

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION AT MEMPHIS**

**COMMODITY FUTURES TRADING
COMMISSION,**

Plaintiff,

v.

FXTRADE FINANCIAL, LLC, et al.,

Defendants,

JOSEPH J. CECALA, JR.,

Relief Defendant.

Case No. 2:04cv2181-D/An

**ORDER FOR ENTRY OF DEFAULT JUDGMENT,
PERMANENT INJUNCTION, AND ANCILLARY EQUITABLE
RELIEF AGAINST DEFENDANT LEE N. ROMANO II**

As a result of Lee N. Romano II's (Romano) failure to appear at the pretrial conference, to provide any required pretrial disclosures, and to otherwise participate in the pretrial process, the Court granted the Commodity Futures Trading Commission's (CFTC's) oral request for entry of default against Romano at the March 26, 2007 pretrial conference (DE # 312). During the pretrial conference, the CFTC orally submitted its application for entry of default judgment against Romano pursuant to Federal Rule of Civil Procedure 55(b)(2). The Court has considered carefully the First Amended Complaint for a Permanent Injunction, Other Equitable Relief, and Civil Monetary Penalties (DE # 52) (Amended Complaint), the allegations of which are well-pleaded and hereby taken as true, and the CFTC's request for entry of default, and being fully advised in the premises, hereby

GRANTS the CFTC's request for entry of default judgment against Romano and enters the following findings of fact and conclusions of law finding Romano liable as to all violations

as alleged in the Amended Complaint. Accordingly, the Court now issues the following Order for Entry of Default Judgment, Permanent Injunction, and Ancillary Relief Against Defendant Lee N. Romano II (Order), which determines that Romano has violated Section 4b(a)(2)(i) and (iii) of the Commodity Exchange Act, as amended (Act), 7 U.S.C. § 1 *et seq.* (2002).

FINDINGS OF FACT

A. Parties

The **Commodity Futures Trading Commission** is an independent federal regulatory agency of the United States that is charged with the responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.*, and CFTC Regulations, 17 C.F.R. §§ 1.1 *et seq.* (2006), promulgated thereunder.

Lee N. Romano II was a managing partner of FxTrade Financial, LLC (FxTrade) and solicited investors to trade with FxTrade Financial, LLC. Romano has a last known address of 6403 Main Street, Union, IL 60180. Romano has never registered with the CFTC in any capacity.

B. Romano Made Fraudulent Misrepresentations and Omissions.

1. Romano Participated in Defendants' Fraudulent Scheme Which, Overall, Defrauded at Least Nine Investors Out of More Than \$1 Million.

From at least June 2003 through at least May 2004, defendants FxTrade, Jeffrey A. Mischler (Mischler), Mary Jo Sibbitt (Sibbitt), Romano, Reverie LLC, Gordon J. Vandeveld, and Ernst H. Behr (collectively, Defendants) fraudulently solicited over \$1 million from at least nine retail investors on behalf of FxTrade for the purported purpose of trading foreign currency futures contracts. Defendants advised investors and potential investors that if they provided FxTrade funds for six months (in most cases), FxTrade would invest those funds in foreign currency and provide investors a guaranteed return ranging between three and seven percent a month (for an annual return ranging between thirty-six and eighty-four percent). Further,

investors and potential investors were told that their principal would be guaranteed by a standby letter of credit.

Defendants, however, simply were operating a Ponzi scheme. In furtherance of this scheme, Defendants allegedly made misrepresentations and fraudulent omissions to induce investors to trade foreign currency futures contracts through FxTrade. Defendants misrepresented, *inter alia*, who had provided funds to FxTrade, the extraordinary rates of return investors (including certain of the Defendants) purportedly enjoyed, the existence of a standby letter of credit to guarantee investors' principal, the foreign currency trading experience and track record of FxTrade and Mischler, and when FxTrade was created. Defendants' fraudulent misrepresentations and omissions conned nine investors out of more than \$1 million, with the vast majority of these funds never even making it into a foreign currency trading account. Set forth below is a more detailed description of the fraudulent misrepresentations and omissions committed by Romano with respect to various FxTrade investors.

2. Romano Committed Fraud with Respect to FxTrade Investors Anne Williamson and Barbara Sheehan and Potential FxTrade Investor Randy Rupp.

