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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

U.S. COMMODITY FUTURES TRADING COMMISSION Plaintiff, v. AMERICAN BULLION EXCHANGE ABEX, CORP., a California corporation, AMERICAN BULLION EXCHANGE, LLC, a California limited liability company and RYAN A. NASSBRIDGES, Defendants, and AMERICAN PREFERRED COMMODITIES APC CORP., a California corporation, R.E. LLOYD COMMODITIES GROUP HOLDING LLC, a California limited liability company and BITA J. NASSBRIDGES, Relief Defendants.	Case No. SACV10-1876 DOC (RNBx) ~~[proposed]~~ ORDER FOR ENTRY OF DEFAULT JUDGMENT AGAINST DEFENDANTS AMERICAN BULLION EXCHANGE ABEX, CORP., AMERICAN BULLION EXCHANGE, LLC, AND RELIEF DEFENDANTS AMERICAN PREFERRED COMMODITIES APC CORP. AND R.E. LLOYD COMMODITIES GROUP HOLDING LLC [258] Date: July 14, 2014 Time: 8:30 a.m. Hon. David O. Carter

I. INTRODUCTION

This matter is before the Court on Plaintiff U.S. Commodity Futures Trading Commission's ("Commission") motion, pursuant to Federal Rule of Civil Procedure 55(b)(2), for entry of Default Judgment Ordering a Permanent Injunction and Other Ancillary Relief Against Defendants American Bullion Exchange ABEX Corp. ("ABEX Corp.") and American Bullion Exchange, LLC ("ABEX LLC") (collectively, "Corporate Defendants" or the "ABEX Enterprise"), and Relief Defendants American Preferred Commodities APC Corp. ("APC") and R.E. Lloyd Commodities Group Holding LLC ("R.E. Lloyd") (collectively, "Corporate Relief Defendants"). The Commission now seeks final judgment against Corporate Defendants and Relief Defendants by default, to include a permanent injunction, monetary relief in the form of disgorgement, an appropriate civil monetary penalty and such ancillary relief as this Court may deem appropriate. For good cause shown, the Court grants Plaintiff's motion, makes findings of fact and conclusions of law, and orders the following injunctive and monetary relief.

II. FINDINGS OF FACT

On December 8, 2010, the Commission filed its Complaint against Defendants Ryan A. Nassbridges ("R. Nassbridges"), ABEX Corp. and ABEX LLC (collectively, "Defendants") and Relief Defendants Bita J. Nassbridges ("B. Nassbridges"), APC and R.E. Lloyd (collectively, Relief Defendants"). Dkt. #1.

On December 22, 2010, Plaintiff served a Summons and Complaint on the Corporate Defendants and Relief Defendants by serving their officer and agent for service of process, R. Nassbridges. Dkt. ##11, 12, 14 and 15.

On June 1, 2012, the Clerk of the Court entered the Default of the Corporate Defendants and Relief Defendants. Dkt. #126.

To date, the Corporate Defendants and Relief Defendants have not responded with a pleading or otherwise defended the Complaint as required by the Federal Rules of Civil Procedure.

The Corporate Defendants and Relief Defendants are not infants or incompetent persons and the Service Members Civil Relief Act (50 U.S.C. App § 521) does not apply because the Corporate Defendants and Relief Defendants are not active members of the military.

A. Defendants' Fraudulent Solicitations of Participants

From at least July 2006 through April 2008, R. Nassbridges fraudulently operated a commodity pool and defrauded at least 80 individuals of approximately $5.5 million in connection with the trading of commodity futures contracts ("futures") and options on commodity futures ("options").

R. Nassbridges was the chief executive officer ("CEO") and president of ABEX Corp. and the president of ABEX LLC. As the owner and operator of the ABEX Enterprise, R. Nassbridges exercised control over its day-to-day business

operations, directed its solicitation of funds from participants, and opened and managed its bank and trading accounts.

Under R. Nassbridges' management, Defendants solicited funds from individuals for the represented purpose of investing in bullion and coins on their behalf. R. Nassbridges was responsible for Defendants' marketing materials and supervised the solicitation practices of the ABEX Enterprise.

As part of their solicitations, Defendants, directly and through their officers, agents and employees, falsely told prospective and existing pool participants that: (1) Defendants would only invest participants' funds in bullion and coins; (2) participants' funds would be maintained in segregated accounts; (3) participants' investments were insured against loss; (4) Defendants would use stop-loss orders to protect participants from any loss of their principal; and (5) R. Nassbridges was registered with the Commission.

