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Commodity Futures Trading Commission; Plaintiff, vs. Emerald Worldwide Holdings, Inc., City Trust and Investment Co. Ltd., Hao Jan Lu and Jian Zhuang, Defendants, and Lynnwood Jen, Esther Pranolo, ACE Capital Advisory Group, Inc., and ACE Emerald W. Holding, Inc., Relief Defendants.

Case No.: No. CV03-8339 AHM (Ex)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 42893

April 19, 2005, Decided
April 19, 2005, Filed

SUBSEQUENT HISTORY: Partial summary judgment granted by, Summary judgment granted by, Summary judgment denied by *CFTC v. Emerald Worldwide Holdings*, 2005 U.S. Dist. LEXIS 46859 (C.D. Cal., July 1, 2005)

PRIOR HISTORY: *CFTC v. Emerald Worldwide Holdings, Inc.*, 2004 U.S. Dist. LEXIS 27511 (C.D. Cal., July 29, 2004)

COUNSEL: [*1] For Commodity Futures Trading Commission also known as Seal 1, Plaintiff: Christine M Ryall, John W Dunfee, US Commodity Futures Trading Commission, Division of Enforcement, Washington, DC; Kent A Kawakami, AUSA -- Office of US Attorney, Civil Division, Los Angeles, CA.

For Emerald Worldwide Holdings Inc also known as Seal A, Defendant: Albert C Lum, Albert C Lum Law Offices, South Pasadena, CA; David W Wiechert, L Michael Alberts, David W Wiechert Law Offices, San Clemente, CA.

For Jan Lu Hao, also known as, Seal B, Erroneously Sued As, Hao Jan Lu, Jian Zhuang, also known as, Seal C, Defendant: Jacob J Stettin, Jacob J Stettin Law Offices, Los Angeles, CA.; Paul D Cass, Stettin & Cass, Los

Angeles, CA.

For ACE Capital Advisory Group Inc, Lynnwood Jen, Defendants: Steven L Krongold, Thomas H Bienert, Jr, Bienert and Krongold, San Clemente, CA.

JUDGES: Honorable A. Howard Matz, UNITED STATES DISTRICT JUDGE.

OPINION BY: A. Howard Matz

OPINION

Order of Judgment By Default Against Defendant City Trust and Investment Co. Ltd.

This matter is before the Court on Plaintiff Commodity Futures Trading Commission's ("CFTC's") uncontested Application for Entry of Judgment By Default ("Application") [*2] against Defendant City Trust and Investment Co. Ltd. ("CTI"). After consideration of the Application, supporting memorandum and other documents filed 'in this matter and for the reasons set forth below, the Court GRANTS the CFTC's Application.

I.**PROCEDURAL BACKGROUND**

On May 10, 2004, the CFTC filed a four-count First Amended Complaint charging defendant CTI with joint and several liability with defendant Emerald Worldwide Holdings, Inc. ("Emerald") for soliciting, or accepting any order for, or otherwise dealing in, illegal off-exchange futures contracts in violation of Section 4(a) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 6(a) (2001); misrepresenting Emerald as a registered entity, in violation of Section 4h of the Act, 7 U.S.C. §§ 6h (2001); and misrepresenting Emerald's affiliation with persons and entities that are actually registered with the CFTC and its trading of customer funds, in violation of Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(C)(i) and (iii) (2001), and CFTC Regulation 1.1(b)(1) and (3), 17 C.F.R. §§ 1.1(b)(1) and (3) (2002). CTI is also charged [*3] with liability, pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2001), for defendant Jian Zhuang's ("Zhuang") misappropriation of customer funds, in violation of Section 4b(a)(2)(C)(i) and (iii) of the Act and Regulation 1.1(b)(1) and (3).

The Court previously found that CTI was properly served with the Summons and First Amended Complaint on May 17, 2004. See Order of Preliminary Injunction (June 3, 2004); Civil Minutes (September 14, 2004). Under *Federal Rule of Civil Procedure 12(a)(1)(A)* ("F.R.Civ.P."), CTI had 20 days to respond to the First Amended Complaint. At the request of the CFTC and pursuant to *F.R.Civ.P. 55(a)*, the Clerk of the Court entered default against CTI on September 14, 2004, for failure to answer or otherwise plead. On or about January 26, 2005, CTI was served with copies of the CFTC's Application, pursuant to *F.R.Civ.P. 55(b)(2)*, along with notice of a hearing scheduled for February 28, 2005.¹ On February 22, 2005, the CFTC filed a request to continue the hearing to March 7, 2005, which the Court granted. [*4] ² Under *Local Rule 7-9*, CTI was required to file opposition to the Application by February 21, 2005. A hearing on Plaintiff's Application was held on March 7, 2005. To date, CTI has not appeared, filed an answer or otherwise pleaded in this matter.

¹ In December 2004, Plaintiff was contacted by counsel newly hired to represent CTI in this matter. Declaration of Christine M. Ryall (Mar. 4, 2005) P 12. Plaintiff's Application was served on CTI via counsel. Ryall Decl. (Mar. 4, 2005) P 13.

However, CTI's counsel has never filed a notice of appearance or other document with the Court.

² Plaintiff served a copy of the request for extension on counsel for CTI. See Certificate of Service to Plaintiff's Application to Continue Hearing on Application for Default Judgment, filed on or about February 22, 2005.

II.**FACTUAL BACKGROUND**

After the clerk has entered default, the Court takes as true the well-pleaded factual allegations of the complaint, except those as to damages. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987); [*5] *Discovery Communications, Inc. v. Animal Planet, Inc.*, 172 F. Supp. 2d 1282, 1288 (C.D. Cal. 2001). Under this standard, the facts of the case, as to defendant CTI, are as follows.

A. Relevant Parties

Plaintiff CFTC is an independent federal regulatory agency that is charged with responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 et seq. (2001), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 et seq. (2002).

Defendant CTI is a Japanese corporation with its primary place of business located at 4F Kyobashi Daikyu Nagaoka Bldg., Chuo-ku Hachobori 2-21-2, Tokyo, Japan. CTI has ever been registered with the CFTC in any capacity.