In June 2003, with Mischler's knowledge and approval, Romano and Sibbitt approached Anne Williamson about investing in foreign currency through FxTrade. Romano and Sibbitt told Ms. Williamson that FxTrade had an established track record of success in trading foreign currency and that it used a proprietary software program that generated recommendations regarding when it should buy and sell various foreign currencies. In addition, Sibbitt told Ms. Williamson that she herself had invested in FxTrade and made approximately \$50,000 in only three weeks. Romano and Sibbitt further told Ms. Williamson that FxTrade investments

were "100 percent guaranteed." As a result of these and other representations by Romano and Sibbitt, Ms. Williamson invested \$25,000 in FxTrade on June 28, 2003.¹

In August 2003, with the knowledge and approval of Sibbitt, Romano, and Mischler, Ms. Williamson passed on to Barbara Sheehan the information that Sibbitt and Romano had conveyed to Ms. Williamson about FxTrade. Ms. Williamson then put Ms. Sheehan in contact with Mischler, who sent Ms. Sheehan an FxTrade account agreement. The FxTrade account agreement promised her a five percent monthly return on her investment and a return of her principal after six months. As a result of the representations made by FxTrade and Mischler (including those through Romano and Sibbitt), Ms. Sheehan invested \$100,000 in FxTrade on August 26, 2003. Romano, as General Partner of FxTrade, executed Ms. Sheehan's FxTrade account agreement on behalf of FxTrade.

Numerous representations made to Ms. Williamson and Ms. Sheehan by FxTrade, Mischler, Romano, and Sibbitt were false or made with reckless disregard for the truth. First, contrary to what Ms. Williamson was told, FxTrade did not have an established track record of success in trading foreign currency. In fact, FxTrade did not even exist until July 11, 2003, and FxTrade did not establish a foreign currency futures trading account until the end of August 2003. Moreover, when FxTrade finally did establish foreign currency trading accounts, its limited trading was highly unsuccessful. Second, Romano confirmed to Williamson that Sibbitt had made significant profits investing in FxTrade when, actually, Sibbitt never invested any money with FxTrade. Third, statements made by Romano with respect to promised rates of return and the guaranteed nature of the investments were simply untrue. Neither Ms. Williamson nor Ms. Sheehan received the monthly payments they were promised, and neither investor (or

¹ Unlike other FxTrade investors, Ms. Williamson was told that she would receive her principal back after thirty days, along with a minimum return of ten percent.

any other FxTrade investor for that matter) ever received her principal back from FxTrade. At all times, FxTrade lacked the capability to pay investors their promised monthly returns, which was evidenced by, among other things, the losses FxTrade sustained when it traded foreign currency. Further, as a result of these false representations to Ms. Williamson and Mr. Sheehan, Romano received thousands of dollars in commissions from FxTrade.

Romano continued fraudulently soliciting FxTrade customers through at least September 2003, at which time he met with Randy Rupp regarding an opportunity to generate capital funding through FxTrade. At the meeting, Romano provided Mr. Rupp a copy of the FxTrade marketing brochure and falsely claimed that Mr. Rupp would double his money in a very short period of time if he invested it in FxTrade. Mr. Rupp ultimately decided not to invest in FxTrade.

C. Romano Misappropriated Investor Funds.

In addition to the aforementioned fraudulent representations and omissions, Romano misappropriated investor funds. Romano and FxTrade failed to deposit investor funds in FxTrade foreign currency trading accounts. In fact, FxTrade did not establish a foreign currency trading account until the end of August 2003. Prior to that time, in June 2003, Romano deposited Ms. Williamson's FxTrade investment funds into his personal account where he subsequently used the funds for his personal expenses.

CONCLUSIONS OF LAW

A. Federal Rule of Civil Procedure 55(b)(2)

Federal Rule of Civil Procedure 55(b)(2) provides that judgment by default may be entered by a district court. The grant or denial of a motion for default judgment lies within a district court's sound discretion. *See Brown v. District Attorney General's Office*, 56 F.3d 64, 1995 WL 316567, at *2 (6th Cir. May 24, 1995) (table decision); *Bank One of Cleveland, N.A. v.*

Abbe, 916 F.2d 1067, 1079 (6th Cir. 1990) (finding that district court did not abuse its discretion in granting motion for default judgment against *pro se* defendants who failed to comply with plaintiff's court-sanctioned discovery requests). Further, if a district court determines that a defendant is in default, then the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true. *See* Fed. R. Civ. Pro. 8(d) ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."); *Pope v. United States*, 323 U.S. 1, 12 (1944); *Benny v. Pipes*, 799 F.2d 489 (9th Cir. 1986) (providing that well-pleaded allegations are taken as admitted on default judgment); *Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200 (5th Cir. 1975).

