UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 05-61588-ALTONAGA/Turnoff

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

vs.

INTERNATIONAL BERKSHIRE GROUP HOLDINGS, INC., et al.

Defendants.
_____/

DEFAULT FINAL JUDGMENT AND ORDER OF PERMANENT INJUNCTION

I. PRELIMINARY STATEMENT

Plaintiff, Commodity Futures Trading Commission ("Commission"), filed an action in this Court on September 29, 2005, charging that defendants have engaged, are engaging, and may be about to engage in acts and practices which constitute violations of Section 4c(b) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 6c(b), and Commission Regulations ("Regulations") 1.1(b) (1) and (3), 32.9(a) and (c), 32.11(a), 17 C.F.R. §§ 1.1(b)(1) and (3), 32.9(a) and (c), and 32.11(a) by soliciting the public for the offer and sale of illegal, off-exchange commodity options and committing fraud while

selling commodity options. The Commission is seeking to enjoin such conduct by an order of permanent injunction, and other relief, including civil monetary penalties.

On October 17, 2006, the Commission filed an "Application for Entry of Default Pursuant to Rule 55(a)." On October 24, 2006 the Clerk entered a "Clerk's Default" against Defaulting Defendants, Harrington Advisory Services, SL, Richmond Royce Advisory Services, SLU, and Stratford Advisory Services, ("Defendants"); and Defaulting Relief Defendants, FED Associates, LLC, International Investments Holding Corporation, and Briscoe and Associates ("Relief Defendants").

The Commission has submitted this Memorandum of Points and Authorities, as well as declarations and other exhibits, in support of Plaintiff's Motion for Default Final Judgment and Order of Permanent Injunction, by which it moves the Court to enter an Order of Permanent Injunction making findings of violations and granting the following relief: 1) entry of findings by the Court that each Defendant violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulations 1.1(b) (1) and (3), 32.9(a) and (c), 32.11(a), 17 C.F.R. §§ 1.1(b)(1) and (3), 32.9(a) and (c), and 32.11(a) by fraudulently soliciting the public for the offer and sale of illegal, off-exchange commodity options and by misappropriating customer funds and that there is a likelihood of future violations; 2) permanently enjoining each defendant from such conduct and violations described in the Complaint as violations of the Act and Regulations, and ordering disgorgement of ill-gotten gains by the defendants and relief defendants and the assessment civil monetary penalties against each defendant.

II. RELEVANT PARTIES

The Plaintiff

The Commodity Futures Trading Commission ("Commission") is an independent federal regulatory agency charged with the responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 et seq. (2002), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 et seq. (2004).

Defaulted Defendants

Harrington Advisory Services, SL a.k.a. Harrington Group, Inc. ("Harrington") is a Spanish corporation with a purported principal place of business at 214 Bajos Buzón #119 08011 Barcelona, Spain. Harrington has never been registered with the Commission in any capacity.

Richmond Royce Advisory Services, SLU a.k.a. Richmond Royce International Group, Ltd, ("Richmond") is a Spanish Corporation with an address at Roger de Luria 137, Buzon 196, Barcelona, Spain 08037. Richmond Royce has never been registered with the Commission in any capacity.

Stratford Advisory Services ("Stratford") is a corporate entity purportedly organized under the laws of the Republic of Spain, with an address at Aribau 221 Bajos, Buzon # 225, 08021 Barcelona, Spain. Stratford has never been registered with the Commission in any capacity.

Defaulted Relief Defendants

FED and Associates, LLC is a dissolved Nevada limited liability company, presumably operating as a sole proprietorship, that lists a principal place of business as

20533 Biscayne Blvd #530, Aventura, Florida 33180. FED and Associates has never been registered with the Commission in any capacity.

International Investments Holdings Corp., ("IIHC") is an International Business Corporation formed in the Bahamas that originally used 4914 NW 52nd Avenue, Coconut Creek, Florida 33073 as its principal place of business, and later conducted business from 2410 NE 31st Court, Lighthouse Point, Florida, as well as from other locations throughout south Florida. IIHC has never been registered with the Commission in any capacity.

Briscoe and Associates, Inc. is a Florida corporation with a principal address of 6278 N. Federal Highway, Ft. Lauderdale, Florida 33308. Erica Briscoe is listed as the president of Briscoe and Associates, Inc. Briscoe and Associates, Inc. has never been registered with the Commission in any capacity.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, being fully advised in the premises, finds that there is good cause for the entry of this Order and that there is no just reason for delay. The Court therefore, further directs the entry of the following Findings of Fact and Conclusions of Law, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), as set forth herein.