B. Offering or Dealing in Illegal Off-Exchange Futures Contracts and Misappropriation of Funds

From at least March 2002 to the present, defendants CTI and Emerald, operating together as a common enterprise, have solicited approximately \$ 5 million from more than 300 customers, purportedly to be used for trading foreign currency futures contracts through or with Emerald in the United States. CTI, holding itself out as Emerald's agent, has solicited customers [*6] to deposit funds into Emerald's United States bank accounts. CTI has five to ten offices in Japan and China. CTI hires "financial consultants" (FCs) to solicit new customers in Japan and China and manage customer accounts. CTI, through its agents, trains its FCs how to solicit customers to invest with Emerald and provides FCs with

promotional materials and account opening documents to disseminate to prospective customers. CTI, through its agents, has solicited approximately 300 investors in Japan and China to deposit investment funds in Emerald's bank accounts in the United States. CTI did not solicit investors to trade through any firm other than Emerald.

When soliciting investors to deposit funds, CTI's FCs represent that Emerald granted CTI exclusive authorization to solicit customers in Japan and China to trade through Emerald. FCs tell prospective customers that Emerald is a branch of "ACE Financial Group" and that ACE Financial Group is one of the biggest foreign currency exchange trading companies in the United States. FCs tell potential customers that their investments will be protected because Emerald is regulated in the United States by the CFTC, the National Futures Association [*7] (NFA), the National Association of Securities Dealers (NASD), and the Securities Investor Protection Corporation (SIPC) and that, as a result of regulation by these entities, customers' investment funds are protected even if Emerald ceases operating. CTI, through its agents, also disseminates to potential customers Emerald's promotional brochure, which makes the same representations.

CTI, through its agents, advises, customers that foreign currency trades placed by FCs or customers at a CTI dealing room are made through Emerald in City of Industry, California. Emerald's website, www.emeraldforex.com, stated that customers could place trade orders directly by calling Emerald in California and that customers had access "24-hours a day from Sunday evening 5:00PM WST (California Time) to Friday afternoon at 12:00pm WST" to the "dealing desk" via Emerald's main telephone number. From approximately March 2002 through November 2003, Emerald employed several part-time operators to answer calls nearly 24 hours a day in Emerald's California office. Emerald customers receive account statements, printed on Emerald letterhead and bearing an Emerald seal, that show trading activity in the customer's [*8] account. CTI distributes the Emerald account statements to Emerald customers in Japan and China.

The customer account statements, in an attempt to characterize the transactions as a spot or forward trades, indicate that foreign currency contracts are bought and sold at a spot rate. However, the foreign currency contracts that defendants offer and purport to sell are

actually contracts for future delivery of foreign currencies that are cash settled ("futures contracts"). Emerald's promotional materials and CTI's solicitations offer an opportunity to profit based upon the fluctuations in the relative values of foreign currencies. The prices or pricing formulas are established at the time the contracts are initiated and the contracts may be settled through offset, cancellation, cash settlement or other means to avoid delivery. These contracts are offered to the general public and are not individually negotiated. They are leveraged positions that can and do remain open for indefinite periods of time.

Additionally, investors do not anticipate taking -- and do not take -- delivery of the foreign currencies as a consequence of these investments. The customers who invest with Emerald have [*9] no commercial need for foreign currency. Emerald does not require its customers to set up banking relationships to facilitate delivery of foreign currencies. Instead, investors enter into these purported transactions to speculate and profit from anticipated price fluctuations in the markets for these currencies. Based on the representations that have been made to investors by Emerald's agents, investors expect that, once the market moves in a favorable direction, Emerald will liquidate their investment by authorizing the sale of the contract and that the investors will take profits. These are all characteristics of futures contracts, not spot or forward contracts.³

3 The Court has previously found that the foreign currency transactions offered by CTI and Emerald are futures contracts. See Order of Preliminary Injunction Against Defendant CTI and Relief Defendants (June 3, 2004); Order Granting In Part and Denying In Part Plaintiff's Motion for Civil Contempt (July 29, 2004).

While the transactions offered [*10] and purportedly sold by Emerald and CTI are foreign currency futures contracts, Emerald customers are not eligible contract participants and Emerald does not serve as a proper counterparty to the purported contracts under the Commodity Exchange Act. Moreover, the transactions are not conducted on or subject to the rules of a board of trade that has been designated or registered by the CFTC as a contract market or derivatives transaction execution facility for such commodity, and such contracts are not executed or consummated by or through such a contract market. They are therefore illegal off-exchange futures

contracts.

C. Misrepresentations About the Trading of Customer Funds and Misappropriation of Customer Funds

Emerald's promotional brochure, which is disseminated by CTI FCs, represents that all "investors' margin deposits are separately secured in [major American Banks such as Bank of America, Citibank and Chase Manhattan Bank] and are protected by FDIC." However, rather than being secured in separate accounts, prior to November 17, 2003, customer funds were deposited into one of two accounts in Emerald's name at a California branch of Citibank.

Other than wire [*11] transfers between them, the only deposits into the two Emerald Citibank accounts were from customers, directly or through Otomo FX International or CTI, totaling approximately \$ 5 million. The Citibank accounts received no distributions from a bank, clearinghouse, designated contract facility or any other entity that would be consistent with trading. The funds collected from Emerald/CTI customers were not traded on the customers' behalf.

Rather, approximately \$ 2.1 million in customer funds was wired to offshore bank accounts in the name of CTI, \$ 82,000 to other entities, \$ 37,000 to Zhuang, and \$ 507,000 to other Emerald bank accounts at either Wells Fargo, Bank of America, or Citibank. Approximately \$ 1.9 million in customer funds was transferred back to customers for the purported liquidation of some or all of their trading accounts. Since no funds were transferred into either of the Emerald Citibank accounts from any bank, clearinghouse, or other designated contract facility that might indicate the existence of trading, customers who received funds from Emerald's accounts were not being paid from returns on their investments. Rather, they were being paid with other customers' [*12] funds.

To uphold the appearance of trading, Emerald and/or CTI manufacture customer account statements, printed on Emerald letterhead and bearing an Emerald seal, detailing purported trading results for any given day. These statements identify the account balance, margin requirements, commissions, and profits/losses, as well as specific contracts purportedly bought or sold. They are sent to customers regularly and serve to maintain the appearance of trading and enable CTI's scheme to continue. CTI distributes the false account statements to

customers in Japan and China.