During the March 26, 2007 pretrial conference, the Court granted the CFTC's request for entry of default against Romano based on his failure to appear at the pretrial conference, provide any of the required pretrial disclosures, or otherwise participate in the pretrial process. As such, in accordance with Federal Rule of Civil Procedure 55(b)(2), the allegations in the Amended Complaint against Romano will be taken as true for purposes of the CFTC's request for entry of default judgment.

B. Jurisdiction

The Court has jurisdiction over the subject matter of this action and Romano pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which authorizes the CFTC to seek injunctive relief against any person whenever it shall appear 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. Further, the CFTC has jurisdiction over fraud that occurs in connection with certain foreign currency transactions that are contracts for the sale of a

commodity for future delivery, including the transactions alleged in the Amended Complaint, *see* 7 U.S.C. §§ 2(c)(2)(B) & (C) and 6b(a)(2).

Venue properly lies with the Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1, in that Romano transacts business in the Western District of Tennessee, and the acts and practices in violation of the Act occurred within this district, among other places.

C. The Act

In analyzing the CFTC's Application, the Court must keep in mind a crucial purpose of the Act—"protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived." *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11th Cir. 2002). "[C]aveat emptor has no place in the realm of federal commodities fraud. Congress, the CFTC, and the Judiciary have determined that investors must be zealously protected from deceptive statements by brokers who deal in these highly complex and inherently risky financial instruments." *Id.* at 1334.

D. Romano Has Engaged in Fraud in Violation of Section 4b(a)(2)(i) and (iii) of the Act.

1. Legal Standard Under Section 4b(a)(2)(i) and (iii) of the Act

Section 4b(a)(2)² of the Act prohibits cheating and defrauding or attempting to cheat or defraud or willfully deceiving or attempting to deceive other persons in connection with

² Section 4b(a) of the Act provides:

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (A) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (B) determining the price basis of any transaction in interstate commerce in such commodity, or (C) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—(i) to cheat or defraud such other person; (ii) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or caused to be entered for such person any false

commodity futures trading for or on behalf of such persons. First, misappropriating investor funds violates Section 4b(a)(2)(i) and (iii). See *CFTC v. Noble Wealth Data Info. Servs., Inc.*, 90 F. Supp. 2d 676, 687 (D. Md. 2000) (determining that defendants violated Section 4b(a)(2)(i) and (iii) of the Act by diverting investor funds for operating expenses and personal use), *aff'd and adopted in relevant part, Baragosh v. CFTC*, 278 F.3d 319 (4th Cir. 2002); *CFTC v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985) (holding that defendant's misappropriation of customer funds which had been entrusted to her for trading violated Section 4b(a) of the Act). Second, a violation of Section 4b(a)(2)(i) and (iii) of the Act also exists when the CFTC demonstrates a misrepresentation, misleading statement, or a deceptive omission on the part of a defendant, made with scienter, that is material. See *R.J. Fitzgerald & Co.*, 310 F.3d at 1329; *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 446-47 (D.N.J. 2000). While what constitutes a misrepresentation, misleading statement, or a deceptive omission is a fairly evident factual matter (especially in light of the facts of this case), slightly greater explanation is needed to determine when a defendant acts with scienter and when a misrepresentation, misleading statement, or deceptive omission is material.

Scienter may be established by showing that: (1) the defendant knew his misrepresentations or omissions were false and calculated to cause harm; or (2) the defendant made the representations with a reckless disregard for their truth or falsity. See *CFTC v. Noble Metals*, 67 F.3d 766, 774 (9th Cir. 1995) (providing that scienter exists when defendants act intentionally or with "careless disregard"); *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d

record thereof; (iii) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or (iv) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling of such person, or become the seller in respect to any buying of such person.

742, 748 (D.C. Cir. 1988) (holding that recklessness is sufficient to satisfy scienter requirement); *CFTC v. Savage*, 611 F.2d 270, 283 (9th Cir. 1979) (holding that knowledge cannot be precluded by ignorance brought about by willfully or carelessly ignoring the truth). The CFTC "need not show that defendants acted with an evil motive or an intent to injure[;] rather, recklessness is sufficient to satisfy the scienter requirement." *Rosenberg*, 85 F. Supp. 2d at 448 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976)).