A. JURISDICTION AND VENUE

This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. §13a-1 (2002), which authorizes the Commission to seek injunctive relief against any person whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation or order thereunder.

Section 2(c)(2)(B) and (C) of the Act, 7 U.S.C. § 2(c)(2)(B) and (C) (2002) grants the Commission jurisdiction over certain retail transactions in foreign currency that are contracts for the sale of a commodity for future delivery (or options on such contracts), and options on foreign currency, including the transactions alleged in this Complaint.

Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2002), because Defendants are found in, inhabit, or transact business, among other places, in this District, or the acts, practices and omissions in violation of the Act have occurred, are occurring, or are about to occur, within this District, among other places.

B. FINDINGS OF FACTS

A. The Berkshire Common Enterprise Scheme

1. The Defendants herein, Harrington Advisory Services, SL, Richmond Royce Advisory Services, SLU, Stratford Advisory Services, as well as well as other corporate Defendants, are entities that participated in the Berkshire Common Enterprise ("BCE"). The BCE operated through a series of phases, as set out below.

(1) Harrington/Berkshire Phase

2. Harrington began operations on or about July 2003, ostensibly providing advice to customers wishing to trade in the currency markets or options on the currency markets.

3. Harrington established a website, harringtonfx.com, which represented to customers: "[w]ith every tick of the clock, fortunes are made and lost. In the Foreign Exchange market, where bulls and bears have little or no role, a timely decision can spell

success." The website further represents that Harrington has the "expertise and resources" to guide customers to success in the foreign exchange markets.

4. Harrington's website also solicits potential retail customers by stating:

- "Harrington Advisory Services is dedicated to managing your investment strategy in the FX markets and as such offers advice, analysis and recommendations to our customers."
- "On the basis of your personal situation and investment objectives, you may be invited to open a trading account with our brokering partner Berkshire International."

The Harrington website also provides customers with "customer service" and "help desk" buttons.

5. According to the Harrington website, Berkshire International, LLC is the clearing firm for foreign exchange options that will hold the customer accounts and funds. Harrington includes Berkshire International, LLC account opening documents on its website. These account opening documents instruct customers to send money to a Wachovia bank account in the name of Berkshire International Group, Inc., an apparent "d/b/a" of Berkshire International, LLC.

6. There are four "Berkshire" entities: International Berkshire Group Holdings, Inc., Berkshire International, LLC also known as Berkshire International Group, Inc., Berkshire International Holdings, LLC, and Berkshire International Holdings Group, LLC (collectively "the Berkshire companies"). Berkshire International, LLC maintains a website, www.berkshirefx.net, and accepts funds from customers solicited by, among

others, Harrington. Harrington introduces its customers only to Berkshire International, LLC.

7. One of the main telemarketers engaged in high-pressure sales on behalf of the Berkshire International, LLC, Jedlicki told one customer that foreign currency options offer "great opportunities to profit" in a short time with limited risk. Jedlicki promised the customer that he would make over one million euros if he invested with Berkshire International.

8. As part of his solicitation efforts, members of the BCE falsely advised a customer that the "Berkshire" for whom he was soliciting was the same company as billionaire investor Warren Buffet's Berkshire Hathaway, and stated that he was a very successful trader who had a long-term relationships with other customers for whom he managed accounts of over $1 million.

9. These representations were knowingly false because, as a previously registered professional in the commodity futures industry, he: (a) knew that he was not soliciting on behalf of Berkshire Hathaway because he never had any relationship whatsoever to Berkshire Hathaway and neither does the Berkshire Common Enterprise, and (b) knew that he was not a successful trader with long-term relationships with customers for whom he managed accounts of over $1 million by virtue of the fact that no customers of the Berkshire International, LLC maintained an account of that size and Berkshire International was only in business for at most a period of months when Jedlicki made the statements.

10. Defendants solicited and accepted orders from customers for the purported purchase of foreign exchange options contracts and convinced one customer to

"purchase" over $472,241 worth of foreign exchange options contracts, resulting in net losses of more than $379,000.

11. Based upon misrepresentations on Harrington's website and those of Berkshire International, LLC's agents, customers opened accounts with Berkshire International, LLC to trade foreign currency options. Contrary to representations made to customers and prospective customers, no trading ever actually occurred. Thus, the transactions at issue did not occur on a contract market or foreign board of trade.