From March through August 2002, Zhuang participated, along with defendant Hao Jan Lu ("Lu"), in the business operations of Emerald. In August 2002, Zhuang purchased all shares of Emerald. From August 2002 to present, Zhuang has controlled the business operations of Emerald. Zhuang, who is also known as "Ken So" or "Ken Sho," has also been a shareholder and director or officer of CTI and has exercised control over business operations of CTI. Zhuang, a signatory on one or more accounts into which investor funds were deposited, knowingly misappropriated and failed to trade investor funds. CTI is liable for Zhuang's actions [*13] because Zhuang was acting as an agent of CTI.

D. Misrepresentations About Emerald's Registration Status and Affiliation With Registered Entities

As Emerald's exclusive agent, CTI distributes Emerald's promotional material to prospective customers. In an attempt to establish itself as a legitimate operation, Emerald represents in its promotional brochure and Internet website that it is affiliated with entities and individuals that are registered with the Commission. These materials identify Emerald as a registered broker or dealer in foreign currency exchange investments and in futures and commodities trading and as "one of the largest and most experienced Futures Commission Merchants ["FCM"] that focuses solely on the currency market." However, Emerald is not and never has been registered with the Commission in any capacity.

In Emerald's promotional brochure and Internet website, Emerald represents that it is a subsidiary of ACE Financial Group ("ACE"), a registered FCM. The brochure goes on to say that ACE is "a member of the U.S.A. Commodity Futures Trading Commission [CFTC], the U.S.A. Futures Commission Merchant [FCM], the U.S.A. National Futures Association [*14] [NFA], the U.S.A. National Association Securities Association [NASD], and the U.S.A. Securities Investor Protection Corporation [SIPC]," and proud to have been "one of the first registered FCM following the passage of the Commodity Modernization Act of August 1998." Although ACE is registered with the CFTC as a notice broker or dealer and introducing broker, and is a member of the National Futures Association, ⁴ ACE is has never been registered as a FCM and it does not engage in foreign currency trading on behalf of clients. Furthermore, ACE has no affiliation or dealings with

Emerald or CTI.

4 The NFA is a not-for-profit membership corporation formed in 1976 to become a futures industry's self-regulatory organization under *Section 17* of the Commodity Exchange Act. *Section 17* was added to the Commodity Exchange Act by Title III of the Commodity Futures Trading Commission Act of 1974 and provides for the registration and CFTC oversight of self-regulatory associations of futures professionals.

ACE Financial [*15] Group is the name under which another entity, Anthony John Columbo Inc. ("Columbo Inc."), conducts business. Emerald also claims that it is affiliated with Columbo Inc. and that Columbo Inc. is a subsidiary of ACE. Emerald's brochure and website state that Anthony John, presumably Anthony John Columbo ("Columbo"), President of Columbo Inc., is the Vice President & Chief of Spot Trading at Emerald. Although Columbo is registered with the Commission, he does not actually have any relationship with Emerald or CTI.

Emerald, in its promotional brochure and Internet website, identifies William Ahdout ("Ahdout") as the Head of Option Trading and provides a biography of Ahdout. Ahdout has never maintained any business affiliation, commercial or otherwise, with Emerald or ACE and has never engaged in foreign currency trading through his employer, Forex Capital, a registered FCM with the Commission. According to Ahdout, his biography and other statements on Emerald's website were taken directly from Forex Capital's website.

In Emerald's promotional brochure and Internet website, Emerald identifies David Sakhai as the Chief Operating Officer of Emerald. David Sakhai is the Principal of Forex [*16] Capital. Sakhai has never maintained any business affiliation, commercial or otherwise, individually or through Forex Capital, with Emerald or ACE. Sakhai has stated that all representations regarding him and Forex Capital in Emerald's website and brochure were made without his knowledge and against his will.

In addition, CTI incorporates many of the same misrepresentations into its own company brochures that are also distributed to prospective customers. CTI's brochures and employee business cards state that

Emerald is part of ACE Financial Group, and that ACE Financial Group is a registered FCM and member of the CFTC, NFA, NASD, and SIPC. Zhuang and other CTI managers use these brochures to train CTI FCs. CTI FCs use this information to solicit customers and lure them into depositing funds with Emerald, by making customers believe to that Emerald is a legitimate foreign currency contract trading company registered and regulated in the U.S.

E. Diversion of Funds to Relief Defendants

Prior to December 1, 2003, CTI FCs gave customers the option of depositing their investment funds directly into one of two Emerald Citibank accounts in the United States, depositing their [*17] funds into a CTI account in Japan for forwarding to Emerald, or making a cash deposit at a CTI branch office for forwarding to Emerald. Prior to November 17, 2003, most Emerald customers wired their investment funds directly to one of Emerald's Citibank accounts in the United States. Since on or about December 1, 2003, Emerald and/or CTI, through their agents, have directed Emerald customers to wire investment deposits to other bank accounts in California. One account, at Citibank, is in the name of relief defendant ACE Capital Advisory Group, Inc. ("ACE Capital"). The second account, at Bank of America, is in the name of relief defendant ACE Emerald W. Holding, Inc. ("ACE Emerald"). Since at least December 1, 2003, several customers solicited by CTI to trade through Emerald have deposited investment funds into these bank accounts in the United States.

III.

ANALYSIS

A. Jurisdiction

The Court has jurisdiction pursuant to *Section 6c* of the Act, 7 *U.S.C. § 13a-1* (2001), 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 [*18] or practice constituting a violation of any provision of the Act or any rule, regulation or order thereunder. The Court has previously held that, based on the allegations in the First Amended Complaint and the exhibits filed in support thereof, the foreign currency transactions offered by CTI and Emerald are futures contracts and that under Section 2(c)(2)(B)(i)-(ii) of the Act, 7 *U.S.C. §*

2(c)(2)(B)(i)-(ii) (2001), the CFTC and the Court have jurisdiction over them. See Order of Preliminary Injunction Against Defendant CTI and Relief Defendants (June 3, 2004); Order Granting In Part and Denying In Part Plaintiff's Motion for Civil Contempt (July 29, 2004). Venue properly lies with this Court pursuant to *Section 6c(e)* of the Act, in that the acts and practices in violation of the Act occurred within this district, among other places.