A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *R.J. Fitzgerald*, 310 F.3d at 1328 (internal quotation omitted); *Rosenberg*, 85 F. Supp. 2d at 447. "When the language of a solicitation obscures the important distinction between the possibility of substantial profit and the probability it will be earned, it is likely to be materially misleading to customers." *In re JCC, Inc.*, No. 89-4 [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,576 n.23 (CFTC May 12, 1994). Accordingly, misrepresentations regarding profit potential are material and constitute fraud with respect to futures transactions under Section 4b(a)(2)(i) and (iii) of the Act. *See, e.g., CFTC v. United Investors Group, Inc.*, 440 F. Supp. 2d 1345, 1358 (S.D. Fla. 2006) (finding material defendant's "misrepresentations and omission concerning his trading record, the potential for huge profits and his own level of trading experience [which] created the false impression that he had vast expertise in commodities trading, that profits were guaranteed and that the only risk variable was whether the customer was willing to act quickly enough to make the trade"); *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1160 (S.D.N.Y. 1979) (involving misrepresentations regarding profitability of investment); *CFTC v. Crown Colony Commodity Options, Ltd.*, 434 F. Supp. 911, 919 (S.D.N.Y. 1977) (involving misrepresentations concerning profit potential); *CFTC v. J.S. Love & Assocs. Options, Ltd.*, 422

7 U.S.C. § 6b(a)(2).

F. Supp. 652, 655 (S.D.N.Y. 1976) (involving misrepresentations concerning profit potential and the trading experience of account executives).

2. Romano Violated Section 4b(a)(2)(i) and (iii) of the Act.

Romano violated Section 4b(a)(2)(i) and (iii) of the Act. Romano and FxTrade failed to deposit investor funds in FxTrade foreign currency futures trading accounts. In fact, FxTrade did not even exist until July 11, 2003, and FxTrade did not establish a foreign currency trading account until the end of August 2003. In June 2003, Romano deposited Ms. Williamson's FxTrade investment funds into his personal account where he subsequently used them for personal expenses. This misappropriation of investor money clearly violates of Section 4b(a)(2)(i) and (iii).

Romano also violated Section 4b(a)(2)(i) and (iii) by falsely representing to the investors and at least one prospective investor, among other things, the extraordinary rates of return FxTrade investors enjoyed, the successful track record of FxTrade in trading foreign currency futures contracts, that Sibbitt personally invested in FxTrade and quickly made a significant profit, and FxTrade's very existence (because it was not formed until at least two weeks after "the company" first received investor funds). Moreover, Romano failed to tell FxTrade investors and at least one prospective investor about the true nature of FxTrade's operation—namely, that it was a Ponzi scheme. Had the FxTrade investors known of the true nature of these misrepresentations and omissions, they would not have invested their funds with FxTrade; as a result, the misrepresentations and omissions of Romano clearly were material.

Romano made these fraudulent representations and omissions with scienter. As a General Partner of FxTrade, Romano knew that the representations made to Ms. Williamson and Ms. Sheehan regarding FxTrade were false. Also, Romano knew that the representations made to Mr. Rupp were false. Moreover, Romano knew or should have known that the representations

contained in the FxTrade brochure and the FxTrade investor agreements were false. Finally, Romano knew he was omitting highly material facts to investors and at least one potential investor. As such, Romano's actions involve "highly unreasonable omissions or misrepresentations that involve not merely simple or inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading [investors] which is either known to the Defendant or is so obvious that the Defendant must have been aware of it." *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678 (11th Cir. 1988).

E. Remedies

1. Permanent Injunction Against Romano

Pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, the CFTC has made a showing that Romano has engaged in acts and practices which violate Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii). Unless restrained and enjoined by this Court, there is a reasonable likelihood that Romano will continue to engage in the acts and practices alleged in the Amended Complaint and in similar acts and practices in violation of the Act. Based on the conduct described above in Findings of Fact Sections B and C, the Court enters a permanent injunction against Romano enjoining him from

- (1) engaging, directly or indirectly, in any activity that violates Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii), including, but not limited to, the following:
 - a. misrepresenting the profit potential of futures trading;
 - b. misappropriating customer funds;
 - c. misrepresenting the existence of a futures trading account;
 - d. omitting material facts necessary to make other facts disclosed not misleading to customers; and