12. Instead of executing forex options transactions, the Berkshire companies misappropriated customer funds. From July 2003 to March 2004, Berkshire International, LLC received over $1.48 million in customer deposits in a Bank of America account. From December 2003 to March 2004, Berkshire International, LLC transferred funds in excess of $1.45 million from the Bank of America account to the bank account of Berkshire International Group, Inc. at First International Bank of Curacao in the Netherlands Antilles. The Bank of America's Berkshire International, LLC account refunded funds to customers in the amount of approximately $45,000.

13. From August 2003 and November 2003, Berkshire International, LLC received customer deposits of over $3.2 million in an account at Wachovia bank in Florida. Of the $3.2 million, approximately $1.35 million was transferred to an account titled "IIHC" at the Bank of Nevis International and approximately $542,000 was transferred to an account titled Berkshire International Group Inc. at First International Bank of Curacao in the Netherlands Antilles. Of the $3.2 million, approximately $1.2 million was transferred to a Berkshire International, LLC "operating account" at Wachovia ("Wachovia Operating Account"). The Wachovia Operating Account

transferred approximately $243,000 offshore to the Berkshire International Group, Inc. account at First International Bank of Curacao in the Netherlands Antilles. The remainder of the funds in the Wachovia Operating Account were used for payroll expenses, various operating expenses and payments to Relief Defendants, herein, as follows: Briscoe and Associates - $7,975; IIHC - $1.35M; and FED and Associates - $155,000.

14. In addition, there existed an account at Wachovia in the name of International Berkshire Group Holdings, Inc. ("IBGH"). From March 2004 through July 2004, the IBGH account received over $813,000 in customer deposits. During the same time period, IBGH transferred over $762,000 to the bank account of Berkshire International Group, Inc. at First International Bank of Curacao in the Netherlands Antilles. The IBGH Wachovia account paid back customers approximately $43,000. Many customers were paid refunds out of this account even though their initial deposits were with other banks with other account names. For example, one customer opened his account with Berkshire International and wired $13,000 into Berkshire International, LLC's Bank of America account on February 17, 2004. However, when he closed his account in April 2004, he received a check in the amount of $3,036 from the Wachovia account of IBGH.

15. In March 2004, an account entitled International Berkshire Group Holdings, Inc. was opened at another Florida branch of Wachovia. As stated above, between March 2004 and July 2004, this account received over $813,000 in customer deposits. During this period, numerous checks were negotiated transferring over $762,000 from the International Berkshire Group Holdings, Inc. account to the bank account of Berkshire

International Group, Inc. at First International Bank of Curacao in the Netherlands Antilles.

(2) The Richmond/IMS Phase

16. The Richmond/IMS phase of the scheme involved three companies. Richmond solicited for and introduced customers to one of two purported clearing firms using "IMS" in their name, International IMS Group Holdings, Inc. and IMS Holdings, LLC (collectively referred to as "IMS").

17. Richmond was a nearly identical company to Harrington. Like Harrington, Richmond is incorporated as a Spanish limited liability company, but conducts business in Florida. Richmond employs many of the same sales consultants as Harrington, some of whom conduct business from Florida.

18. Richmond, via its website, richmondroycefx.com, and telemarketers, solicited customers to trade foreign currency options with IMS and included IMS account opening documents on its website. The website explained that call options on the Euro "have limited risk and duration" but allow investors "an unlimited propensity for profit." Risk is only limited to the loss of "premiums, commissions, and fees." Richmond attempted to have a veneer of legitimacy by including its "CFTC required Risk Disclosure Statement."

19. After opening accounts with Richmond, customers sent funds to IMS without knowing that the IMS companies operate under various names. For example, the IMS website referred alternately to IMS Holdings, Inc. or IMS Group Holdings, Inc. However, funds paid to IMS go to International IMS Group Holdings, Inc. or IMS Holdings, LLC.

20. IMS also maintained a website to solicit customers to purchase foreign currency options. Contrary to representations made to customers and prospective customers, no trading ever actually occurred. Thus, the transactions at issue did not occur on a contract market or foreign board of trade.

21. As instructed, customers sent approximately $425,000 to various IMS bank accounts at Wachovia Bank, N.A. or Bank of America in Florida. IMS, through its agents, wired approximately $364,846 in customer funds to IMS accounts at the First International Bank of Curacao in the Netherlands Antilles. No money was returned to customers.

(3) Stratford/Oakmont Phase

22. Operating parallel and as a successor to the Richmond /IMS phase are Stratford Advisory Services ("Stratford") and Oakmont International LLC ("Oakmont"). Stratford introduces customers to Oakmont. The Stratford/Oakmont operations are nearly identical to the Richmond/IMS operations.