B. Standard for Default Judgment

F.R.Civ.P. 55(b)(2) and *Local Rule 55-1* require an application for default judgment to be accompanied by a declaration that states: (1) when and against which party default was entered; (2) the identification of the pleadings to which default was entered; [*19] (3) whether the defaulting party is an infant or incompetent person, and if so, whether that person is adequately represented; (4) that the Soldiers' and Sailors' Civil Relief Act of 1940 does not apply; and (5) that notice of the application has been served on the defaulting party, if required. The CFTC's application has met the procedural requirements of *Fed.R.Civ.P. 55* and *Local Rule 55-1*. A court may not enter a default judgment against an unrepresented minor, an incompetent person, or a person in military service. See *Fed.R.Civ.P. 55(b)(2)*. As a corporation, these characteristics do not apply to CTI.

Judgment by default may be entered by the Court when the party entitled to a judgment by default applies to the Court for such judgment. *Fed. R. Civ. Pro. 55(b)*. The Court may consider the following factors in determining whether to award a default judgment: (1) the merits of plaintiff's claims; (2) the sufficiency of the complaint; (3) the amount of money at stake; (4) the likelihood of prejudice to plaintiff if judgment of default is denied; (5) the possibility [*20] of dispute as to any material facts in the case; (6) whether default resulted from excusable neglect; and (7) the policy of the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Here, these factors weigh in favor of granting the motion for entry of default judgment.

1. Substantive Merits and Sufficiency of the Complaint

The first two Eitel factors require that the factual allegations in the First Amended Complaint "state a claim on which [the CFTC] may recover." *Danning v. Lavine*,

572 F.2d 1386, 1388 (9th Cir. 1978); *PepsiCo, Inc. v. California Security Cans*, 238 F. Supp. 2d 1172, 1175 (C.D. Cal. 2002). As described below, the First Amended Complaint alleges sufficient facts to make a prima facie case on each count charged therein. This factor favors granting a default judgment.

a. Fraudulent Misappropriation

Count I of the First Amended Complaint charges that CTI is vicariously liable for Emerald's and Zhuang's violations *Sections 4b(a)(2)(C)(i)* and *(iii)* of the Act and Commission Regulations *1.1(b)(1)* and *(3)*, pursuant to *Section 2(a)(1)(B)* of [*21] the Act, 7 U.S.C. § 2(a)(1)(B) (2001). The First Amended Complaint charges that Zhuang, as an agent of Emerald and CTI, violated these sections of the Act and Regulations by fraudulently misappropriating investor funds. *Sections 4b(a)(2)(C)(i)* and *(iii)* of the Act prohibit cheating or defrauding or attempting to cheat or defraud other persons, and willfully deceiving or attempting to deceive other persons in connection with commodity futures trading. See *Saxe v. E.F. Hutton & Co. Inc.*, 789 F.2d 105, 111 (2d Cir. 1986) and *CFTC v. Skorupskas*, 605 F. Supp. 923 (E.D. Mich. 1985). CFTC Regulation *1.1(b)(1)* and *(3)* similarly prohibits such conduct in connection with foreign currency futures contracts. In support of Count I, the First Amended Complaint alleges that Zhuang fraudulently misappropriated customer funds because he controlled the Emerald bank accounts into which customers deposited investment funds, but knowingly failed to send funds to any trading firm and instead made transfers to CTI, himself and others; Zhuang was acting in his capacity as agent of Emerald and CTI; Emerald and CTI operated as a common enterprise; and CTI is [*22] liable for Zhuang's violations, pursuant to *Section 2(a)(1)(B)* of the Act.

The facts alleged by the CFTC establish a prima facie case that Zhuang violated *Section 4b(a)(2)(C)(i)* and *(iii)* and Regulation *1.1(b)(1)* and *(3)*. Soliciting or obtaining funds from investors for trading, then failing to trade the funds while using them for personal and business expenses, is misappropriation. *Skorupskas*, 605 F. Supp. at 923 (defendant misappropriated customer funds entrusted to her by soliciting investor funds for trading and then trading only a small percentage of those funds, while disbursing the rest of the funds to other investors, herself, and to her family); *CFTC v. Muller*, 570 F.2d 1296 (5th Cir.1978) (preliminary injunction

affirmed where CFTC made a prima facie showing that defendant had misappropriated customer funds in violation of Act). Misappropriation of funds entrusted to a defendant for trading purposes is "willful and blatant fraudulent activity" that violates *Section 4b(a)* of the Act. *CFTC v. Weinberg*, 287 F. Supp. 2d 1100, 1106(C.D. Cal. 2003). See also *CFTC v. Noble Wealth Data Info. Servs., Inc.*, 90 F. Supp. 2d 676 (D. Md. 2000), [*23] aff'd in part and vacated in part by, *CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002)(defendants defrauded investors by diverting investor funds for operating expenses and personal use); *CFTC v. Clothier*, 788 F. Supp. 490 (D. Kan.1992) (a violation of *Section 4o (1)* of the Act includes the fraudulent misappropriation of customers' funds entrusted to broker for trading purposes); *In re Lincolnwood Commodities, Inc.*, [1982-1984 Transfer Binder] *Comm. Fut. L. Rep. (CCH) P 21,986 at 28,255 (CFTC 1984)* (CFTC affirmed holding that defendant violated *Section 4b* when he "diverted to his own use funds entrusted to him by or on behalf of his customers").

Under *Section 2(a)(1)(B)* of the Act 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." 7 U.S.C. § 2(a)(1)(B) (2001). Whether one person is an agent acting for another [*24] turns . . . on an overall assessment of the totality of the circumstances in each case." *Berisko v. Eastern Capital Corp.*, [1984-1986 Transfer Binder] *Comm. Fut. L. Rep. (CCH) P 22,772 at 31,223 (CFTC 1985)*; accord *Bogard v. Abraham-Rietz & Co.*, [1984-1986 Transfer Binder] *Comm. Fut. L. Rep. (CCH) P 22,273 (CFTC 1984)*. Here, the First Amended Complaint alleges that Zhuang was shareholder and director or officer of both Emerald and CTI. He has been a sole signatory to the Emerald accounts holding customers' investment funds. Zhuang works out of the Tokyo, Japan headquarters of CTI, holds himself out as Administration Director and "head of business operations" of CTI and personally works with large investors. Plaintiff has made a prima facie showing that Zhuang was acting as an agent of Emerald and CTI and that CTI is liable, pursuant to *Section 2 (a) (1MB)* of the Act, for Zhuang's misappropriation of customer funds, in violation of *Sections 4b(a)(2)(C)(i)* and *(iii)* of the Act and Regulations *1.1(b)(1)* and *(3)*.