Defendants directed participants to deposit or wire funds into bank accounts held in the name of ABEX Corp. and ABEX LLC. Defendants accepted and pooled approximately $5.5 million of participants' funds into ABEX Enterprise bank accounts controlled by R. Nassbridges.

Contrary to their representations to participants, Defendants, through the acts of R. Nassbridges, did not use participants' funds solely for the purpose of purchasing bullion and coins. Instead, they used participants' funds to trade commodity futures and options in corporate and personal trading accounts.

In their solicitation of prospective participants, Defendants did not disclose that they intended to use participants' funds to trade commodity futures and options or the risks associated with that trading.

Additionally, Defendants did not keep participants' funds in segregated accounts, did not insure investments or implement stop-loss orders to protect participants' principal, and R. Nassbridges was never registered with the Commission.

Participants relied upon these misrepresentations and omissions concerning Defendants' management and investment of their funds. Had participants been aware of Defendants' misrepresentations and omissions, they would not have entrusted Defendants with their funds.

B. Defendants' Undisclosed Trading of Participants' Funds

R. Nassbridges opened and maintained five commodity futures and options trading accounts in his name, his wife's name or ABEX Corp.'s name at two Futures Commission Merchants ("FCM"). R. Nassbridges had trading authority over and controlled the trading in all of these accounts, with a limited exception where he granted trading authority over one of his five trading accounts to an FCM account executive - who rescinded it less than a month later.[1]

R. Nassbridges deposited approximately $2.1 million of participants' funds

[1] The FCM account executive rescinded his trading authority over the one account because he was uncomfortable with the overly aggressive trades that R. Nassbridges was directing him to make.

into these trading accounts. R. Nassbridges used participants' funds to trade commodity futures and options, including gold, silver, soybean and British Pound futures and gold, silver soybean and Dow Jones Average Index options. R. Nassbridges sustained overall net trading losses of approximately $2.2 million, resulting in a combined deficit balance of approximately $290,000.

Defendants never provided participants with account statements referencing their trading of participants' funds in commodity futures and options and never disclosed their trading losses to participants.

C. Defendants Misappropriated Participants' Funds

Defendants, through the acts of R. Nassbridges, misappropriated approximately $2.5 million of pool participants' funds by funneling those funds to R&B Nassbridges' personal bank accounts and to third parties that R. Nassbridges controlled (e.g., APC and R.E. Lloyd[2]). R. Nassbridges used participants' funds to trade commodity futures and options and to pay his and B. Nassbridges' mortgage, credit card debts, car payments and other personal expenses.

Through the trading of spot metals with some participant funds, Defendants earned net profits of approximately $300,000. Defendants returned approximately $870,000 to certain participants as purported profits from Defendants' trading of spot metals, in a manner akin to a Ponzi scheme.

D. Corporate Relief Defendants Received Participant Funds

[2] R. Nassbridges is the CEO, chief financial officer, owner, president, principal and sole shareholder of APC and CEO, chairman and president of R.E. Lloyd.

Defendants, through R. Nassbridges, cumulatively transferred approximately $1.25 million of participant funds from the Defendants' bank accounts into R.E. Lloyd's bank accounts. R.E. Lloyd is the holding company of the Corporate Defendants, ABEX Corp., and ABEX LLC. R&B Nassbridges were the sole shareholders of and controlled R.E. Lloyd and had signatory authority over the R.E. Lloyd bank accounts. R.E. Lloyd did not provide any legitimate services to Defendants, and has no legitimate interest or entitlement to the participant funds.

Defendants also transferred approximately $110,600 of participant funds from Defendants' bank accounts to APC's bank accounts. R&B Nassbridges had signatory authority over the APC bank accounts. The $110,600 does not reflect payment for any legitimate services APC provided to Defendants and APC does not have any legitimate interest or entitlement to the participant funds.

III. CONCLUSIONS OF LAW

A. Procedure for Entry of Default Judgment

After a party's default has been entered, the party who sought the default may move for the entry of a default judgment. *RingCentral, Inc. v. Quimby*, 711 F. Supp. 2d 1048, 1057 (N.D. Cal. 2010). Failure to make a timely answer to a properly served complaint will justify the entry of a default judgment. *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986).