23. Like the Richmond/IMS arrangement, Stratford/Oakmont established websites to solicit customers to trade foreign currency options. The websites, stratfordfx.com and oakmontfx.com, are nearly identically to richmondroycefx.com. Contrary to representations made to customers and prospective customers, no trading ever actually occurred. Thus, the transactions at issue did not occur on a contract market or foreign board of trade.

24. Stratford solicited customers to purchase foreign currency options by touting its purported experience in the foreign exchange market. The website offers "full service trading accounts," "managed trading accounts," and "option trading programs."

25. Customers interested in opening an account with Stratford are linked to Oakmont's website and its account opening forms. In the "pre-investment checklist" portion of their respective websites, Stratford/Oakmont advise customers that any firm offering foreign currency options should be registered with the Commission, despite the fact that neither Stratford nor Oakmont ~~are~~ is registered with the Commission.

26. The initial version of the Oakmont website provided a link to account opening documents for IMS until the operators apparently realized that the name on the documents needed to be changed.

27. Funds of customers opening an account with Oakmont are directed to a Bank of America account entitled "Oakmont International LLC" at a bank branch in Sarasota, Florida ("Oakmont Account").

28. A limited cash flow analysis of the recent activity in the Oakmont Account indicates that the account continues to be used to pass money to offshore and domestic accounts in the name of Berkshire Common Enterprise entities. During April 2005, in excess of $439,000 was wired into the account and over $426,688 was wired out.

C. CONCLUSIONS OF LAW

A. The Commission Has Fraud Jurisdiction Over the Foreign Currency Option Contracts Offered to Retail Customers by the Berkshire Common Enterprise

29. Under Section 2(c)(2)(B)(i) and (ii) and 2(c)(2)(C) of the Act, the Commission has jurisdiction over foreign currency transactions if three criteria are met: 1) the transactions at issue are futures or options contracts; 2) the futures or options contracts were offered to, or entered into with, a person ~~that~~ who is not an eligible contact participant, i.e., retail customers; and 3) if the counterparty to the transaction is an

improper counterparty, or if the counterparty is an FCM or a certain FCM affiliate and fraud or manipulation is alleged in the transaction.

30. In this case, the Defendants, through the entities participating in the BCE, including the Defendants herein, Harrington Advisory Services, SL, Richmond Royce Advisory Services, SLU, and Stratford Advisory Services, were offering foreign currency options contracts through websites and oral solicitations. Thus, the first criterion to establish jurisdiction is satisfied.

31. As to the second criterion, Section 1a(12)(A)(xi) of the Act defines an eligible contract participant as either (1) an individual who has total assets in excess of ten million dollars ($10,000,000) or (2) an individual who has total assets in excess of five million dollars ($5,000,000) and who enters the transaction to manage the risk associated with the asset he owns or liability incurred. It appears that most of the customers are likely retail customers and do not meet any of the criteria for eligible contract participants.

32. Finally, the purported clearing firms, the Berkshire and IMS companies, are not proper counterparties under the Act. Section 2(c)(2)(B)(ii) exempts from Commission jurisdiction retail sales of foreign currency options if the counterparty, or the person offering to be the counterparty, of the retail customer is:

(I) a financial institution;
(II) a broker or securities dealer or a futures commission merchant ...
(III) an associated person of a broker or dealer or an affiliated person of a futures commission merchant ...
(IV) an insurance company ...
(V) a financial holding company ...
(VI) an investment bank holding company ... ."

None of the BCE companies are financial institutions or any other entity set forth in Section 2(c)(2)(B).

B. The Berkshire, IMS and Oakmont Entities Operated as a Common Enterprise

33. International Berkshire Group Holdings, Inc., Berkshire International LLC, Berkshire International Holdings, LLC, Berkshire International Holdings Group, LLC, International IMS Group Holdings, Inc., IMS Holdings, LLC, and Oakmont International LLC and the Defendants herein, Harrington Advisory Services, SL, Richmond Royce Advisory Services, SLU, and Stratford Advisory Services, engaged in and are engaging in a common enterprise. Where one or more corporate entities operate in a common enterprise, each may be held liable for the deceptive acts and practices of the other. *Sunshine Art Studios, Inc. v. FTC,* 481 F.2d 1171, 1175 (1st Cir. 1973); *CFTC v. Wall Street Underground,* 281 F. Supp.2d at 1271; *FTC v. Think Achievement Corp.*, 144 F.Supp.2d 993, 1011 (N.D. Ind. 2000); *FTC v. Wolf,* 1996 WL 812940, *7 (S.D. Fla. Jan. 31, 1996). See also *CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d 676, 690 (D. Md. 2000), *aff'd in part, vacated in part, sub nom. CFTC v. Baragos*h, 278 F.3d 319 (4th Cir. 2002) (concluding that when two firms were formed as successors to original corporation, and the successors were operated by the same individuals and used the same marketing materials as one another, all three firms were jointly and severally liable for violations of the Act).