b. Fraudulent Misrepresentation

Count II of the First Amended Complaint charges CTI with violating *Section 4b(a)(2)(C)(i)* and *(iii)* of [*25] the Act and CFTC Regulations 1.1(b)(1) and (3), which prohibit acts, transactions, and practices or courses of businesses that operate with fraud or deceit, including misrepresentations and omissions of a material fact, in connection with the offer, purchase or sale of commodity futures contracts. The CFTC must show that the defendants made material misrepresentations or omissions of material fact with the requisite scienter. See *In re Slusser*, [1998-1999 Transfer Binder] *Comm. Fut. L. Rep. (CCH) P 27,701 at 48,311 (CFTC July 9, 1999)*, aff'd and remanded on other grounds sub nom., *Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000). A material fact is one that "it is substantially likely that a reasonable investor would consider . . . important in making an investment decision." *Sudol v. Shearson Loeb Rhodes, Inc.*, [1984-1986 Transfer Binder] *Comm. Fut. L. Rep. (CCH) P 22,748 at 31,119 (CFTC Sep. 30, 1985)*. A showing of intentional conduct or reckless disregard is sufficient to satisfy the scienter requirement. See *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985); *CFTC v. Noble Metals Int'l*, 67 F.3d 766 (9th Cir. 1995), [*26] cert. den., *Schulze v. CFTC*, 519 U.S. 815, 136 L. Ed. 2d 26, 117 S. Ct. 64 (1996); *In re Conti Commodity Services, Inc.*, [1990-1992 Transfer Binder] *Comm. Fut. L. Rep. (CCH) P 25,038 at 37,878 (CFTC Apr. 17, 1991)*. In general, all manner of omissions and misrepresentations of material fact regarding futures and options transactions violate the antifraud provisions of the Act and Regulations, including omissions and misrepresentations concerning the likelihood of profit, the risk of loss, and other matters that a reasonable investor would consider material to his investment decision. See e.g., *JCC, Inc., et al. v. CFTC*, 63 F.3d 1557, 1571 (11th Cir. 1995).

The First Amended Complaint alleges that Emerald and CTI, operating as a common enterprise, and their agents, made false and deceptive representations and omissions of material fact, in Emerald's promotional materials and CTI FCs' solicitations, regarding Emerald's trading of foreign currency futures contracts on behalf of customers Emerald's affiliations with unrelated individuals and entities registered with the CFTC, including ACE Financial Group, Anthony John Columbo, David [*27] Sakhai and William Ahdout; Emerald's registration status with the CFTC; Emerald's status as a

subsidiary of ACE Financial Group; and ACE Financial Group's registration status with the CFTC, NFA, NASD and SIPC. These facts are material. The First Amended Complaint alleges that Emerald and CTI, and their agents, willfully deceived or attempted to deceive Emerald customers through these misrepresentations and omissions of fact.

The First Amended Complaint alleges sufficient facts to establish that Emerald and CTI operated in a common enterprise. The two companies had common control, did not operate separate from each other or at arms length, and they commingled funds in Emerald's U.S. bank accounts. *See FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000); *Sunshine Art Studios v. FTC*, 481 F.2d 1171, 1173 (1st Cir. 1973); *CFTC v. Wall Street Underground Inc.*, 281 F. Supp. 2d 1260, 1271 (D.C. Kan. 2003); *CFTC v. Comvest Trading Corp.*, 481 F. Supp. 438, 440 (D.C. Mass. 1979). CTI may therefore be held liable for the deceptive acts and practices of the Emerald. *Sunshine Art Studios*, 481 F.2d at 1175; [*28] *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000). The CFTC has alleged all of the prima facie elements for a violation of *Sections 4b(a)(2)(C)(i) and (iii)* of the Act and CFTC Regulations *1.1(b)(1) and (3)*.

c. Misrepresentation As a Registered Entity

Count III of the First Amended Complaint charges CTI, together with Emerald, with violating *Section 4h* of the Act by falsely representing that Emerald is registered with the Commission. *Section 4h* prohibits any person from falsely representing itself or its agents or representatives as being registered with the Commission in its solicitation of customers. *Section 4h* also makes it unlawful to falsely represent that in connection with the handling of any order or contract for the purchase or sale of any commodity, that order or contract is being executed through a member that is registered.

The First Amended Complaint alleges that Emerald's brochure and website misrepresent that Emerald is a registered FCM with the Commission and that Emerald's parent company "ACE Financial Group" is also registered as a FCM and notice broker or dealer with the Commission. Emerald is not now, nor has it ever [*29] been, registered with the Commission in any capacity. ACE, although it is a registered broker dealer and introducing broker, has no affiliation with Emerald. CTI is liable for Emerald's violations because they operate as

a common enterprise. The First Amended Complaint alleges sufficient facts to establish that Emerald and CTI operated in a common enterprise. See *Section III.B.1.b.*, herein, above. The CFTC has pleaded a prima facie violation of *Section 4h*.

d. Offering or Dealing in Illegal Off-Exchange Futures Contracts

Count IV of the First Amended Complaint alleges that CTI violated *Section 4(a)* of the Act by soliciting, or accepting orders for, or otherwise dealing in, illegal off-exchange foreign currency futures contracts. *Section 4 (a)* of the Act provides that unless exempted by the Commission, it shall be unlawful for any person to offer to enter into, execute, confirm the execution of, or conduct an office or business in the United States for the purpose of soliciting, accepting any order for, or otherwise dealing in transactions in, or in connection with, a contract for the purchase or sale of a commodity for future delivery when such transactions have not been conducted [*30] on or subject to the rules of a board of trade which has been designated or registered by the Commission as a contract market or derivatives transaction execution facility for such commodity; and such contracts have not been executed or consummated by or through such contract market. Two elements must be established to show a *Section 4(a)* violation: (1) the contract in question is a futures contract; and (2) the contract was not traded on or subject to the rules of a designated contract market.