- e. omitting or downplaying the risks involved in futures trading.
- (2) engaging, directly or indirectly, in any activity related to trading in any commodity, as that term is defined in Section 1a(4) of the Act, 7 U.S.C. § 1a(4) (commodity interest), including but not limited to, the following:
- a. trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29);
 - b. engaging in, controlling or directing the trading for any commodity interest account for or on behalf of any other person or entity, whether by power of attorney or otherwise;
 - c. soliciting or accepting any funds from any person in connection with the purchase or sale of any commodity interest;
 - d. entering into any commodity interest transactions for his own personal account, for any account in which he has a direct or indirect interest and/or having any commodity interests traded on his behalf; and
 - e. engaging in any business activities related to commodity interest trading.
- (3) applying for registration or seeking exemption from registration with the CFTC in any capacity or engaging in any activity requiring registration or exemption from registration, except as provided for in CFTC Regulation 4.14(a)(9), 17 C.F.R § 4.14(a)(9), and acting, directly or indirectly, as a principal, officer, director, supervisor, agent or employee of any person registered, required to be registered or exempted from registration, unless

such exemption is pursuant to CFTC Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9).

2. Restitution

a. The Court Has Authority to Order Restitution.

The Court's authority to order restitution is ancillary to the Court's authority to order injunctive relief under Section 6c of the Act, 7 U.S.C. § 13a-1. This authority is founded on the well-established legal principle articulated by the Supreme Court in *Porter v. Warner Holding Co.*:

Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader power and more flexible character than when a private controversy is at stake. Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case."

328 U.S. 395, 398 (1946) (citations omitted).

The Court reaffirmed this principle in *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 296 (1960), where it found that the district court had jurisdiction to order an employer to reimburse employees for lost wages in a suit by the Secretary of Labor to restrain violations of the Fair Labor Standards Act. "[T]he comprehensiveness of [the court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable reference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* at 291 (quoting *Porter*, 328 U.S. at 398).

The Sixth Circuit has followed these principles in granting broad equitable powers to district courts. See *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 760-761 (6th Cir. 1999). "Restitution and disgorgement are part of the courts' traditional equitable authority." *Id.*

at 760. "Absent a clear command by Congress that a statute providing for equitable relief excludes certain forms of such relief, [the Sixth Circuit] will presume the full scope of equitable powers may be exercised by the courts." *Id.* at 761; *see also Division No. 1, Detroit, Bhd. of Locomotive Eng'rs v. Consolidated Rail Corp.*, 844 F.2d 1218, 1226 (6th Cir. 1988) (stating that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction") (alteration in original) (citation omitted).

Likewise, district courts have followed these same principles in allowing the CFTC to seek restitution on behalf of defrauded investors. *See United Investors Group, Inc.*, 440 F. Supp. 2d at 1359 ("The Court has authority to order restitution as ancillary equitable relief.") (internal quotation omitted); *CFTC v. Commercial Hedge Servs., Inc.*, 422 F. Supp. 2d 1057, 1060 (D. Neb. 2006) (holding that law is well settled that court has authority to order restitution under the ancillary relief provision in 7 U.S.C. § 13a-1); *Wilshire*, 407 F. Supp. 2d 1304, 1314 (S.D. Fla. 2005); *CFTC v. Midland Rare Coin Exch., Inc.*, 71 F.Supp.2d 1257, 1264 (S.D. Fla. 1999) (holding that the CFTC may seek restitution in order to compensate victims of fraud). This Court, thus, has complete authority to issue ancillary equitable relief, including, but not limited to, ordering Romano to make full restitution to every FxTrade investors who invested funds as a result of violations of the Act by Romano and his cohorts, plus pre- and post-judgment interest. *See United Investors Group, Inc.*, 440 F. Supp. 2d at 1359-60 (determining that defendant must pay pre- and post-judgment interest on restitution award).

b. The Amount of Restitution is \$125,000.

An award of restitution in this case is appropriate to compensate the victims of Romano's fraud.³ Romano used fraudulent solicitations in enticing members of the public to become FxTrade investors. These investors relied upon Romano's misrepresentations to their detriment. Because Romano participated in a scheme to defraud FxTrade investors and potential investors, Romano should be jointly and severally liable with FxTrade, Mischler, and Sibbitt (DE #241) for the \$125,000 invested in FxTrade by Ms. Williamson and Ms. Sheehan.