34. Courts look to a variety of factors when determining whether a common enterprise exists. *Sunshine Art Studios, Inc.*, 481 F.2d at 1175; *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427, 431 (7th Cir.), cert. denied, 377 U.S. 992 (1964);

Wall Street Underground, 281 F. Supp. 2d at 1271. Some factors that aid in determining a common enterprise are: (1) whether the corporations are distinct entities that operate at arms-length from one another and (2) whether they commingle corporate funds. *SEC v. Elliott*, 953 F.2d 1560, 1565 n.1 (11th Cir. 1992) (the commingling of corporate funds and failure to maintain separation of companies aided in determining common enterprise); *Wall Street Underground*, 281 F. Supp.2d at 1271; *Zale Corp. and Corrigan-Republic, Inc. v. FTC,* 473 F.2d 1317, 1320 (5th Cir. 1973) (sharing of office space and officers and unified advertising are factors of common enterprise); *FTC v. Wolf,* 1996 WL 81240 at 6 (S.D. Fla. 1996) (evidence that reveals that no real distinction existed between the corporate defendants is a factor that aids in determining whether a common enterprise existed). As members of the common enterprise, Harrington Advisory Services, SL, Richmond Royce Advisory Services, SLU, Stratford Advisory Services, are jointly and severally liable for the acts of the common scheme. *Wolf*, 1996 WL 81240 at *7.

C. The Defendants violated Section 4c(b) of the Act and Regulations 1.1 and 32.9(a)

35. Misappropriation of customer funds violates the antifraud provision of the Act as well as Commission regulations. *See CFTC v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985) (commodity pool operator's disbursing of investor funds to other investors, herself and her family violated Section 4b of the Act). *See also CFTC v. Morse*, 762 F. 2d 60, 62 (8th Cir. 1985) (defendant's use of customer funds for personal use violated Section 4b of the Act); and *In re Slusser,* ¶27,701 at 48,315 (respondents violated Section 4b of the Act by surreptitiously retaining money in their own bank accounts that should have been traded on behalf of the investors); and *In re Staryk,*

[1994-1996 Transfer Binder] Comm Fut. L. Rep. (CCH) ¶ 26,701, at 43,923-24 (CFTC June 5, 1996), *aff'd in rel. part,* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,515 at 47,374 (CFTC Dec. 4, 1998) (outlining requirements for options fraud under Section 4c(b) of the Act and noting parallels between applicable Commission Regulation and Section 4b(a) of the Act).

36. The Defendants cheated customers by misappropriating their funds. As set forth above, the money trail associated with the BCE leads to the inescapable conclusion that no trading activity was actually occurring. Rather, a substantial majority of the funds were sent to offshore accounts in a sporadic manner never to be returned to customers.

37. The Defendants in their role in the BCE also defrauded prospective and actual customers by making various misrepresentations and omissions. In order to establish liability for fraud, the Commission 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,* 310 F. 3d 1321, 1328 (11th Cir. 2002); *see also Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) 24,617 (CFTC Mar.1, 1990).

38. Whether a misrepresentation has been made depends on the "overall message" of the communication and the "common understanding of the information conveyed." *R.J. Fitzgerald*, 310 F.3d at 1328; *Hammond* at 36,675 & n.12. Scienter has been found when representations are made intentionally or with a reckless disregard for the truth. *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,313 (CFTC July 19, 1999), *aff'd in relevant part and rev'd in part sub nom., Slusser v. CFTC,* 210 F. 3d 783 (7th Cir. 2000). A fact is material if a reasonable person

would view the information as important in making a trading decision – in other words, as including facts significantly altering the total mix of information already in his possession. *R.J. Fitzgerald*, 310 F. 3d at 1328. Such actionable misrepresentations include those made to customers when soliciting their funds. *CFTC v. Rosenberg*, 85 F.Supp.2d 424, 447-448 (D.N.J. 2000); *Saxe v. E. F. Hutton & Co., Inc.*, 789 F. 2d 105, 110-111 (2d Cir. 1986); *Hirk v. Agri-Research Council Inc.*, 561 F. 2d 96, 103-104 (7th Cir. 1977).