The First Amended Complaint alleges that (1) CTI and Emerald, operating as a common enterprise, offered and dealt in foreign currency transactions, purportedly traded through Emerald in California, and that the foreign currency transactions are futures contracts and (2) the futures contracts offered by CTI and Emerald have not been conducted on or subject to the rules of a board of trade designated or registered by the Commission as a contract market or derivatives transaction execution facility, nor executed or consummated by or through a contract market.⁵ Thus, the CFTC has pleaded a prima facie case of a *Section 4(a)* violation.

⁵ See n.3, above.

[*31] 2. Amount at Stake

This *Eitel* factor requires the Court to consider "the amount of money at stake in relation to the seriousness of

Defendant's conduct." *Cal. Sec. Cans.*, 238 F. Supp. 2d at 1176; see also *Eitel*, 782 F.2d at 1471-72. Here, in addition to a permanent injunction, Plaintiff seeks from CTI restitution of \$ 3,242,106.37 and a civil monetary penalty of \$ 9,000,000. The Court may order restitution, pursuant to its general equity powers to afford complete relief, and courts regularly order defendants to pay restitution in federal regulatory enforcement actions. See *CFTC v. CoPetro Mrktg. Group Inc.*, 680 F.2d 573, 583-84 (9th Cir. 1982); *CFTC v. Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979); *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1163 (S.D.N.Y. 1979); *SEC v. Manor Nursing Centers Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) (upholding an order requiring return of investment proceeds to investors in a public offering).

The appropriate amount of restitution is the total amount invested by customers, less refunds made by the defendants to the [*32] customers. *FTC v. Wolf*, 1996 U.S. Dist. LEXIS 1760 *27, 1996 WL 812940 *9 (S.D. Fla. 1996); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) (restitution restores the status quo by returning to the purchaser the price of unlawfully sold goods); *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1089 (D.N.J. 1996) (citing *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993)) (restitution is designed to restore victims to the position that existed before the illegal or wrongful transaction occurred by compensating them for loss caused by the conduct). Here, the CFTC seeks restitution from CTI in an amount equal to the net customer deposits into the U.S. bank accounts of Emerald, ACE Capital and ACE Emerald from March 2002 through April 2004, ⁶ the period of the solicitation and fraud alleged in the First Amended Complaint. The restitution sought by the CFTC is therefore reasonable under the circumstances.

6 See Brown Declaration P 5.

[*33] Section 6c of the Act together with CFTC Regulation 143.8(2)(ii), 17 C.F.R. § 143.8(2)(ii), permit civil monetary penalties of up to the greater of \$ 120,000 per violation or triple a defendant's monetary gain. ⁷ The First Amended Complaint alleges that each act by the defendants is a separate violation of law. See First Amended Complaint PP 67, 71, 74 and 77. It also alleges that more than 300 customers were fraudulently solicited, were offered illegal off-exchange futures contracts and were the victims of misappropriation. Therefore, the civil monetary penalty against CTI could potentially be as high

as \$ 36 million (300 times \$ 120,000). See *Slusser*, 210 F.3d at 786 ("[T]he penalty . . . is limited by the number of violations alleged in the complaint times the maximum fine per violation").

7 As authorized by the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410; 104 Stat. 890, the Commission raised the penalty per violation from \$ 100,000 to \$ 120,000 for each act committed on or after October 23, 2000. 17 C.F.R. § 143.8 (2) (ii)

[*34] Courts and the CFTC have found that a high CMP is warranted where customers have been defrauded of a substantial amount. See *JCC, Inc.*, 63 F.3d at 1571 (quoting *In re Premex, Comm. Fut. L. Rep. (CCH) P 24,165 at 34,890-91 (CFTC Feb. 17, 1988)*) ("conduct that violates core provisions of the Act's regulatory system -- such as manipulating prices or defrauding customers -- should be considered very serious"). The CFTC has stated that "[c]ivil 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 the 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." *In re GNP Commodities, Inc.*, [1990-1992 *Transfer Binder*] *Com. Fut. L. Rep. (CCH) P 25,360 at 39,222 (CFTC 1992)* (citations omitted).

Here, [*35] the First Amended Complaint alleges that CTI, together with Emerald, induced through misrepresentations about the use of their investment funds and the registration status of Emerald and its purported affiliates approximately three hundred customers to deposit a net amount of \$ 3,242,106.37 into the U.S. bank accounts of defendant Emerald and relief defendants ACE Capital and ACE Emerald. Rather than trade the funds, as expected by customers, CTI and Emerald misappropriated them. CTI received a majority of the misappropriated funds, a total of \$ 2,733,909.79. Under these circumstances, the Court finds that the CFTC's request for a civil monetary penalty of \$ 9,000,000 is not unreasonable. This factor favors granting a default judgment.

3. Possibility of Prejudice to Plaintiffs

Another inquiry under *Eitel* is whether there is a significant possibility of prejudice to Plaintiff should relief be denied. In this case, if relief is denied, Plaintiff would be without other recourse for recovery. Moreover, without default judgment CTI would be free to continue to offer illegal U.S. futures contracts. This factor favors granting a default judgment.

4. Possibility of Dispute

[*36] As to CTI, no dispute exists as to material facts. CTI has never appeared in this action and default was entered by the clerk. Upon entry of default, all well-pleaded facts in the complaint are taken as true, except those relating to damages. *TeleVideo Sys., Inc.*, 826 F.2d at 917-18. The facts alleged in Plaintiff's well-pleaded First Amended Complaint are now taken as true and, as described above, are sufficient to establish Plaintiff's claims against CTI. No dispute has been raised by CTI and it is unlikely that CTI will appear in the future. This factor favors granting default judgment.

5. Possibility of Excusable Neglect

CTI's default did not result from excusable neglect. CTI has been given notice reasonably calculated to apprise it of the pendency of the action and was afforded an opportunity to present its objections. *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Defendant CTI was served with copies of the Summons and the First Amended Complaint via FedEx on May 17, 2004. See Order of Preliminary Injunction entered June 3, 2004 (finding CTI validly served under Hague Convention); Civil [*37] Minutes filed September 14, 2004.⁸ Moreover, a shareholder and director of CTI, Jian Zhuang, is also a defendant in this matter and has participated in all proceedings. Nearly eleven months have passed since the CFTC filed and served its First Amended Complaint and seven months since the default was entered, yet CTI has not answered the First Amended Complaint or otherwise appeared. In light of the notifications CTI received of this lawsuit and the period of time that has passed, there is little if any possibility of excusable neglect. This factor favors granting a default judgment.