In addition, Romano should be required to pay pre-judgment interest on the restitution amount (beginning from the date the particular investor provided funds for investment in FxTrade to the date of this Order) to be paid at the then prevailing underpayment rate established by the Internal Revenue Service pursuant to 26 U.S.C. § 6621 and post-judgment interest (which shall begin accruing on the date of this Order) to be paid at the then prevailing Treasury Bill rate pursuant to 28 U.S.C. § 1961. All restitution payments (including all pre-judgment interest) shall be immediately due and owing as of the date of this Order.

c. A Monitor Shall Be Appointed to Effect Payment by Romano and Distributions to Investors.

To effect payment by Romano and distribution to injured FxTrade investors, the Court appoints Daniel A. Driscoll of the National Futures Association (NFA) (or whomever else may be selected within the NFA) as Monitor (Monitor). The Monitor shall collect restitution payments from Romano, compute pro-rata allocations to injured FxTrade investors Ms. Williamson and Ms. Sheehan, and make restitution distributions consistent with this Order. Romano shall submit restitution payments, made out to "FxTrade Restitution Fund," and sent by

³ Because this restitution award includes funds that Romano received as a result of the fraud, it is unnecessary to order separately that Romano disgorge those funds.

electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order, to

Daniel A. Driscoll, Monitor
National Futures Association,
200 W. Madison Street, #1600
Chicago, Illinois 60606-3447

under a cover letter that identifies his name and the name and docket number of the proceeding.

Romano simultaneously shall transmit a copy of the cover letter and the form of payment to

Office of Cooperative Enforcement
Division of Enforcement
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

The Monitor shall oversee Romano's restitution obligation and shall make periodic distributions of funds to investors as appropriate. Based upon the amount of funds available, the Monitor may defer distribution until such time as he deems a distribution to be cost-efficient and otherwise appropriate. Restitution payments shall be made in an equitable fashion as determined by the Monitor to Ms. Williamson and Ms. Sheehan and to any other FxTrade investor who was defrauded by Romano in connection with the FxTrade scheme described in this Order upon sufficient proof of his or her investment in FxTrade. Omission from this Order in no way limit the ability of any other FxTrade investor to seek recovery from Romano or any other entity or person. Further, the restitution amount contained in this Order shall not limit the ability of any investor to prove that a greater amount is owed from Romano or any other entity or person, and nothing herein shall be construed in any way to limit or abridge the rights of any investor that exist under state or common law. In addition, because the Monitor is not being specially compensated for these services, and these services are outside the normal duties of the Monitor,

he shall not be liable for any action or inaction arising from his appointment as Monitor, other than actions involving fraud.

3. Civil Monetary Penalties

Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1), provides that "the [CFTC] may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation [of the Act] a civil penalty." For the time period at issue in the case at bar, the civil monetary penalty shall be "not more than the greater of \$120,000 or triple the monetary gain to such person for each such violation." CFTC Regulation 143.8(a)(1)(ii), 17 C.F.R. § 143.8(a)(1)(ii).

"In determining how extensive the fine for violations of the Act ought to be, courts and the [CFTC] have focused upon the nature of the violations." *Noble Wealth Data*, 90 F. Supp. 2d at 694. In this regard, the CFTC has stated:

Civil monetary penalties serve a number of purposes. These penalties signify the importance of particular provisions of the Act and the [CFTC]'s rules, and act to vindicate these provisions in individual cases, particularly where the respondent has committed violations intentionally. Civil monetary penalties are also exemplary; they remind both the recipient of the penalty and other persons subject to the Act that noncompliance carries a cost. To effect this exemplary purpose, that cost must not be too low or potential violators may be encouraged to engage in illegal conduct.

CFTC v. Emerald Worldwide Holdings, Inc., 2005 WL 1130588, *11 (C.D. Cal. Apr. 19, 2005) (citing *In re GNP Commodities, Inc.*, [1990-92 Transfer Binder] Com. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (CFTC 1992)) (citations omitted).