If the court determines the defendant is in default, the well-pleaded factual allegations of the complaint, except those relating to the amount of damages, will

be taken as true. *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). Thereafter, the judgment entered by default is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded. *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). A judgment by default may be entered without a hearing on damages when the amount claimed is liquidated or capable of ascertainment from the definite figures contained in the documentary evidence or in detailed affidavits. *Franchise Holding II, LLC v. Huntington Rest. Group, Inc.*, 375 F.3d 922, 929 (9th Cir. 2004).

B. Default Judgment Against Corporate Defendants and Relief Defendants

The decision to grant a motion for default judgment is within the sound discretion of the district court. Fed. R. Civ. P. 55(b); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The Ninth Circuit has identified seven factors courts should consider when determining whether to grant a default judgment: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Here, all of these factors weigh heavily in favor of entry of default judgment against Corporate Defendants and Relief Defendants.

Under the first factor, the Commission may be prejudiced if a default judgment is not awarded because any delay in resolving this matter could result in unneeded expenditure of Commission and judicial resources, would delay collection of penalties and damages, and would delay the injunction against the Corporate Defendants. This factor favors entry of default judgment.

Collectively the second and third factors strongly weigh in favor of entry of default judgment. Together, they require that a plaintiff state a claim upon which it may recover. *Danning*, 572 F.2d at 1389. As already established by the Court's denial of R. Nassbridges' Motion to Dismiss and Motion for Summary Judgment (Dkt. ##22 and 217), the Commission has stated claims upon which it may recover.

Under the fourth factor, the Court must assess whether the damages sought by a plaintiff are proportionate to the defendant's violation. *Landstar Ranger, Inc. v. Parth Enter., Inc.*, 725 F.Supp.2d 916, 921 (N.D. Cal. 2010). The Commission seeks civil monetary penalties against the Corporate Defendants as specifically provided by Section 6c(d)(1) of the CEA, 7 U.S.C. § 13a-1(d)(1) (2012), and Regulation 143.8(a)(2), 17 C.F.R. § 143.8(a)(2) (2013), and the disgorgement of ill-gotten gains from the Relief Corporate Defendants. The Commission's statutorily driven and equitable remedies are directly proportionate to Corporate Defendants and Relief Defendants' violations.

Under the fifth factor, given Corporate Defendants and Relief Defendants' failure to respond to the complaint, the likelihood of a dispute over the material

facts in this matter is minimal. *PepsiCo*, 238 F. Sup.2d at 1177. Therefore, this factor weighs in favor of entry of default judgment.

The sixth factor favors entry of default judgment because the Corporate Defendants and Relief Defendants' failure to respond did not result from excusable neglect. *PepsiCo*, 238 F. Supp. 2d at 1177. Corporate Defendants and Relief Defendants were properly served over three and a half years ago, via service on Defendant R. Nassbridges, who actively litigated his defense in this action. Dkt. ##11, 12, 14 and 15.

The seventh factor states that "[c]ases should be decided upon their merits whenever reasonably possible." *Eitel*, 782 F.2d at 1472. However, the "mere existence of [Rule 55(b)] demonstrates that this 'preference, standing alone, is not dispositive.'" *PepsiCo*, 238 F. Supp. 2d at 1177. This case cannot be decided on its merits because the Corporate Defendants and Relief Defendants have refused to participate in it.

C. <u>Defendants Violated Antifraud Provisions of the CEA and Regulations</u>

The second and third *Eitel* factors -- the "sufficiency of the complaint" and "merits of plaintiff's claim" -- warrant the entry of default judgment. As established in the Court's denial of R. Nassbridges' Motion to Dismiss and Motion for Summary Judgment (Dkt. ##2 and 217), the Commission has stated claims upon which it may recover.

The uncontroverted facts establish that R. Nassbridges violated antifraud

provisions of the CEA and Regulations alleged in the Complaint, Sections 4b(a)(2)(A) and (C), 4c(b) and 4o(1) of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 6b(a)(2)(A) & (C), 6c(b) & 6o(1) (2012), and Commission Regulations ("Regulations"), 17 C.F.R. §§ 33.10(a) & (c) (Repealed June 26, 2012).