39. The BCE made material misrepresentations to customers and potential customers by holding itself out as a collection of entities that actually execute forex options transactions on behalf of customers. Since no trading actually occurred, this representation was necessarily false. In a similar manner, by failing to disclose the fact that the entire enterprise was simply a scheme designed to cheat customers, they omitted a material fact. *See Waters v. Int'l Precious Metals*, 172 F.R.D. 479, 488-90 (S.D. Fla. 1996).

D. Harrington, Richmond, and Stratford Violated Section 4c(b) of the Act and Regulation 32.11(a).

40. The Commodity Futures Modernization Act of 2000 ("CFMA") clarified the Commission's jurisdiction over retail foreign currency options when engaged with a counterparty that is not a regulated financial institution. By the terms of the CFMA, the Commission's jurisdiction over foreign currency options includes options on physical currencies, and not just options on forex futures contracts.[1]

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

41. Section 2(c)(2)(B)(i) and (ii) of the Act, 7 U.S.C. § 2(c)(2)(B)(i) and (ii) provides that the Commission shall have jurisdiction over an agreement, contract or transaction in foreign currency that is a sale of a commodity for future delivery or an option, so long as the contract is "offered to, or entered into with, a person that is not an eligible contract participant" unless the counterparty, or the person offering to be the counterparty, is one of the regulated entities enumerated in Section 2(c)(2)(B)(ii)(I-VI). Futures commission merchants and certain statutorily defined affiliates are regulated entities enumerated in that Section. Because the Berkshire common enterprise customers are not eligible contract participants and because none of the entities that comprise the common enterprise are registered FCMs or their affiliates, the entire Act applies to the transactions at issue here. Consequently, Section 4c(b) applies to these transactions.

42. Section 4c(b) of the Act provides that "no person shall offer to enter into or confirm the execution of, any transaction involving any commodity regulated under this Act 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 Commission prohibiting any such transaction...." Commission Regulation 32.11(a), a rule promulgated pursuant to Section 4c(b), states that it is unlawful for any person to solicit or accept orders for the purchase or sale of any commodity option, except for commodity option transactions conducted or executed on or subject to the rules of a contract market.

43. The options offered by the Berkshire Common Enterprise and solicited through Harrington, Richmond, and Stratford are not "conducted or executed on or subject to the

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national securities exchange ...; and (ii) is offered to, or entered into with, a person that is not an eligible contract market participant, unless the counterparty, or the person offering to be the counterparty, of the person is - [a regulated entity]."

rules of a contract market". Accordingly, all these entities have violated or are violating Regulation 32.11.

E. Relief Defendants

44. A district court may freeze the assets of relief defendants. *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d 187, 193 (4th Cir. 2002) ("[W]hen a plaintiff seeks equitable relief..., a district court possesses 'inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief.'" (quoting *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995); *SEC v. Heden,* 51 F. Supp.2d 296, 299 (S.D.N.Y. 1999).

45. A nominal or relief defendant is a person or entity that has received ill-gotten funds, and does not have a legitimate claim to those funds. *SEC v. Cavanagh*, 155 F.3d 129, 136 (2nd Cir. 1998). A relief or nominal defendant is joined to aid in full relief without asserting separate subject matter jurisdiction over the person or entity. *CFTC v. Kimberlynn Creek Ranch,* 276 F.3d at 191; *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (nominal defendant is joined as a means of facilitating collection, no subject matter jurisdiction needs to be asserted as the relief defendant has no ownership interest, but merely possession of the funds that are at the center of the controversy.); *SEC v. Collelo*, 139 F.3d 674, 677 (9th Cir. 1998) (In order to effect full relief in recovering assets that are the fruit of the underlying fraud, SEC could name a non-party depository as a relief defendant.)

46. FED and Associates, LLC, IIHC, and Briscoe and Associates, Inc. have received funds from the various proposed corporate defendants that were obtained through those entities' fraudulent activities. These proposed relief defendants have

received these funds but do not appear to have provided any legitimate services in exchange for the payments they received.

47. Equitable remedies, including disgorgement of ill-gotten gains, are remedies for violations of the Act. *CFTC v. American Metals Exch. Corp.*, 991 F.2d 71, 76 (3rd Cir. 1993) ("A number of courts have held that district courts have the power to order disgorgement as a remedy for violations of the Commodity Exchange Act for the purpose of depriving the wrongdoer of his ill-gotten gains and deterring violations of the law.") In this case, disgorgement is necessary as these entities do not have a legitimate claim to the funds and a deterrent is necessary.