This case warrants imposition of substantial civil monetary penalties against Romano. See *United Investors Group, Inc.*, 440 F. Supp. 2d at 1361 (determining that, among other things, "the gravity of the offenses, the brazen and intentional nature of the violations, [and] the vulnerability of the victims" justified "imposition of a substantial and meaningful [civil monetary penalty]"). Romano repeatedly lied to investors and at least one potential investor and

misappropriated investor funds. This fraudulent conduct constitutes serious violations of the Act that strike at the core of the Act's regulatory system. See *In re Premex*, [1987-90 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at 34,890-91 (CFTC Feb. 17, 1988) ("[C]onduct that violates core provisions of the Act's regulatory system—such as manipulating prices or defrauding customers—should be considered very serious.").

Romano, on behalf of FxTrade and Mischler, fraudulently solicited at least three investors: Ms. Williamson, Ms. Sheehan, and Mr. Rupp. Although Romano made numerous fraudulent representations to each of these investors and potential investors, for purposes of assessing civil monetary penalties, this Court shall treat each deceived investor and potential investor as a single violation of Section 4b(a)(2)(i) and (iii) of the Act. See *United Investors Group, Inc.*, 440 F. Supp. 2d at 1361 (deciding to treat defendant's dealings with each of the testifying customers as a single violation of the Act and determining that a \$120,000 civil monetary penalty was a reasonable penalty assessment for each of the five testifying customers—for a total civil monetary penalty of \$600,000). Accordingly, Romano shall be assessed a civil monetary penalties of \$360,000, which represents the imposition of a \$120,000 civil monetary penalty for each of the two FxTrade investors and the one potential investor that Romano fraudulently solicited. The civil monetary penalty assessed against Romano shall be immediately due and owing as of the date of this Order. Further, post-judgment interest, calculated in the same manner as post-judgment interest on restitution, as discussed above, shall begin accruing as of the date of this Order.

Romano shall pay his civil monetary penalty 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 and sent to

Commodity Futures Trading Commission
Division of Enforcement
Att'n: Marie Bateman—AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Boulevard
Oklahoma City, Oklahoma 73169

If payment by electronic transfer is chosen, contact Marie Bateman at 405-954-6569 for instructions. Romano shall accompany payment of the civil monetary penalty with a cover letter that identifies his name and the name and docket number of the proceeding. Romano shall simultaneously transmit a copy of the cover letter and the form of payment to

Office of Cooperative Enforcement
Division of Enforcement
Commodity Futures Trading Commission
Three Lafayette Centre, 1155 21st Street, N.W.
Washington, D.C. 20581

4. Attorney's Fees

Romano has been ordered to pay the CFTC attorney's fees for discovery misconduct. Because Romano has failed to pay that amount, he shall be required to do so as part of this Order. The amount of attorney's fees Romano previously has been ordered to pay is \$66.67. Romano shall submit payment regarding this attorney's fees sanction in the same manner that he submits payments regarding civil monetary penalties as set forth in the immediately preceding section of this Order.

F. Miscellaneous Provisions

Order of Payments: Romano's obligation to pay restitution, a civil monetary penalty, and attorney's fees sanction are all due and owing as of the date of this Order. Should Romano, however, not be able to satisfy all these obligations at the same time, payments from Romano shall first be used to satisfy his restitution obligation. After Romano's restitution obligation is satisfied fully, then Romano's payments shall be applied to satisfaction of the civil monetary

penalty. Only after full satisfaction of Romano's restitution and civil monetary penalty obligations shall Romano's payments be applied to the attorney's fee sanction.

Notification of Financial Institutions: The CFTC shall provide any financial institution which may have any assets of Romano as of the date of this Order with a copy of this Order. Within thirty (30) days of receiving a copy of this Order, each bank and financial institution affected by this Order is specifically directed to liquidate and release any and all funds held by Romano in any account as of the date of the entry of this Order, whether the account is held or controlled singly or jointly with another Defendant or by Romano in any other capacity, and to convey by wire transfer to an account designated by the Monitor, any and all funds contained in those accounts, less any amounts required to cover the banks' reasonable and outstanding administrative or wire transfer fees. The transfer of such funds represents an offset to Romano's aggregate joint and several restitution obligations. At no time during the liquidation, release, and/or wire transfer of these funds pursuant to this Order shall Romano be afforded any access to, or be provided with, any funds from these accounts. Romano, as well as all banks and financial institutions affected by this Order, shall cooperate fully and expeditiously with the CFTC and the Monitor in the liquidation, release, and wire of any of Romano's funds.

Equitable Relief: The equitable relief provisions of this Order shall be binding upon Romano and any person who is acting in the capacity of agent, employee, servant, or attorney of Romano, and any person acting in active concert or participation with Romano, and those equitable relief provisions that relate to restitution shall be binding on any financial institutions listed above or on any other entity holding frozen funds or assets of Romano, who receives actual notice of this Order by personal service or otherwise.