⁸ Plaintiff also arranged service through Japanese authorities, as permitted by the Hague Convention. The Toyko Circuit Court mailed

copies of the summons and First Amended Complaint, along with Japanese translations, to CTI. The package was received at CTI's Toyko address on July 9, 2004. See Ex. 1 to Plaintiff's Request to Enter Default Against CTI, filed on or about September 2, 2004. Plaintiff additionally sent copies of the First Amended Complaint and SRO to CTI by facsimile. See Declaration of Christine M. Ryall in Support of Plaintiff's Memorandum on Service of Process on CTI Under the Hague Service Convention (May 28, 2004), P 10.

[*38] 6. Policy for Deciding on the Merits

While there is a policy favoring a decision on the merits whenever possible, this factor is not alone dispositive. *Cal. Sec. Cans.*, 238 F. Supp. 2d at 1177. Under *Fed.R.Civ.P.* 55, termination of a case before hearing the merits is allowed whenever a defendant fails to defend an action. *Id.* CTI's failure to answer the First Amended Complaint makes a decision on the merits impractical, if not impossible. This factor favors granting a default judgment.

Because these factors weigh in favor of granting default judgment, the Court grants default judgment against CTI.

C. REMEDIES

The CFTC seeks a permanent injunction, restitution and a civil monetary penalty.

1. Permanent Injunction

Section 6c of the Act authorizes the Court to grant a permanent injunction. *See 7 U.S.C. § 13a-1.* "As a general rule, a permanent injunction will be granted when liability has been established and there is a threat of continuing violations." *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511, 520 (9th Cir. 1993). As a result of the entry of default, [*39] the liability of CTI has been established. Moreover, due to CTI's non-appearance and the effort to circumvent the Court November 18, 2003 SRO by directing customer deposits to alternate bank account, it is clear that there is a threat of continuing violations. Thus, a permanent injunction is warranted.

2. Restitution

In determining damages, the Court can rely on

declarations submitted by the CFTC or order a full evidentiary hearing. *Elektra Entertainment Group, Inc. v. Bryant*, 2004 U.S. Dist. LEXIS 26700, 2004 WL 783123 (C.D. Cal. 2003) (citing *F.R.Civ.P. 55(b)(2)*); *Philip Morris USA, Inc. v. Castworld Products*, 219 F.R.D. 494, 498 (C.D. Cal. 2003) (citing *Fed.R.Civ.P. 55(b)(2)*). As evidence of damages, the CFTC filed the Declaration of Jamie Brown (January 25, 2005). The Court finds the CFTC's documentary evidence sufficient and finds no reason to hold an evidentiary hearing on damages.

The Brown Declaration, which summarizes voluminous bank records for the U.S. bank accounts of Emerald, ACE Capital and ACE Emerald, states that between March 2002 and April 2004, over [*40] 300 customers deposited \$ 5,256,909.83 into those accounts. Brown Decl. P 5. Of this amount, \$ 2,014,803.46 was returned to customers and, therefore, the net customer deposits are \$ 3,242,106.37. *Id.* The Court finds that the appropriate amount of customer restitution is \$ 3,242,106.37. See section III.B.2., herein.

3. Civil Monetary Penalty

The Brown Declaration states that a total of \$ 2,733,909.79 was transferred from the U.S. bank accounts of Emerald and ACE Capital to CTI in Japan. Brown Decl. P 6. This includes \$ 2,153,904.79 in funds transferred from the Emerald accounts before the November 18, 2003, Statutory Restraining Order ("SRO") was issued against Emerald, \$ 550,000 from Emerald's accounts after the SRO was issued, and \$ 30,000 from ACE Capital's account. As noted above, CTI's solicitations, misrepresentations and misappropriation, as alleged in the First Amended Complaint, were intentional, defrauded a substantial number of victims out of a substantial amount of money and served to undermine the integrity of the U.S. commodity futures market. See also section III.B.2., herein. In these circumstances, the Court finds that a civil monetary penalty of \$ 8,201,729.37, [*41] or triple CTI's monetary gain, is appropriate.

IV.

ORDER FOR PERMANENT INJUNCTION

Pursuant to *Section 6c* of the Act, 7 U.S.C. § 13a-1, IT IS HEREBY ORDERED that:

Defendant City Trust and Investment Co. Ltd

("CTI") is permanently restrained, enjoined and prohibited from directly or indirectly:

a. (1) cheating or defrauding or attempting to cheat or defraud any persons; and (2) deceiving or attempting to deceive any person: in or in connection with orders to make, or the making of, contracts of sale of commodities for future delivery, made, or to be made, for or on behalf of other persons where such contracts for future delivery were or may have been used for (i) hedging any transaction in interstate commerce in such commodity, or the products or byproducts thereof, or (2) determining the price basis of any transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof;

b. Offering to enter into, entering into, executing, confirming the execution of, or conducting business for the purpose of soliciting, accepting any order for, or otherwise [*42] dealing in any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery when: (1) such transactions have not been conducted on or subject to the rules of a board of trade which has been designated by the CFTC as a "contract market" for such commodity; and (2) such contracts have not been executed or consummated by or through a member of such contract market;

c. Soliciting, receiving, or accepting any funds in connection with the purchase or sale of any commodity futures contract or any option on a futures contract in the United States;

d. Controlling or directing the trading of any commodity futures or commodity options account in the United States for or on behalf of any person or entity, directly or indirectly, whether by power of attorney or otherwise;

e. Acting in any capacity for which registration with the CFTC is required under the Act;

f. Violating *Sections 4(a)* and *4b(a)(2)(C)(i)* and *(iii)* of the Act, and CFTC Regulations *1.1(b)(1)* and *(3)*.

The provisions of this Order shall be binding upon CTI, upon any person insofar as he or she is acting in the capacity of officer, agent, servant or employee of CTI, and upon any person [*43] who receives actual notice of

this Consent Order, by personal service or otherwise, insofar as he or she is acting in active concert or participation with CTI.

V.