F. Permanent Injunction

48. Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), authorizes and directs the Commission to enforce the Act and Regulations. In an action for permanent injunctive relief, the Commission is not required to make a specific showing of irreparable injury or inadequacy of other remedies, which private litigants must make. *CFTC v. Muller,* 570 F.2d 1296, 1300 (5th Cir. 1978); *United States v. Quadro Corp.*, 928 F.Supp. 688, 697 (E.D. Tex. 1996) (citations omitted), aff'd, U.S. v. Quadro Corp., 127 F.3d 34 (5th Cir, 1997); *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 141-42 (2nd Cir. 1977), cert. denied 438 U.S. 905 (1978).

49. The Plaintiff makes the requisite showing for issuance of injunctive relief when it presents a prima facie case that the defendant has engaged, or is engaging, in illegal conduct, and that there is a likelihood of future violations. *CFTC v. American Bd. of Trade, Inc.*, 803 F.2d 1242, 1250-51 (2d Cir. 1986); *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979), cert. denied, 442 U.S. 921 (1979).

50. In a Commission enforcement case, it has been held that the district court's finding that there was the likelihood of future violations supported its entry of a permanent injunction, *CFTC v. Sidoti,* 178 F.3d 1132 (11th Cir. 1999). In *Sidoti,* the Eleventh Circuit stated: "In light of the likelihood of future violations, the district court did not abuse its discretion in enjoining further violations of the CEA." *See SEC v. Carriba Air, Inc.* 681f.2d 1381, 1322 (11th Cir.1982); *SEC v. Blatt* 583 F.2d 1325, 1334 (5th Cir. 1978)." *Sidoti* at 1137. Whether such a likelihood of future violations exists depends on the "totality of the circumstances." *SEC v. Management Dynamics, Inc.,* 515 F.2d 801, 807 (2d Cir. 1975); *CFTC v. Morgan, Harris & Scott, Ltd.,* 484 F.Supp. 669, 676 (S.D.N.Y. 1979). Foremost among these circumstances is the past illegal conduct of the defendants, from which courts may infer a likelihood of future violations. *CFTC. v. British Am. Commodity Options Corp.,* 560 F.2d at 142; *SEC v. Management Dynamics, Ltd.,* 515 F.2d at 807; *SEC v. Carriba Air, Inc.,* 681 F.2d 1318, 1322 (11th Cir. 1982).

51. The scope of the injunctive relief can be tailored to meet the circumstances of the violations shown. For example, courts have entered permanent injunctions against future violations of the Act upon the Commission's showing of a violation and likelihood of future violations. *See,* e.g., *CFTC v. U.S. Metals Depository Co.,* 468 F.Supp.1149 (S.D.N.Y. 1979). Other courts have issued broader injunctions prohibiting trading activity. *CFTC v. Noble Wealth Data Information Services, Inc.,* 90 F.Supp.2d 676, 692 (D.Md. 2000) ("[t]he pervasiveness and seriousness of [the defendant's] violation justify the issuance of a permanent injunction prohibiting him from violating the Act and from engaging in any commodity-related activity, including soliciting customers and funds"); *see also, CFTC v. Rosenberg,* 85 F.Supp.2d 424, 454-55 (D.N.J. 2000) (permanently

enjoining defendant from trading commodities on behalf of others). Under these standards, permanent injunctive relief is clearly warranted against the Defendants.

G. Disgorgement and Restitution by Defendants

52. Equitable remedies, including disgorgement of ill-gotten gains, are remedies for violations of the Commodity Exchange Act. *See CFTC v. American Metals Exch. Corp.*, 991 F.2d 71, 76 (3rd Cir. 1993) ("A number of courts have held that district courts have the power to order disgorgement as a remedy for violations of the Commodity Exchange Act for the purpose of depriving the wrongdoer of his ill-gotten gains and deterring violations of the law.")

53. Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), allows the Commission to seek and the Court to issue all forms of ancillary equitable relief, including monetary restitution and disgorgement. Courts consistently have held that in order to adequately and fully enforce the Act, relief in a Commission action must require a defendant to return both investor funds (restitution) as well as any and all funds that constitute ill-gotten gains (disgorgement). *See CFTC v. Midland Rare Coin Exchange, Inc.*, No. 97-7422-Civ, 1999 U.S. Dist. LEXIS 20977 at *28-29 (S.D. Fla. Oct. 20, 1999); CFTC v. *Wellington Precious Metals, Inc.*, 1988 U.S. Distr. LEXIS 17381 (S.D. Fla. July 15, 1988).