Notices: All notices required to be given to the CFTC or the NFA by any provision in this Order shall be sent certified mail, return receipt requested, as follows: Notice to CFTC:

Attention - Director of Enforcement, Commodity Futures Trading Commission, Division of Enforcement, 1155 21st Street N.W., Washington, DC 20581; Notice to NFA – Daniel Driscoll, National Futures Association, 200 W. Madison St., #1600, Chicago, IL 60606-3447.

Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this cause to assure compliance with this Order and for all other purposes related to this action.

DECRETAL PROVISIONS

In light of the foregoing, it is **ORDERED** and **ADJUDGED**:

1. The **INJUNCTIVE RELIEF** requested in the CFTC's Amended Complaint is **GRANTED** as outlined above.
2. The CFTC is awarded a judgment of **RESTITUTION** against Romano jointly and severally with FxTrade, Mischler, and Sibbitt (DE # 241) for total restitution of \$125,000 awarded to FxTrade victims Ms. Williamson and Ms. Sheehan. In addition, Romano shall pay pre-judgment interest on the restitution amount (beginning from the date the particular investor provided funds for investment in FxTrade) to be paid through the date of this Order at the prevailing underpayment rate established by the Internal Revenue Service (pursuant to 26 U.S.C. § 6621) and post-judgment interest to be paid on the resulting total restitution obligation from the date of this Order until it is paid in full at the Treasury Bill rate prevailing on the date of this Order (pursuant to 28 U.S.C. § 1961). All restitution payments (including all pre-judgment interest) shall be immediately due and owing as of the date of this Order.

As set forth above, the Monitor shall collect restitution payments from Romano and distribute any funds paid to restitution (including pre- and post-judgment interest) for the period beginning with the date of entry of this Order and continuing until distribution of the complete restitution obligation called for by this Order. Romano shall submit restitution payments, made payable to "FxTrade Restitution Fund," to

Daniel A. Driscoll, Monitor,
National Futures Association,
200 W. Madison Street, #1600
Chicago, Illinois 60606-3447

under a cover letter that identifies his name and the name and docket number of the proceeding.

Romano simultaneously shall transmit a copy of the cover letter and the form of payment to

Office of Cooperative Enforcement
Division of Enforcement
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

3. The CFTC is awarded a **CIVIL MONETARY PENALTY** of \$360,000 against Romano. The civil monetary penalty shall be immediately due and owing as of the date of this Order. Further, Romano shall pay post-judgment interest on the civil monetary penalty from the date of this Order until the civil monetary penalty is paid in full, at the rate provided in 28 U.S.C. § 1961.

Romano shall pay his civil monetary penalty 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 and sent to

Commodity Futures Trading Commission
Division of Enforcement
Att'n: Marie Bateman—AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Boulevard
Oklahoma City, Oklahoma 73169

If payment by electronic transfer is chosen, contact Marie Bateman at 405-954-6569 for instructions. Romano shall accompany payment of the civil monetary penalty with a cover letter that identifies his name and docket number of the proceeding. Romano shall simultaneously transmit a copy of his cover letter and the form of payment to

Office of Cooperative Enforcement
Division of Enforcement
Commodity Futures Trading Commission
Three Lafayette Centre, 1155 21st Street, N.W.
Washington, D.C. 20581

4. Romano is once again ordered to pay a previously assessed **ATTORNEY'S FEES** sanction to the CFTC for his discovery misconduct. Because Romano has failed to pay this amount, he shall be required to do so as part of this Order. The amount of attorney's fees Romano previously has been ordered to pay is \$66.67. Romano shall submit payment regarding this attorney's fees sanction in the same manner that he submits payments regarding civil monetary penalties as set forth in the immediately preceding section of this Order.

5. Romano shall not transfer or cause others to transfer funds or other property to the custody, possession, or control of any other person for the purpose of concealing such funds or property from the Court, the CFTC, the Monitor, or any other officer that may be appointed by the Court to monitor the payment of Romano's restitution, civil monetary penalty, or attorney's fees obligation.

This Court shall retain jurisdiction of this case to assure compliance with the Order and for all other purposes related to this action.

IT IS SO ORDERED this 24th day of April, 2007.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT JUDGE