1997)) (holding that the introduction of clients to an FCM, even when done pursuant to an exclusive introducing agreement, does not alone create the type of control necessary to establish an agency relationship). For example, here Gibraltar and FxCM were incorporated independently, maintained separate ownership, had no common employees, and did not coordinate sales efforts. Johnson v. First Nat'l Monetary Corp., et. al, CFTC Docket No. 85-R107, 1987 CFTC LEXIS 35, at *13-14 (CFTC Dec. 10, 1987). As such, the Court finds insufficient grounds upon which to conclude that an implied actual agency relationship existed between Gibraltar and FxCM.

29. Apparent agency arises when a principal, either intentionally or through a lack of ordinary care, induces third parties to believe that an entity is its agent even though no express or implied actual authority exists to make that entity an agent. Schultheis v. Heineman Franklin, Inc., et al., CFTC Docket No. R78-519-79-251, 1985 CFTC LEXIS 301, at *8-9 (CFTC Aug. 5, 1985). To establish liability for a principal under apparent agency there must be evidence that: (1) third parties were induced by representations made by the principal that the entity was its agent, and (2) the third parties acted with reasonable prudence and in good faith when they relied upon the agent's authority. Id. Like actual authority, apparent agency may be inferred from course of conduct. Buckner v. Refco, Inc., et al., CFTC Docket No. 00-R122, 2001 CFTC LEXIS 53, at * 4-5 (CFTC April 25, 2001). However, unlike actual agency which focuses only upon the relationship between agent and principal, apparent agency examines the relationship between the purported agent, purported principal, and third parties. Id.

30. Here, the record fails to provide sufficient support for a finding of apparent agency. First, it is unclear exactly what representations the CFTC alleges were relied upon by third parties when forming the belief that Gibraltar was FxCM's agent. At best, the CFTC has provided evidence that Gibraltar used FxCM's status as a licensed and regulated FCM to induce potential customers to use Gibraltar's services. However, no evidence was presented that FxCM knew that Gibraltar was making such representations to potential clients. Moreover, under apparent agency it is the purported principal's representations that are relevant, rather than the unknown representations of the purported agent. As such, even if some clients relied upon Gibraltar's representations when deciding to open accounts, it is irrelevant to the Court's analysis of whether FxCM created an apparent agency relationship with Gibraltar.

31. Second, and more importantly, assuming *arguendo* that FxCM made representations to third parties that indicated a grant of authority to Gibraltar, the CFTC failed to establish that the third parties were reasonably prudent when they relied upon that apparent grant. The record reveals several circumstances that should have put these third parties on notice that Gibraltar was not acting for FxCM. For example, the limited power of attorney forms that were signed by each of Gibraltar's customers contains a hold harmless clause and numerous other indications that clearly conveyed that Gibraltar's actions were on the clients' behalf, not for FxCM. Limited power of attorney forms that contain similar provisions have been determined to "go along way toward disproving any apparent agency." Palomares v. Bradshaw, et al., CFTC Docket No. 99-R015, 2000 CFTC LEXIS 226, at * 55-56 (CFTC Oct. 2, 2000).

32. In addition to the limited power of attorney forms, Gibraltar's customers were required to sign several additional forms that each should have put Gibraltar's customers on

notice that FxCM did not consider Gibraltar its agent. For example, Gibraltar's customers were informed that FxCM does not control Gibraltar, does not endorse Gibraltar, and makes no warranties or representations about Gibraltar. (See, e.g., CFTC Exhibit 2 at p. 5, ¶ 9 (Notice to Trader) & p. 9, ¶ 15(b) (Trader Agreement)). These disclosures were sufficient to give potential Gibraltar customers constructive, if not actual, notice that Gibraltar was not an agent of FxCM.[10] John Rondinelli, Inc. v. Safeco Title Ins., Co., 544 So. 2d 326, 328-29 (Fla. 5th DCA 1989). Moreover, in light of these disclosures, Gibraltar's customers should have inquired as to the scope of any agency that they believed Gibraltar may have had on behalf FxCM. Id. The fact that none of Gibraltar's customers made such inquires should preclude any finding that they acted in a reasonably prudent manner when relying upon their belief that Gibraltar was FxCM's agent. Id. As such, the Court finds insufficient grounds upon which to conclude that FxCM induced Gibraltar's customers to prudently rely upon Gibraltar as its agent.