1. **Elements of Anti-Fraud Provisions**

a. **Sections 4b(a)(2)(A) and (C).** Sections 4b(a)(2)(A) and (C) prohibit fraudulent activities "in connection with" commodity futures trading.[3] The Commission need only prove three elements to establish its claims of fraud under section 4b(a)(2)(A) and (C): (1) the making of a misrepresentation, misleading statement, or deceptive omission; (2) scienter; and (3) materiality. *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002), *cert denied*, 543 U.S. 1034 (2004); *Driver*, 877 F. Supp. 2d at 977.

b. **Section 4c(b) and Regulations 33.10(a) & (c).** The anti-fraud provisions of Section 4c(b) apply to fraud in connection with commodity *options* trading, such that the same misrepresentations, and omissions that violate Section 4b in connection with futures trading also violate Section 4c(b) and Regulation 33.10 in connection with options. *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 445 (D. N.J. 2000) (analyzing Sections 4(b)(a) and 4c(b) claims together).

[3] "By its terms, Section 4b is not restricted in its application to instances of fraud or deceit 'in' orders to make or the making of contracts. Rather, Section 4[b] encompasses conduct 'in or in connection with' futures transactions." *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103 (7th Cir. 1977). In this regard, actionable misrepresentations include those made to customers when soliciting their funds. *CFTC v. Driver*, 877 F. Supp. 2d 968, 977-78 (C.D. Cal. 2012).

c. Sections 4o(1)(A) and (B). Sections 4o(1)(A) and (B) make it unlawful for a commodity pool operator to engage in fraudulent activities in connection with commodity futures trading. The elements of proof for Section 4o(1) overlap with the elements of proof for Section 4b(a). *Driver*, 877 F.Supp.2d at 978-79 ("The same intentional or reckless misappropriations, misrepresentations, and omissions of material fact violative of section 4b of the Act . . . also violate section 4o(1)(A)-(B) of the Act"); *CFTC v. Weinberg*, 287 F. Supp. 2d 1100, 1108 (C.D. Cal. 2003) (misrepresentations violated both Sections 4b(a) and 4o(1)).[4]

2. Defendants Violated Antifraud Provisions

Defendants violated all of these antifraud provisions of the CEA and Regulations because they made material misrepresentations and omissions with the requisite scienter and they misappropriated participant funds.

a. Fraud by Misrepresentations and Omissions

i) Defendants Made Misrepresentations. The uncontroverted facts establish that when soliciting funds from prospective participants and existing participants or trying to retain control over existing participants' funds, R. Nassbridges and the ABEX Enterprise, through R. Nassbridges, knowingly or recklessly made misrepresentations and omissions, including but not limited to the following: (1) misrepresenting that Defendants would only invest participants'

[4] "The primary difference is that unlike Sections 4b and 4o(1)(A) of the CEA, Section 4o(1)(B) has no scienter requirement." *Driver*, 877 F. Supp. 2d at 979.

funds in bullion and coins; (2) omitting that participants' funds would be used to trade commodity futures and options; (3) omitting the risks of trading commodity futures and options; (4) omitting that Defendants were sustaining losses trading commodity futures and options with participants' funds; (5) misrepresenting that participants' funds would be maintained in segregated accounts; (6) misrepresenting that Defendants' investments were insured against loss; (7) misrepresenting that Defendants would use stop-loss orders to protect participants from any loss of their principal; (8) omitting that Defendants were misappropriating participants' funds for personal uses; and (9) misrepresenting that R. Nassbridges was registered with the Commission.

Defendants' false statements and failures to inform participants constitute misrepresentations and omissions in violation of the CEA. *Crothers v. CFTC*, 33 F.3d 405, 409 (4th Cir. 1994) (executing trades in commodity futures without the customer's permission or contrary to the customer's trading instructions violates Section 4b); *Driver*, 877 F. Supp. 2d at 978 (misrepresenting the profitability and amount of trading were violations of the CEA); *CFTC v. Rolando*, 589 F. Supp. 2d 159, 168-69 (D. Conn. 2008) (representing that solicited funds would be used exclusively for securities trading, when defendant actually used them to trade commodity futures and options, were acts of misrepresentation and omission in violation of the CEA).

ii) Defendants' Misrepresentations and Omissions Were Material. "A

misrepresentation or omission is material if a reasonable investor would consider it important in deciding whether to make an investment." *R.J. Fitzgerald*, 310 F.3d at 1328-29; *Driver*, 877 F. Supp. 2d at 977. In general, all manner of misrepresentations and omissions of material fact regarding futures transactions violate the antifraud provisions of the CEA and Regulations, including omissions and misrepresentations concerning the likelihood of profit, the risk of loss, and other matters that a reasonable customer would consider material to his/her investment decisions. *R.J. Fitzgerald*, 310 F.3d at 1328-29; *Driver*, 877 F. Supp. 2d at 977 ("Misrepresentations concerning profit and risk are material."). Likewise, the location of investors' money is material. *Weinberg*, 287 F. Supp. 2d at 1106-07.