ORDER FOR ANCILLARY EQUITABLE RELIEF

IT IS FURTHER ORDERED that:

The CFTC is awarded judgment against CTI of restitution in the amount of \$ 3,242,106.37 ("CTI Restitution Obligation"). Post-judgment interest shall accrue on the CTI Restitution Obligation at the rate provided in 28 U.S.C. § 1961.

IT IS FURTHER ORDERED that:

CTI shall pay the CTI Restitution Obligation to the CFTC by electronic funds transfer to a U.S. bank account designated by the National Futures Association or by U.S. postal money order, certified check, bank cashier's check, or bank money order made payable to the "the National Futures Association" and sent to the following address: The National Futures Association, Attention: Daniel A. Driscoll, 200 W. Madison Street, Chicago, IL 60606. Simultaneously with the payment(s), CTI shall transmit a letter to the National Futures Association that identifies CTI, the name and docket number of this proceeding and the payment(s). CTI shall simultaneously [*44] transmit a copy of the 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;

IT IS FURTHER ORDERED that:

The National Futures Association is designated as the Monitor for a period beginning with the date of entry of this Order and continuing until final distribution of full amount of the CTI Restitution Obligation plus post-judgment interest. The Monitor is authorized to collect and distribute funds for purposes of restitution to identifiable Emerald/CTI customers. The Monitor shall hold all funds collected pursuant to this Order in an interest-bearing account;

Exhibit A to this Order, which is filed *in camera*, is a list of Emerald/CTI customers currently identified by the CFTC as having deposited funds into the bank accounts of defendant Emerald, relief defendant ACE Capital and relief defendant ACE Emerald during the period of

March 2002 through April 2004, their last-known addresses, and the estimated restitution owed by CTI to each of them. Exhibit A may be incomplete for various reasons including that records have not been provided to the CFTC or records are missing, [*45] are illegible, or have been destroyed. The entry of this Order shall not limit the ability of any Emerald/CTI customer not currently listed in Exhibit A from offering proof to the Monitor and/or the CFTC that the customer belongs on Exhibit A. The Monitor shall have discretion to amend Exhibit A for the sole purpose of adding customers, based on such documentation and proof as the Monitor in its sole discretion shall deem sufficient, whose identity can be traced to funds deposited into the U.S. accounts of Emerald, ACE Capital or ACE Emerald during the period of March 2002 through April 2004, and whose funds are accordingly included in the restitution amount awarded by this order, but whose investment is not currently identified in Exhibit A;

Nothing herein shall be construed in any way to limit or abridge the rights of any Emerald/CTI customer that exist under state or common law. Moreover, pursuant to *Fed.R.Civ.P. 71*, each Emerald/CTI customer identified in Exhibit A is explicitly deemed an intended third-party beneficiary of this Order, such that each such Emerald/CTI customer may seek to enforce any part of the CTI Restitution Obligation, [*46] to ensure continued compliance with any provision of this Order and to hold CTI in contempt for past violations of any provision of this Order;

Upon receipt of any part of CTI Restitution Obligation, the Monitor and/or the CFTC shall attempt to contact those Emerald/CTI customers listed in Exhibit A. For each customer that the Monitor is able to contact, the Monitor shall verify the customer's current address and obtain from the customer documentation and/or a statement, in a form acceptable to the Monitor, that confirms all deposits and withdrawals by the customer and the resulting "net loss" for the customer. The net loss shall be determined by the simple calculation of deposits from March 1, 2002, through April 30, 2004, minus subsequent withdrawals, without any adjustment for purported trading results or other account activity;

Thereafter, if the amount of funds held by the Monitor is sufficient to justify the expense of an immediate distribution, the Monitor shall disburse the available funds among those Emerald/CTI customers

whom the Monitor was able to contact and who provided the requested documentation and/or statement (hereafter referred to as "identifiable customer(s)"), [*47] in proportion to each such identifiable customer's share of the total losses of all identifiable customers plus applicable interest;

Upon any subsequent payment of funds to the Monitor in an amount sufficient to justify the expense of a distribution, the Monitor shall make further distributions in the following manner:

a) The Monitor and/or the CFTC shall first make a renewed effort to contact all customers listed in Exhibit A, including customers who were not located previously;

b) For each customer that the Monitor is able to contact, the Monitor shall verify the customer's current address and obtain from the customer documentation and/or a statement, in a form acceptable to the Monitor, that confirms all deposits and withdrawals by the customer and the resulting net loss for the customer;

c) The Monitor shall first pay restitution to those identifiable customers located since the previous distribution, so that all identifiable customers receive restitution in an equal percentage of their net losses, or as close thereto as possible, plus interest; and

d) The Monitor shall then make further proportionate distributions to the remaining currently identifiable [*48] customers;

The Monitor shall continue to make such distributions until the total amount of the restitution judgment, plus applicable interest, has been paid to identifiable customers. In the event that any unclaimed funds remain following distribution of restitution to customers, such funds shall be paid to the United States Treasury. Any such unclaimed funds shall not be credited to CTI's obligation to pay a civil monetary penalty; and

Contemporaneously with each distribution of funds,

the Monitor shall notify the CFTC of the names of the customers to whom funds were distributed and the amounts distributed to each.

IT IS FURTHER ORDERED that:

The CFTC is awarded judgment against CTI of a civil monetary penalty in the amount of \$ 8,201,729.37. CTI shall pay post-judgment interest on the civil monetary penalty amount thereon from the date of this Order until the civil monetary penalty amount is paid in full, at the rate provided in *28 U.S.C. § 1961*;

Payment of the civil monetary penalty shall be made to the Commodity Futures Trading Commission, Division of Enforcement, 1155 21st Street, N.W., Washington, D.C. 20581 to the attention of Ms. Dennese [*49] Posey. 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. The payment(s) shall include a cover letter that identifies CTI and the name and docket number of this proceeding. CTI 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.

IT IS FURTHER ORDERED that:

Upon the entry of this Order the provisions of the Court's May 11, 2004, Statutory Restraining Order entered against CTI, imposing a freeze on its assets, shall no longer be in effect;

IT IS FURTHER ORDERED that:

CTI 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 officer that may be appointed by the Court.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this case to assure compliance with this Order and for all other purposes [*50] related to this action.

SO ORDERED, at Los Angeles, California on this 19th day of April, 2005.

Honorable A. Howard Matz

UNITED STATES DISTRICT JUDGE