33. Having considered each of the factors set out above and the record as a whole, the Court cannot conclude that a preponderance of the evidence establishes that Gibraltar, or any Gibraltar agent, was an agent of FxCM. Accordingly, any violations that Gibraltar, or its agents, may have committed cannot form the basis of FxCM's liability under CFTC regulation 1.2.

[10] Many of the Gibraltar customers testified that they did not read the account-opening documents that were provided to them. These documents contained various provisions that repeatedly indicated that Gibraltar should be considered an independent entity from FxCM. If these customers read these materials, then most likely they would not have developed the mistaken belief that Gibraltar was FxCM's agent. However, according to their own testimony, some customers simply signed and returned the forms without fully reading and comprehending their content. Under these circumstances–where FxCM took affirmative steps to prevent customers from believing that Gibraltar was its agent, but these efforts were ignored by the customers–the Court cannot find that the customers acted with reasonable prudence in relying upon their mistaken beliefs.

Liability of Kline for Violating a CFTC Cease and Desist Order

34. Section 6(c) of the CEA provides that, "[i]f the [CFTC] has reason to believe that any person . . . is violating or has violated any of the provisions of [the CEA] or of the rules, regulations, or orders of the [CFTC] thereunder, it may serve upon such person a complaint stating its charges in that respect . . . ." 7 U.S.C. § 9. When an individual violates an order of the CFTC a civil penalty may be imposed against that individual. Cf. Lawrence v. CFTC, 759 F.2d 767, 771 (9th Cir 1995) (affirming the imposition of a civil penalty assessed for a violation of a CFTC order).

35. On December 9, 1993, the CFTC issued a cease and desist order prohibiting Kline from violating Section 4c(b) of the CEA. That order prohibited Kline from committing fraud in connection with commodities options. In this matter, the Court has found that Kline violated the CEA by controlling others who violated Section 4c(b) of the CEA. By acting as a controlling person Kline violated the terms of the CFTC's December 9, 1993 order, as well as Section 6(c) of the CEA.

Injunction

36. The CFTC requests this Court to enter permanent injunction against the Defendants, prohibiting: (1) future violations of the CEA; (2) the destruction, mutilation, concealment, altering or disposing of any records relating to Defendants' business operations; (3) the Defendants from refusing authorized representatives of the CFTC from inspecting all of Defendants' business records; (4) the withdrawal, transfer, removal, dissipation, concealment, or disposal of any funds or other property under control of, or in the name of, the Defendants; and (5) barring the Defendants from engaging in any commodity-related activity, including soliciting customers and

funds. In determining whether an injunction is appropriate, the Court should consider past illegal conduct and the likelihood of future violations. See, e.g., CFTC v. Sidoti, 178 F.3d 1132, 1137 (11th Cir. 1999).

37. An injunction is appropriate in this matter against all remaining Defendants, with the exception of FxCM.[11] As detailed above, Defendants Kline, Fremer, and Johnson violated the CEA in dealing with their customers. These violations included acts by multiple Gibraltar employees on multiple occasions. Most importantly, with respect to the likelihood of future violations, none of these Defendants have acknowledged any wrongdoing. Wilshire Inv. Mgmt. Corp., 407 F. Supp. 2d at 1313-14. The lack of candor demonstrated at trial by Defendants Kline, Fremer, and Johnson "belies any intent of making good faith efforts to comply with restrictions in the future." Id. at 1314. As such, the Court will enjoin these Defendants from conducting the activities described in subsections one through four in the proceeding paragraph.

38. Moreover, the Court finds that a more extensive injunction is warranted because these Defendants violated the CEA in a blatant, brazen, and repeated fashion. Id. Therefore, the Court will further enjoin Defendants Kline, Fremer and Johnson from engaging in any commodity-related activity in the future.

Restitution

[11] The Court notes that similar permanent injunctions have already been entered against Defendants Gibraltar [DE 190] and Clancy [DE 279].

39. The Court finds that restitution for all customer losses is an appropriate remedy. Clearly, restitution is appropriate for those customers who testified to the details of how they were harmed by Gibraltar's fraudulent solicitations. Id. at 1315. However, the evidence also supports a conclusion that Gibraltar practiced a systematic and pervasive fraud that warrants restitution to all of Gibraltar's customers. Id. at 1314-15. Testimony from Gibraltar's compliance officer, a securities compliance officer from the Utah Department of Commerce, and the adverse inferences permitted as a result of the individual Defendants' refusal to testify in response to the evidence presented against them further convinces the Court that fraudulent tactics were part of each Gibraltar solicitation. When viewing the totality of the evidence, this Court finds that the Defendants' fraudulent actions were such that all customers were harmed. As such, in this matter the Court finds it appropriate to presume pervasive fraud based upon the testimony of a handful of customers, Gibraltar's compliance officer, a state securities compliance office, and the adverse inferences that are permitted against the individual Defendants.[12]

40. The CEA's "ancillary relief" provision empowers courts to order restitution. See 7 U.S.C. § 13a-1; see also Midland Rare Coin Exch., Inc., 71 F. Supp. 2d at 1264. Restitution is measured by the amount invested by customers less any refunds made by the defendants. See FTC v. Wolf, No. 94-8119-CIV-FERGUSON, 1996 WL 812940, at *9 (S.D. Fla. Jan. 31, 1996); see also CFTC v. Emerald Worldwide Holdings, Inc., et al., No. CV03-8339AHM, 2005 WL

[12] The Court notes that there is one exception to this presumption. During a preliminary injunction hearing in this matter one Gibraltar customer, Rick Winther, testified that Gibraltar did not act fraudulently in connection with his account. In fact, although he lost more than $98,000.00 when trading with Gibraltar, Mr. Winther testified that he would trade with Gibraltar again if he had the money. As such, because he testified that Gibraltar acted honestly during his trading experience, the Court will not order that restitution be paid to Mr. Winther.

1130588, at *10 (C.D. Cal. April 19, 2005). Since Gibraltar customers invested $3,304,685.24 and received $552,307.74 in return, they sustained a net loss of $2,752,377.50.[13] Accordingly, the Court holds that Defendants Kline, Fremer, and Johnson are jointly and severally liable for restitution in the amount of $2,752,377.50. Defendants Kline, Fremer, and Johnson are thereby ordered to pay restitution to Gibraltar's customers in the following amounts, representing their total losses:[14]

1) Gilbert Abramson: $10,000.00
2) Jason/Jamee Adams: $11,800.00
3) Mike Adams: $4,320.00
4) Manjul Agarwal: $9,887.50
5) Mohammad Akhtar: $9,677.50
6) Syed Ali: $4,937.50
7) Abduladim Alshaik: $19,460.00
8) John Anderson: $7,452.50
9) Paul Anderson (Account No. 9907): $15,020.00
10) Paul Anderson (Account No. 10476): $21,120.00
11) Paul Anderson (Account No. 10684): $16,055.00
12) Rodrigo Andrade: $7,170.00
13) Michael Andre: $4,790.00
14) John Ankerman: $4,365.00
15) Steven Arvizu: $8,875.00
16) Farah Ayob: $7,620.00
17) Jide Azinge: $9,987.50
18) Harold Bailey: $191,927.50
19) Wojciech Bajsarowicz: $4,050.00
20) Andrew Barfell: $4,975.00
21) Talal Barghouthi: $5,000.00
22) John Bartkowski: $4,375.00
23) Sambit Barua: $9,510.00
24) William Beeler: $97,300.00
25) Marc Bellora: $3,510.00
26) David Bernacchi: $4,625.00
27) Leonard Bienkowski: $412.50
28) Thomas Bingham: $9,940.00
29) Herbert Blachly: $4,967.50
30) Kpangbala Blamah: $14,060.00
31) George Bobolakis: $4,520.00
32) John Bolos: $9,437.50
33) Mark Boniface: $4,937.50
34) Robert Bontke: $24,920.00
35) Johnny Booth: $1,147.50
36) Rosie Brady: $4,920.00
37) Douglas Brown: $4,612.50
38) James Bryant: $4,575.00
39) Jacek Bula: $4,905.00
40) David Cahill: $3,912.50
41) Scott Cain: $54,765.00
42) John Canty: 19,530.00
43) Lawrence Carty: 5,875.00
44) Alan/Julie Castro: $14,085.00
45) Alexei Chemiakine: $4,750.00

[13] The Court notes that during the trial FxCM presented evidence that conflicts with the CFTC's figures regarding the total net losses sustained by Gibraltar's customers. However, after reviewing the record and making all necessary credibility determinations, the Court finds the CFTC's revised figures–as found in CFTC Exhibit 88–best represent the net losses suffered by Gibraltar's customers.

[14] These figures are taken from CFTC Exhibit 88.

46) Chulwon Chulwon: $11,960.00
47) Andrzej Ciesielski: $5,900.00
48) Ken Cline: $2,745.00
49) Jerry Colivas: $4,990.00
50) Kathryn Couch: $4,612.50
51) Charles Dady: $27.50
52) Lester Dahlberg: $19,240.00
53) Wei Dai: $14,955.00
54) Richard Daniel: $9,280.00
55) Nancy Davis: $4,877.50
56) Dallas Decarlo: $4,290.00
57) Carla DePetris: $5,800.00
58) Tarunkumar Desai: $4,812.50
59) Tanya Desloover: $4,937.50
60) Mark Dion: $6,702.50
61) Helen Dixon: $92,200.00
62) George Domme: $37,960.00
63) Richard Donnelly: $67,785.00
64) Berniece Edwards: $4,990.00
65) Joseph Ertman: $18,820.00
66) Frederick Falzarano: $2,260.00
67) Marshall Feuer: $3,875.00
68) Michael Flaherty: $19,660.00
69) Steven Fleet: $4,542.50
70) Christopher Flood: $9,597.50
71) Hawley Forde: $9,640.00
72) Jack Frank: $9,362.50
73) Marion/Veronica Freckleton: $4,062.50
74) Richard/Llana Freedman: $4,875.00
75) Bruce Gakbraith: $4,937.50
76) Samuel Galvan: $7,295.00
77) Steven Gerlich: $4,880.00
78) Kyle Gerstner: $4,875.00
79) Brian Gillings: $19,860.00
80) John Givens: $7,380.00
81) David Goben: $5,340.00
82) Thomas Goder: $22,450.00
83) Patrick Golder: $9,540.00
84) Eugenion Gonzalez: $6,580.00
85) John Goracy: $4,247.50
86) Scott Grady: $4,750.00
87) Joel Granquist: $6,500.00
88) Jose Gutierrez: $4,937.50
89) Samuel Hahn: $44,075.00
90) Lewis Hale: $7,665.00
91) John Hancock: $9,265.00
92) Sue Hansel: $4,540.00
93) Harry Harcrow: $9,940.00
94) Lee Harper: $7,955.00
95) Bobby Harris: $10,000.00
96) Phillip Hegedus: $4,375.00
97) Iam/Penelope Henry: $9,862.50
98) Helmut Hohenleitner: $9,570.00
99) Arnold Holeman, Jr.: $8,290.00
100) Tyrone Holloway: $4,710.00
101) Robert Horan: $2,042.50
102) Billy Hosford: $8,737.50
103) David Hudson: $9,850.00
104) Kevin Hughes: $9,410.00
105) Ogonna Hymes: $4,625.00
106) Vuemeli Iloka: $17,720.00
107) Elizabeth Itta: $2,390.00
108) David Jacobs: $3,105.00
109) Pinches Jakobowitz: $44,687.50
110) Paul/Annette Jensen: $5,000.00
111) Gerald Johnson: $5,925.00
112) Archie Joseph: $4,687.50
113) Mark Juliusson: $4,760.00
114) Brad Kaplan: $9,400.00
115) Sanjith Karayl: $150.00
116) Cathleen Key: $7,627.50
117) Jong Kim: $4,550.00
118) Randall Kobernat: $4,187.50
119) Frederick Koehler: $4,240.00
120) Kwang Koh: $6,370.00
121) Michael Kollmann: $7,400.00
122) Lillian/Albert Krauss: $14,887.50
123) Leroy/Kathleen Lackey: $9,595.00
124) Timothy Landers: $4,955.00
125) Charlotte Lane: $2,400.00
126) Raymond Lane: $5,190.00
127) Gregory Lantz: $4,425.00
128) Maxwell Le: $2,205.00
129) Joseph/Adele Le Pera: $4,812.50
130) Benjamin Leboeuf: $49,535.00

131) Albert/Betty Lessard: $4,360.00
132) Jerry Lewis: $4,577.50
133) Arthur Libecki: $4,950.00
134) Gerhard Liesche: $4,640.00
135) Jonathan Long: $19,952.50
136) Robert Macnab: $4,625.00
137) Ben Mahabir: $24,860.00
138) Raphael Manuel: $9,800.00
139) Charles Martin: $4,800.00
140) William Martin: $4,040.00
141) Esther Martinez: $4,562.50
142) Michael Martino: $4,500.00
143) Donald Materi: $4,875.00
144) Phillip McClellon: $5,992.50
145) William McCluen: $8,700.00
146) Lael McCormick: $4,110.00
147) Chad/Brook McDonald: $4,860.00
148) David McDowell: $4,800.00
149) Yeshwant Mehta: $4,247.50
150) Raj Menon: $9,625.00
151) Rita/Thomas Merryman: $4,962.50
152) John Michelsen: $1,142.00
153) James Miller: $4,812.50
154) Ervin Mitchem: $9,425.00
155) Michael Mieczko: $2,515.00
156) Katsuko Morigiwa: $6,690.00
157) John Nahas: $4,750.00
158) Anthony/Diane Nickeltti: $9,940.00
159) Sorin Nicolescu: $18,750.00
160) Paul Nonnamaker: $4,320.00
161) Knut Nordby: $4,600.00
162) Paul Nordin: $4,500.00
163) Steven Normandin: $2,665.00
164) Bennie Norton: $4,410.00
165) Sandra Obert: $7,190.00
166) Michael O'Keefe: $3,890.00
167) Slobodan Oracev: $3,777.50
168) Clayton Osbon: $3,960.00
169) Steven Osso: $9,875.00
170) Paul/Deborah Otto: $4,287.50
171) Odniel Pagan: $9,410.00
172) Charles Parraga: $9,685.00
173) Shawn Patridge: $5,330.00
174) Curtis/Carla Peverini: $4,585.00
175) Scott Pfeiffer: $4,720.00
176) Norris Phifer: $92,045.00
177) Babara/Bryon Phillips: $3,662.50
178) Denton Phillips: $1,780.00
179) Janet Phillips: $9,612.50
180) Sharel Pizzolato: $25,340.00
181) Dana Poulin: $4,665.00
182) Richard/Katherine Power: $17,930.00
183) Lowell Presson: $2,655.00
184) William Pruden: $9,100.00
185) Gregory Rachunok: $18,840.00
186) Mario Ramirez: $4,250.00
187) James Rands: $4,625.00
188) Kenneth Rehman: $5,287.50
189) Mark/Jacqueline Reigle: $4,680.00
190) Frederick Reynolds: $9,875.00
191) Gregory Rice: $4,225.00
192) Joe/Sandra Roberts: $4,995.00
193) Eugene Robinson: $18,772.50
194) Daniel Roder: $29,747.50
195) Andrew Rukstelis: $4,910.00
196) Michael Rupprecht: $9,367.50
197) Ramakrishnan Sabapathy: $4,760.00
198) Robert Sabella: $8,675.00
199) Louis Schenck: $4,512.50
200) Robert/Jacoba Schneider: $9,215.00
201) Richard Schuley: $10,000.00
202) Nathan Seppala: $3,960.00
203) Bibi Shariff: $4,500.00
204) Pete Shee: $4,930.00
205) Peter Shepard: $4,927.50
206) Mihail Sigalas: $7,560.00
207) Annette Smith: $4,790.00
208) Maurice Smith: $4,937.50
209) Stephen Smith: $4,720.00
210) Donald Snably: $6,400.00
211) Robert Sobocinski: $4,552.50
212) Mitchel Songailo: $5,200.00
213) Natalie Soo: $4,562.50
214) Todd Spaulding: $6,470.00
215) Robert Stefaniak: $4,680.00

216) John Stephenson: $9,670.00
217) Sterling International LLC: $5,597.50
218) Phillip Stern: $4,750.00
219) Rickey Stevens: $4,245.00
220) Joseph Stevenson: $4,750.00
221) David Stewart: $5,900.00
222) Hongwu Su: $2,877.50
223) John Summer: $8,227.50
224) Stanley Suttles: $4,635.00
225) Thomas Thee: $5,637.50
226) Chaiporn Tiancharoen: $3,490.00
227) Charlotte Timmons: $4,687.50
228) Richard Tober: $14,792.50
229) Matthew Tomsic: $4,737.50
230) Mark Trotter: $4,875.00
231) Emmanuel Udeh: $3,810.00
232) Damian Van Der Putten: $5,850.00
233) Roslyn Van Pelt: $2,557.50
234) Mark Vergari: $10,625.00
235) Llir Vesho: $8,600.00
236) George Veto: $4,812.50
237) Petr Viskup: $1,580.00
238) Robert Wainio: $28,125.00
239) Shane Walden: $50,985.00
240) Georgette Ward: $3,987.50
241) Lenther Warren: $33,915.00
242) Leonard Weber: $4,895.00
243) Melvin Winschrott: $4,800.00
244) Kurtis Welton: $5,120.00
245) Vivienne White: $4,950.00
246) Joseph Wilkey: $4,740.00
247) Garth Williams: $4,937.50
248) Herbert Williams: $50,475.00
249) William William: $15,915.00
250) Cary Wilson: $4,875.00
251) Gloria Womack: $3,857.50
252) Phillip Wykle: $3,477.50
253) Urich Zender: $39,800.00

Civil Penalties

41. A court may impose a civil penalty against any person found to have violated the CEA "in the amount of not more than the higher of $100,000 or triple the monetary gain to the person for each violation." 7 U.S.C. § 13a-1(d)(1); see also 7 U.S.C. § 9(3). The CFTC increased the maximum civil monetary penalty per violation to $120,000.00 for violations made between October 23, 2000 and October 22, 2004. 17 C.F.R. § 143.8. Civil penalties should be imposed to act as a deterrent, but should be proportional to the gravity of the offenses committed. See Miller v. CFTC, 197 F.3d 1227, 1236 (9th Cir. 1999). However, the maximum civil penalty "is limited by the number of violations alleged in the complaint times the maximum fine per violation." Slusser v. CFTC, 210 F.3d 783, 786 (7th Cir. 2000) (holding civil penalties should be

restricted to the number alleged in the complaint even when the CFTC could have separated the events into several more violations).

42. The CFTC alleged two violations of the CEA in their complaint. The first violation alleged that all Defendants violated the CEA's the anti-fraud provisions. The second violation alleged that Kline violated a CFTC cease and desist order. As discussed above, the Court finds that Defendant Fremer, Johnson and Kline are liable for violating the CEA's anti-fraud provisions, and that Defendant Kline is also liable for violation an order of the CFTC. Accordingly, civil penalties are appropriate against these Defendants.

43. During the trial, the CFTC presented uncontroverted evidence that Defendants Fremer and Johnson were paid approximately $117,337.00 and $63,789.00 respectively in commissions and fees while working at Gibraltar. However, no evidence was provide of the monetary gain, if any, received by Defendant Kline. Because of the blatant, pervasive, and unapologetic nature of the violations involved in this matter, the Court will impose the maximum fine allowed. Thus, the Court imposes civil penalties in the following amounts for violations of the CEA's anti-fraud provisions: Defendant Fremer will be fined $352,011.00; Defendant Johnson will be fined $191,367.00; and Defendant Kline will be fined $120,000.00. An additional civil penalty in the amount of $120,000.00 will be imposed against Kline for his violation of the CFTC cease and desist order.

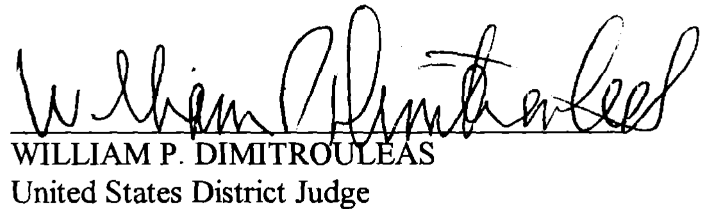
Disgorgement

44. Disgorgement is an appropriate remedy when the CFTC demonstrates violations of the CEA. Wilshire Inv. Mgmt. Corp., 407 F. Supp. 2d at 1316. However, when the civil penalty is sufficient "to ensure that the Defendants did not profit" from their fraudulent conduct, then

disgorgement is not necessary. Id. Here, the Court finds that the civil penalties imposed make the need for an additional order for disgorgement unnecessary.

45. A separate final judgment will be entered herein consistent with the Court's Findings of Fact and Conclusions of Law.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 30 day of May, 2006.



WILLIAM P. DIMITROULEAS
United States District Judge

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