Soliciting funds for a specific purpose other than trading futures and options and then using those funds to conduct the unauthorized trading of futures and options constitutes a material misrepresentation that violates the CEA. *Rolando*, 589 F. Supp. 2d at 168-69 (unauthorized futures and options trading of funds solicited for securities trading violated CEA); *Cf. Rosenberg*, 85 F. Supp. 2d at 447-448 (unauthorized trading in investor account constituted a material misrepresentation in violation of the CEA).

A reasonable investor would want to know that Defendants were using his/her funds to trade futures and options and the risks associated with that inherently risky trading. *R.J. Fitzgerald*, 310 F.3d at 1345 (explaining that

"options trading is a risky business and customers need to be told about the possibility of losing their entire investment").

Here, the uncontroverted facts establish that Defendants' misrepresentations and omissions were material as a reasonable investor would consider them important when deciding to invest. Indeed, Defendants' misrepresentations and omissions caused their participants to invest, re-invest additional money and remain invested with Defendants.

iii) Defendants Acted With Scienter. Proof of scienter requires evidence that a Defendant committed the alleged wrongful acts intentionally, or "that the representations were made with a reckless disregard for their truth or falsity." *Driver*, 877 F. Supp. 2d at 977; *see also, CFTC v. Noble Metals Intern, Inc.*, 67 F.3d 766, 774 (9th Cir. 1995).[5]

Knowingly misrepresenting to customers that their funds would be traded in something other than commodity futures and options, while trading those funds in futures and options constitutes material misrepresentations and omissions made with scienter. *Rolando*, 589 F. Supp. 2d at 170; *Cf. Rosenberg*, 85 F. Supp. 2d at 447-448.

[5] A reckless action "is one that departs so far from the standards of ordinary care that it is very difficult to believe the [actor] was not aware of what he was doing." *First Commodity Corp. v. CFTC*, 676 F.2d 1, 7 (1st Cir. 1982). The Commission need not prove evil motive or intent to injure a client, or that the defendants wanted to cheat or defraud pool participants. *Cange v. Stotler & Co. Inc.*, 826 F.2d 581, 589 (7th Cir. 1987). Further, scienter can be established by circumstantial evidence. *DGM Inv. Inc. v. New York Futures Exch., Inc.*, 265 F. Supp. 2d 254, 263 (S.D.N.Y. 2003).

Here, Defendants' misrepresentations were made with the requisite scienter. As the person operating the ABEX Enterprise, directing the solicitation of participants, handling participants' funds and opening ABEX Enterprise bank and trading accounts, R. Nassbridges knew that he and the ABEX Enterprise were failing to disclose their use of participant funds to trade commodity futures and options, the significant losses they were sustaining, and their misappropriation of participants' funds. *See, e.g., Driver*, 877 F. Supp. 2d at 977 (scienter established where defendant had control over bank and trading accounts from which funds were misappropriated).

b. Fraud By Misappropriation

Misappropriation of customer funds for personal use or to pay other participants constitutes "willful and blatant" fraud in violation of the antifraud provisions of the CEA. *Driver*, 877 F. Supp. 2d at 978 (misappropriating participant funds violated Sections 4b(a)(2)(A) and (C), and 4o); *Weinberg*, 287 F. Supp. 2d at 1106 (same). Here, Defendants violated Sections 4b(a)(2)(A) and (C), 4c(b) and 4o(1), and Regulations 33.10(a) and (c), by misappropriating participants' funds to trade commodity futures and options for their personal benefit, to pay R. Nassbridges' personal expenses, to funnel to third parties that R. Nassbridges controlled and to make payments to participants in a manner akin to a Ponzi scheme.

D. Failure to Register as CPOs and APs

Section 4m(1) of the CEA, 7 U.S.C. § 6m(1) (2012), prohibits a CPO, unless registered under the CEA, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as a CPO or AP. Section 4k(2) of the CEA, 7 U.S.C. § 6k(2) (2012), requires any person associated with a CPO in any capacity that involves solicitation of funds for participation in a commodity pool to be registered with the Commission.

Section 1a(5) of the CEA, 7 U.S.C. § 1a(5) (2012), defines a CPO as any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market. Regulation 1.3(aa)(3), 17 C.F.R. §1.3(aa)(3) (2013), defines an AP of a CPO to include one who solicits funds for participation in the commodity pool, or who supervises any person so engaged.

Using instrumentalities of interstate commerce, Defendants solicited and received funds from individuals, pooled those funds together and traded those funds in commodity futures. Thus, ABEX Corp. and ABEX LLC were acting as CPOs without being registered as required in violation of Section 4m(1). Further, R. Nassbridges was acting as an AP of ABEX Corp. and ABEX LLC without being registered in violation of Section 4k(2).

E. Violations of Regulations 4.20, 4.21 and 4.22

The ABEX Enterprise operated their commodity pool in violation of several regulatory requirements. The ABEX Enterprise violated Regulations 4.20(a)(1) and (b), 17 C.F.R. §§ 4.20(a)(1) and (b) (2013), by failing to operate the pool as a legal entity separate from themselves and by receiving funds from pool participants in the name of ABEX Corp. and ABEX LLC rather than in the name of the pool. Pursuant to Regulation 4.21(a)(1), 17 C.F.R. § 4.21(a)(1) (2013), a CPO is required to provide a "Disclosure Document" to prospective pool participants prepared in accordance with Regulations 4.24 and 4.25, 17 C.F.R. §§ 4.24 & 4.25 (2013), by no later than the time it delivers to the prospective participant a subscription agreement for the pool. Pursuant to Regulation 4.21(b), 17 C.F.R. § 4.21(b) (2013), a CPO may not accept or receive funds from a prospective participant unless the CPO receives from the prospective participant a written receipt that they have received a Disclosure Document. The ABEX Enterprise failed to provide pool participants with a Disclosure Document, as required, and solicited and accepted funds from pool participants, in violation of Regulation 4.21.

Defendants also violated Regulation 4.22, 17 C.F.R. § 4.22 (2013), by not providing pool participants with a monthly Account Statement.

F. Corporate Defendants' Liability Under Section 2(a)(1)(B) of the CEA and Regulation 1.2

R. Nassbridges committed the acts and omissions described herein within the course and scope of his employment as an officer or agent at or with the ABEX

Enterprise. Therefore, Corporate Defendants are liable under Section 2(a)(1)(B) of the CEA, 7 U.S.C. § 2(a)(1)(B) (2012), and Regulation 1.2, 17 C.F.R. § 1.2 (2013), as principals for its agent's violations of the CEA and Regulations.

G. ABEX Corp and ABEX LLC Constitute a Common Enterprise

When determining whether a common enterprise exists, courts look to a variety of factors, including: common control (*Sunshine Art Studios, Inc. v. FTC,* 481 F.2d 1171, 1175 (1st Cir. 1973)); the sharing of office space and officers (*Zale Corp., Inc. v. FTC,* 473 F.2d 1317, 1320 (5th Cir. 1973)); whether business is transacted through "a maze of interrelated companies" (*Delaware Watch Co. v. FTC,* 332 F.2d 746 (2d Cir. 1964)); the commingling of corporate funds and failure to maintain separation of companies (*SEC v. Elliot,* 953 F.2d 1560, 1565 n.1 (11th Cir. 1992)); unified advertising (*Zale Corp.,* 473 F.2d at 1320); and evidence that "reveals that no real distinction existed between the Corporate Defendants" (*Jordan Ashley*, 1994-1 Trade Cases (CCH) ¶ 70,570 at 72,095 (S.D. Fla. Apr. 5, 1994)). As a common enterprise, defendants are jointly and severally liable for the acts of the common scheme. *CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d 676, 691 (D. Md. 2000), *aff'd in relevant part, vacated in part by CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002), *cert denied Baragosh v. CFTC*, 537 U.S. 950, 123 S.Ct. 415, 154 L.E.2d 296 (2002).

ABEX Corp. is merely ABEX LLC operating under a different name. Their principals are the same, their addresses are the same, their employees are the same

and their customers are the same. There is no meaningful distinction between the two entities. Thus, ABEX Corp. and ABEX LLC are engaged in a common enterprise and are jointly and severally liable for the violations of the CEA and Regulations alleged in the Complaint.

H. APC and R.E. Lloyd Should Be Compelled To Disgorge Their Ill-Gotten Gains

A nominal or relief defendant is a person or entity that has received ill-gotten funds, and does not have a legitimate claim to those funds. *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998). A relief or nominal defendant is joined to aid in full relief without asserting separate subject matter jurisdiction over the person or entity. *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d 187, 191 (4th Cir. 2002); *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (in order to effect full relief in recovering assets that are the fruit of the underlying fraud, plaintiff could name a non-party depository as a relief defendant); *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (nominal defendant is joined as a means of facilitating collection, no subject matter jurisdiction needs to be asserted as the relief defendant has no ownership interest, but merely possession of the funds that are at the center of the controversy). A district court may freeze the assets of relief defendants. *Kimberlynn Creek*, 276 F.3d at 193.

As discussed above, Defendants funneled $1.25 million of participant funds from the Defendants' bank accounts into R.E. Lloyd's bank accounts and $110,600 of participant funds from Defendants' bank accounts to APC's bank accounts.

Neither APC nor R.E. Lloyd provided any legitimate service or have any legitimate claim to those funds. Accordingly, APC and R.E. Lloyd should be compelled to disgorge those ill-gotten gains to which they have no legitimate claim.

I. Permanent Injunction, Trading and Registration Bans Are Warranted

Section 6c(a) of the CEA, 7 U.S.C. § 13a-1(a) (2012), authorizes injunctive relief whenever it appears that a person or entity has engaged, is engaging, or is about to engage in any act or practice that violates the CEA. Section 6c(b) of the CEA, 7 U.S.C. § 13a 1(b) (2012), provides that upon a proper showing, a permanent injunction shall be granted without bond. To make a proper showing, the Commission "need not prove irreparable injury or the inadequacy of other remedies as required in private injunctive suits. A prima facie case of illegality is sufficient." *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978). The Commission must establish that a person violated and is likely to continue violating the CEA, the latter of which "may be inferred from past unlawful conduct." *CFTC v. British Am., Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977); *see also CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir. 1999) (finding no abuse of discretion in permanently enjoining further violations "[i]n light of the likelihood of future violations").

Corporate Defendants' misappropriation and misrepresentations and omissions constitute willful and blatant violations of the CEA. Corporate

Defendants have even failed to respond to the serious allegations leveled against them in the Complaint. Unless enjoined, Corporate Defendants may commit future violations by soliciting new clients by making material misrepresentations. Permanent injunctive relief is, therefore, proper and warranted.

J. Civil Monetary Penalties Are Warranted

Section 6c(d)(1) of the CEA, 7 U.S.C. § 13a-1(d)(1) (2012), and Regulation 143.8(a)(2), 17 C.F.R. § 143.8(a)(2) (2013), provide for a civil monetary penalty in the amount of not more than the greater of: (1) triple the monetary gain for each violation; or (2) $130,000 for each violation of the CEA occurring from October 23, 2004 through October 22, 2008.

Here, Defendants received approximately $5.5 million from participants, earned approximately $300,000 through the spot trading of metals trading with some of those funds, and returned approximately $870,000 to participants – leaving the amount of funds not returned to participants, i.e., Defendants' monetary gain, of approximately $4,930,000 ($5.5 million + $300,000 - $870,000). Triple that amount is $14,790,000, for which the Corporate Defendants have joint and several responsibility.

K. Disgorgement Is Warranted

"[D]istrict courts have the power to order disgorgement as a remedy for violations of the Act for 'the purpose of depriving the wrongdoer of his ill-gotten gains and deterring violations of the law.'" *CFTC v. Am. Metals Exch. Corp.*, 991

F.2d 71, 76 (3rd Cir. 1993). "To order disgorgement, the district court . . . need find only that [the defendant] has no right to retain the funds illegally taken from the victims." *Colello,* 139 F.3d at 679 (9th Cir. 1998). District courts have "broad discretion in calculating the amount to be disgorged," which need only be a "reasonable approximation of profits causally connected to the violation." *Id*. at 1113-14.

Here, R.E. Lloyd improperly received $1.25 million of participant funds and APC improperly received approximately $110,600 of participant funds. Corporate Relief Defendants should be ordered to disgorge these amounts.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff Commission's Motion for Default Judgment against Default Judgment Ordering a Permanent Injunction and Other Ancillary Relief Against Corporate Defendants and Corporate Relief Defendants is GRANTED.

2. Corporate Defendants are permanently enjoined and prohibited from knowingly, willfully, or recklessly: (1) cheating or defrauding or attempting to cheat or defraud other persons; (2) making or causing to be made false reports or statements to such other persons; and/or (3) deceiving or attempting to deceive such other persons, in or in connection with orders to make, or the making of, any commodity for future delivery, or options, for or on behalf of such other persons, in violation of the anti-fraud provisions of 7 U.S.C. §§ 6b(a)(1)(A) and (C), 6c(b), and Regulation 33.10.

3. While acting as a CPO, Corporate Defendants are permanently enjoined and prohibited from using the mails and other means of instrumentality of interstate commerce to directly or indirectly a) employ a scheme or artifice to defraud pool participants, or b) engage in transactions, practices or courses of business which operate as a fraud or deceit upon pool participants, all in violation of 7 U.S.C. § 6o(1)(A) and (B).

4. Corporate Defendants are permanently enjoined and prohibited from: a) trading commodity futures, options on commodity futures, or commodity options (as that term is defined by 17 C.F.R. § 1.3 (2013) ("commodity options")), security futures products, and/or foreign currency (as described in 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i) (2012)("forex contracts")), on or subject to the rules of any registered entity, as that term is defined by 7 U.S.C. § 1a (2012), either on their own behalf or on behalf of others; b) controlling or directing the trading for or on behalf of any other person or entity, in any account involving commodity futures, options on commodity futures, commodity options, security futures products, and/or forex contracts; c) soliciting or accepting any funds from any person for the purpose of purchasing or selling commodity futures, options on commodity futures, commodity options, security futures products, and/or forex contracts; d) applying for registration or claiming exemption from registration with the CFTC in any capacity, and engaging in any activity requiring registration or exemption from registration with the CFTC, except for 17 C.F.R. § 4.14(a)(9), and/or e (2013))

acting as a principal (as defined in 17 C.F.R. § 3.1(a) (2013)), agent or any other officer or employee of any person (as defined in 7 U.S.C. § 1a (2012) registered, exempted from registration or required to be registered with the CFTC, except for 17 C.F.R. § 4.14(a)(9) (2013).

5. Corporate Defendants are permanently enjoined and prohibited from violating 7 U.S.C. § 6m(1), by acting as CPOs, without being registered as such, by engaging in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and in connection therewith, from soliciting, accepting, or receiving from others, funds, securities, or property, either directly or indirectly or through capital contributions, for the purpose of trading in commodities for future delivery on or subject to the rules of a contract market.

6. Corporate Defendants are permanently enjoined and prohibited from violating Regulations 4.20(a)(1) and (b), by failing to operate the pool as a legal entity separate from themselves and by receiving funds from pool participants in their names rather than in the name of the pool.

7. Corporate Defendants are permanently enjoined and prohibited from violating Regulation 4.21(a)(1) by failing, while a CPO, to provide a "Disclosure Document" to prospective pool participants prepared in accordance with Regulations 4.24 and 4.25, by no later than the time it delivers to the prospective participant a subscription agreement for the pool.

8. Corporate Defendants are permanently enjoined and prohibited from

violating Regulation 4.21(b) while a CPO, by accepting or receiving funds from a prospective participant unless the CPO receives from the prospective participant a written receipt that they have received a Disclosure Document.

9. Corporate Defendants are permanently enjoined and prohibited from violating Regulation 4.22 by not providing pool participants with a monthly Account Statement.

10. Corporate Defendants, jointly and severally, shall pay a civil monetary penalty of $14,790,000, plus post-judgment interest, using the Treasury Bill rate prevailing on the date of entry of this Consent Order pursuant to 28 U.S.C. § 1961, within ten (10) days of the date of entry of this Order.

11. APC is ordered to disgorge $110,600.

12. R.E. Lloyd is order to disgorge $1.25 million.

IT IS SO ORDERED this 16th day of September, 2014.

David O. Carter

Hon. David O. Carter
UNITED STATES DISTRICT JUDGE