H. Civil Monetary Penalty

54. Under Section 6c(d)(1) of the Act, 7 U.S.C. 13a-1(d)(1) (2002), "the Commission may seek and the Court shall have jurisdiction to impose, ... on any person found in the action to have committed any violation, a civil penalty 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) (2002). The Act defines the term "person" to include individuals, associations, partnerships, corporations and trusts. 7 U.S.C. § 1a(28). Specifically, 7 U.S.C. 13a-1(d) (1) (2002) and 17 C.F.R. § 143.8(a)(ii)(2005) provides for fines of not more than the higher of $120,000 for each violation on or after October 23, 2000. In determining the amount of the civil penalty to be paid by each Defendant, the Court has considered the egregiousness, duration and scope of the fraud and misappropriation of over $9.5M.

IV. ORDER OF PERMANENT INJUNCTION AND OTHER RELIEF

It is hereby ORDERED, pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1, and the Court's equitable powers that:

A. The Court finds that the Defendants violated the Act and Regulations alleged in the complaint, to wit, Sections 4o(1)(A) and (B), 4k(3) and Section 4m(1) of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 6o(1)(A) & (B), 6k(3) and 6m(1), and for violations of Sections 4.41(a)(1) and (2) and Section 4.41(b)(1) of the Commission's Regulations, 17 C.F.R. §§ 4.41(a)(1) and (2), and 4.41(b)(1);

B. Defendants, and any other person or entity associated with them, or any successor thereof, are permanently enjoined and prohibited from engaging in conduct that violates any of the provisions of the Act and Regulations as alleged in the Complaint or set forth in this Order, and are further enjoined and prohibited from engaging in any activity relating to commodity interest trading, including but not limited to, soliciting,

accepting or receiving funds, revenue or other property from any person, giving advice for compensation, or soliciting prospective clients, participants or customers, related to the purchase and sale of any commodity futures or options on commodity futures contracts;

C. Defendants are hereby ordered to disgorge immediately all all ill-gotten gains as found herein, to wit, $9,555,041 for each Defendant, with each Defendant jointly and severally liable for the total amount, with each other and with the previously-defaulted Defendants in this action. The Relief Defendants herein shall disgorge the following amounts $155,000 from FED and Associates, LLC.; $7,975 from Briscoe and Associates, Inc.; and $1.35M from International Investments Holding Corporation. All disgorgement shall accrue post-judgment interest, and all disgorgement shall be paid to the National Futures Association which will serve as monitor. Pre-judgment interest to be paid by the Defendants shall run from July 1, 2003, the date such violations commenced, to the date of this Order and shall be determined by using the underpayment rate established quarterly by the Internal Revenue Service pursuant to 26 U.S.C. § 6621(a)(2). Post-judgment interest shall accrue beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of this Order pursuant to 28 U.S.C. § 1961. These disgorged funds shall be sent by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check, or bank

money order, made out to "International Berkshire Disgorgement Fund" and sent to:

Daniel Driscoll, Monitor
National Futures Association
200 W. Madison St., #1600
Chicago, IL 60606-3447

to be used first for restitution to customers, as ordered herein, and as previously ordered in this action, with any remaining disgorged funds not distributed as restitution shall be paid over by NFA to the U.S. Treasury, and;

D. Defendants are assessed and shall pay within ten (10) days a civil monetary penalty in the following amounts: Harrington Advisory Services, SL shall pay $4M; Richmond Royce Advisory Services, SLU shall pay $4M; and Stratford Advisory Services shall pay $1.5M, plus post-judgment interest. Post-judgment interest shall be determined by using the Treasury Bill rate prevailing on the date of this Order pursuant to 28 U.S.C. § 1961. Post-judgment interest shall accrue beginning on the date of entry of this Order. Each Defendant is jointly and severally liable for the total civil monetary penalty of $9.5M. Payment of the civil monetary penalty shall be made to the Commodity Futures Trading Commission, Division of Enforcement, ATTN: Marie Bateman – AMZ-300, DOT/FAA/MMAC, 6500 S. Macarthur Blvd., Oklahoma City, OK 73169. Payment must be made by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission. If

payment by electronic transfer is chosen, contact Marie Bateman at 405-954-6569 for instructions. The payment(s) shall include a cover letter that identifies the payee and the name and docket number of this proceeding. Defendants shall simultaneously transmit a copy of the cover letter and the form of payment to the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581;

E. Defendants are ordered to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2); and

F. The Court shall retain jurisdiction over this matter to provide such other and further relief as the Court may deem just and appropriate.

DONE AND ORDERED in Chambers at Miami, Florida this 29 day of November, 2006.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE