

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 04-22549-CIV-SEITZ/MCALILEY

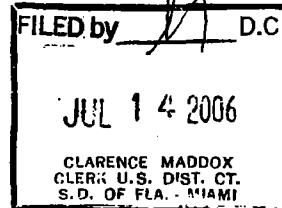
COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

BRICKELL KEY FINANCIAL, LLC,
EDUARDO BARALE, MICHAEL
MESA, and MALINI NERSIAN,

Defendants.



**ORDER GRANTING MOTION FOR DEFAULT JUDGMENT
AGAINST BRICKELL KEY FINANCIAL, LLC**

THIS MATTER is before the Court on Plaintiff Commodity Futures Trading Commission's (the "CFTC") Motion for Default Judgment Against Defendant Brickell Key Financial, LLC ("BKF") [DE-74]. The Court has reviewed the motion and the memorandum submitted in support thereof (including the Appendix of Exhibits thereto), as well as the entire record in the case. The Court finds that the CFTC is entitled as a matter of law to the entry of a default judgment on liability against defendant BKF, an award of restitution and the imposition of an injunction and a civil monetary penalty.

I. PROCEDURAL HISTORY

On October 8, 2004, the CFTC filed a three count Complaint [DE-1] alleging violations of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 1 *et seq.* (2002). BKF executed a Waiver of Service of Summons on March 16, 2005. On October 21, 2004, this Court entered a Statutory Restraining Order [DE-13] against all defendants, and on June 28, 2005, this Court entered an Order Granting Motion For Expedited Discovery [DE-34]. On November 1, 2005, this Court Ordered BKF to obtain counsel and to have such counsel file a Notice of

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Appearance by November 21, 2005 [DE-56]. On November 4, 2005, this Court entered a Consent Order Granting Preliminary Injunction And Other Equitable Relief against BKF [DE-58]. Finally, this Court entered an Order Granting Motion for Entry Of Default against BKF on January 12, 2006 [DE-71].

II. LEGAL STANDARD FOR DEFAULT JUDGMENT

A. BKF Was Properly Served With a Copy of the Complaint After Its President and CEO Executed a Waiver of Service of Summons on BKF's Behalf, But Failed to Obtain Counsel.

On March 16, 2005, BKF executed a Waiver of Service of Summons. Pursuant to this Court's November 1, 2005 Order [DE-56], BKF was advised that it could not appear *pro se*, and was required to obtain counsel and to have such counsel file a Notice of Appearance by November 21, 2005. BKF failed to obtain counsel by the ordered deadline, and the CFTC filed its Application to the Clerk of the Court for Entry of Default Against Defendant Brickell Key Financial, LLC on November 22, 2005 [DE-62]. On January 12, 2006, this Court granted the CFTC's Motion for Entry of Default [DE-71].

B. The Legal Standards for a Default Judgment Have Been Met.

The CFTC is entitled to a default judgment because BKF has failed to plead or otherwise defend this action. Because the Complaint in this case seeks injunctive and other equitable relief, in addition to a sum certain, the CFTC seeks entry of judgment by the Court pursuant to FRCP 55(b)(2). As a general rule, a default judgment establishes, as a matter of law, that a defendant is liable to a plaintiff as to each cause of action alleged in the complaint. *Thompson v. Wooster*, 114 U.S. 104, 110 (1885); *see also U.S. v. Kahn*, 164 Fed. Appx. 855, 858 (11th Cir. 2006) (district court may enter default judgment when the government's complaint contained sufficient

well-pleaded allegations to state a claim for injunctive relief); *Buchanan v. Bowman*, 820 F.2d 359 (11th Cir. 1987); *Petmed Express, Inc. v. Medpets.com, Inc.*, 336 F. Supp. 2d 1213, 1217 (S.D. Fla. 2004). BKF has, by law, admitted the allegations of the complaint. See *White v. Bombardier Corp.*, 313 F. Supp. 2d 1295, 1303 (N.D. Fla. 2004) (“A party in default admits the complaint’s well pleaded factual allegations.”)

The CFTC’s motion for default judgment is supported by a substantial evidentiary record. Further, a judgment by default may be entered without a hearing on damages when, as here, the amount claimed is liquidated or capable of ascertainment from the definite figures contained in the documentary evidence or in detailed affidavits. *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979).

III. FINDINGS

THE COURT FINDS THAT:

JURISDICTION AND VENUE

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

2. Venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, in that the defendant is found in, inhabits, or transacts business in this district, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this district, among other places.

3. Defendant, directly and indirectly, has made use of the means and instrumentalities of interstate commerce, including the mail, in connection with the acts, practices and courses of business complained of herein.

THE PARTIES

4. Plaintiff CFTC is the independent federal regulatory agency charged with responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.* The CFTC is authorized by Section 6c of the Act, 7 U.S.C. § 13a-1, to bring a civil action to enjoin any act or practice constituting a violation of the Act, to enforce compliance with the Act, and to seek civil penalties.

5. Defendant Brickell Key Financial, LLC, was incorporated on April 24, 2002, in Florida. BKF registered with the CFTC as an introducing broker (“IB”) on June 13, 2002, and withdrew its registration on August 27, 2003. BKF operated pursuant to introducing agreements with Vision Limited Partnership (“Vision”) and Alaron Trading Corporation (“Alaron”), registered futures commission merchants (“FCM”). BKF’s business address was 1221 Brickell Avenue, Suite 1140, Miami, Florida 33131. Defendant Eduardo Barale was the CEO and President of BKF.

OVERVIEW OF BKF’S OPERATIONS

6. BKF was a Florida-based registered introducing broker (“IB”) that solicited retail public customers to trade futures contracts and options on futures contracts. Eduardo Barale (“Barale”) was the CEO and president of BKF.

7. Between at least June 2002 and April 2003 (the “relevant period”), BKF, by and through its associated persons (“APs”) solicited members of the general public to open

commodity trading accounts at Vision Limited Partnership ("Vision") and Alaron Trading Corporation ("Alaron"), registered futures commission merchants ("FCMs"), to trade futures contracts and options on futures contracts through BKF.

8. Once a member of the public became a BKF customer, most of the trades entered by the customer in his/her Vision and/or Alaron accounts were based on recommendations from BKF's APs.

9. In other situations, the APs entered orders directly on behalf of customers.

10. As is customary in the futures industry, BKF's customers executed agreements and deposited funds directly with Alaron and Vision. BKF received commissions for the customers it introduced from one or the other FCM.

11. During the relevant period, approximately 257 BKF customer accounts were carried at Vision and 32 accounts at Alaron. Approximately 93% of these accounts were closed with overall losses. These accounts incurred total aggregate losses in excess of \$1.7 million, including more than \$800,000 in commissions paid to BKF.

BKF Hired APs to Solicit Prospective Customers and
Failed to Provide them with Training or Proper Supervision

12. BKF hired personnel with no experience in the futures and options trading to solicit prospective customers and provided them with no training. The APs were not provided with a training manual or any training material for them to review with respect to customer solicitation.

13. BKF APs were not provided with proper supervision regarding soliciting customers to trade futures and options. Michael Mesa ("Mesa"), a BKF AP and one of the defendants herein, claims he did not know whether BKF had a compliance officer or any person

who was responsible for training APs.

BKF Exaggerated the Magnitude and Likelihood of Potential Profits and
Downplayed the Risk of Loss to Customers and Prospective Customers

14. BKF's APs solicited members of the public to open accounts to purchase or sell futures contracts and/or options on futures contracts.

15. During the initial telephone solicitation of prospective customers, BKF's APs often represented that the cash price of a certain commodity was about to go up because demand would exceed supply, due to seasonal patterns or well known events such as the impending war with Iraq. Malini Nersian ("Nersian"), a BKF AP and a defendant herein, also stated in her testimony that during one of the morning meetings at BKF with the APs to discuss what would be recommended to customers, heating oil was discussed and "how it would affect this part of the world." Such representations included the following:

- (a) demand for heating oil always increased in autumn due to the impending onset of colder weather, or words to that effect;
- (b) that the impending war with Iraq would cause an increase in the price of oil, or words to that effect; and
- (c) the customer could at least double his/her investment during the cold season investing in heating oil, crude oil, and unleaded gas options, or words to that effect.

16. During the solicitations, the BKF APs would combine these statements about the movement of cash prices with statements regarding the profit potential of trading futures and options in the underlying cash commodity. By doing so, BKF APs sought to convey that customers would make a profit trading futures and options based on the price movement of the cash market.

17. Once prospective customers indicated a willingness to invest, a senior AP in the

trading department would take over the account and commence making trade recommendations.

These senior APs would then make further misrepresentations about the profit potential of their trading recommendations, such as representing that:

- (a) if the customer invested in the futures and options market, he/she would likely get a return of 30 to 50 percent, or words to that effect;
- (b) the customer could at least double his/her investment during the cold season investing in heating oil, crude oil, and unleaded gas options, or words to that effect;
- (c) the customer could make a significant profit trading crude oil because the next big price move would be in crude oil because of the forthcoming Iraqi war and crude oil was at an eleven year low, or words to that effect.

18. BKF's APs also affirmatively misrepresented the risks of trading futures and options to customers and prospective customers. BKF's APs assured at least one customer that she could recoup her losses from trading in mutual funds by trading heating oil options. At least one other customer was told that BKF used a software program to trade the S&P that minimized almost all risk of trading.

19. BKF's APs had no reasonable basis for making these profit claims because they knew or should have known that the widely-reported geopolitical crises and seasonal demands were already factored into the price of futures.

BKF Represented that Its Recommended Trades could
Make Large Profits within Short Periods of Time

20. In their sales solicitations, BKF's APs deliberately or recklessly misrepresented to prospective customers and existing customers the need to trade immediately so as not to miss what they indicated was a fleeting opportunity to make a substantial profit.

21. If customers hesitated about trading, BKF's APs increased the frequency of their

calls and the urgency of their sales pitches, again urging them to invest immediately in order to maximize their profits.

22. There was no reasonable basis for BKF's APs to make these above representations because BKF received daily an equity run from Vision and Alaron showing customers' profits and losses.

BKF Failed to Advise Customers that the
Vast Majority of Its Customers Lost Money Trading

23. BKF APs told prospective customers that BKF had done very well for its customers who previously traded these futures and options in accordance with the AP's recommendations, and that they could have returns of between 30 and 50 percent in a relatively short period when, in fact, approximately 93 percent of BKF's customers closed their accounts with overall losses.

24. There were 290 customers who invested with BKF and 272 of these customers' accounts were unprofitable. BKF's APs knew or should have known that these representations were false because they knew or should have know that the vast majority of BKF customers lost money trading.

25. BKF's CEO and President, Barale, admitted in his testimony that he reviewed the equity runs which showed BKF's customers' profits and losses in their accounts, that the equity runs were received by email at BKF on a daily basis, and that they were available to the trading department on a daily basis. (Barale Dep.¹ 82:1583:22; 84:7-25.)

26. Barale admitted that he spoke to clients who were upset about the poor

¹ "Barale Dep." refers to portions of the official transcript of the deposition of Eduardo Barale, taken on September 27, 2005, and submitted in support the CFTC's motion for default judgment.

performance of their accounts. (*Id.* 184:13-20.)

27. Defendant Nersian testified that the APs were aware of how her customer accounts were doing because the equity runs were faxed to them. (Nersian Dep.² 33:13-34:16.) In addition, Nersian admitted that both her father and uncle invested with BKF and both lost money. (*Id.* 38:10-39:11.)

BKF Provided a Fraudulent or Misleading Advertisement to Customers

28. BKF provided prospective customers with promotional material entitled "Heating Oil: Facts & Information." The package contained outdated articles from the years 2000 and 2001 that discussed heating oil prices rising in the winter.

29. A BKF employee provided misleading written commentary to these articles, which discussed seasonal trends of the heating oil market, but failed to discuss the limitations of such trends.

30. The commentary to the articles made references to dramatic historical price moves with a suggestion that the same dramatic move is likely to occur again. Because these statements were linked to other statements regarding the profit potential of trading in heating oil futures and options, they sought to persuade readers into believing that profits could be generated in the futures markets based upon known and expected events. Since such a message unreasonably exaggerates the likelihood of profits in a short period of time without presenting a balanced picture of potential risks, the advertisement was fraudulent or misleading.

² "Nersian Dep." refers to portions of the official transcript of the deposition of Malini Nersian, taken on November 17, 2004, and submitted in support the CFTC's motion for default judgment.

VIOLATIONS OF THE ACT AND CFTC REGULATIONS

31. BKF violated Sections 4b(a)(2)(i) and (iii) and 4c(b) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii) and 6c(b) (2002), and Regulation 33.10, 17 C.F.R. § 33.10 (2004). The violations of Sections 4b(a)(2)(i) and (iii) and 4c(b) of the Act by BKF employees were done within the scope of their employment with BKF and, therefore, BKF is liable for those violations, pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2.

IV. IMPOSITION OF A PERMANENT INJUNCTION AND AWARD OF RESTITUTION AND CIVIL PENALTIES

Unlike private actions, which are grounded in equity, a CFTC request for injunctive relief has its basis in Section 6c of the Act, 7 U.S.C. § 13a-1. Under 6c, the CFTC must show only two things to obtain permanent injunctive relief: first, that a violation of the Act has occurred (see discussion above) and second, that there is a reasonable likelihood of future violations. *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978). *See also Kelly v. Carr*, 442 F. Supp. 346 (W.D. Mich. 1977) *aff'd in part, rev'd in part*, 691 F.2d 800 (6th Cir. 1980) (granting default judgment for permanent injunction).

BKF's fraudulent conduct extended over a period of a year and injured many members of the public. BKF has not demonstrated any willingness to correct its conduct. Thus, unless it is enjoined, BKF will certainly be in a position to commit future violations by soliciting and accepting funds from the public and lying to the public about potential profits and risk of loss. Such an injunction would effectuate the manifest objectives of the anti-fraud provisions of the Act.

Further, the Court shall award restitution in the amount of \$114,199.74 which reflects net losses to nine (9) customers, as set forth in their declarations, plus pre-judgment and post

judgment interest thereon. *See United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 224 (3rd Cir. 2005) (district court sitting in equity may order restitution unless there is an explicit statutory limitation on the district court's equitable jurisdiction and powers),³ *but see CFTC v. Wilshire Inv. Mgmt., Inc.*, 407 F. Supp. 2d 1304, 1314-15 (S.D. Fla. 2005) (district court only awarded restitution to testifying customers in mixed omission/affirmative misrepresentation case). The CFTC seeks restitution for all of the allegedly defrauded customers, in the amount of \$1.7 million. However, because this is a "mixed" case of misrepresentation and omission, the Court cannot presume that every customer was harmed specifically by BKF's fraudulent conduct. *See Wilshire*, 407 F. Supp. 2d at 1314-15; *see also In re Amerifirst Sec. Litig.*, 139 F.R.D. 423, 430 n.4 (S.D. Fla. 1991). Accordingly, the Court shall allow the CFTC a period of thirty (30) days to submit declarations and other documentary evidence from additional customers allegedly defrauded by BKF.

Finally, Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1), provides that a civil penalty may be assessed against a defendant for each violation of the Act. In light of the egregiousness and continuing nature of the fraud in this case, such an assessment is appropriate and BKF shall pay a civil monetary penalty of \$120,000 per count (for a total of three (3) counts), which is substantially less than \$120,000 per violation allowed by the Act. Thus, it is hereby

ORDERED that:

(1) The CFTC's Motion for Default Judgment Against Defendant Brickell Key Financial, LLC ("BKF") [DE-74] is GRANTED.

³ *See also* this Court's July 12, 2006 Order in this action, denying Defendant Michael Mesa's motion to strike the CFTC's restitution claim.

(a) BKF is permanently restrained, enjoined and prohibited, directly or indirectly from violating Sections 4b(a)(2)(i) and (iii) and 4c(b) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii) and 6c(b) (2002), and Regulation 33.10, 17 C.F.R. § 33.10.

(b) BKF is permanently restrained, enjoined and prohibited, directly or indirectly from engaging in any commodity futures or options related activity, including but not limited to:

1. Soliciting investors and accepting any funds from any person for the purpose of trading commodity futures, security futures, options, options on futures, or foreign currency futures contracts;
2. Soliciting, accepting or placing orders, giving advice or price quotations or other information in connection with the purchase or sale of commodity futures contracts for themselves or others, introducing customers to any other person engaged in the business of commodity futures trading, issuing statements or reports to others concerning commodity futures trading, security futures, options, options on futures, or foreign currency futures trading for or on behalf of any other person or entity whether by power of attorney or otherwise and otherwise engaging in any business activities related to commodity futures trading;
3. Controlling or directing the trading for any commodity futures, security futures, options, options on futures, or foreign currency futures for or on behalf of any other person or entity, whether by power of attorney or otherwise; and
4. Applying for registration or claiming exemption from registration with the CFTC in any capacity, and engaging in any activity requiring such registration or

exemption from registration with the CFTC, or acting as a principal, agent or officer or employee of any person registered, required to be registered or exempted from registration with the CFTC under the Act.

(c) Restitution. Within thirty (30) days of the date of this Order, Defendant BKF shall pay restitution in the amount of \$114,199.74 (the "Restitution Amount"). In addition, BKF shall pay pre-judgment interest thereon from October 8, 2004 to the date of this Order calculated at the underpayment rate established by the Internal Revenue Service, pursuant to 26 U.S.C. § 662(a)(2). BKF shall also pay post-judgment interest at the Treasury Bill rate prevailing on the date this Order is entered, pursuant to 28 U.S.C. § 1961(a), from the date this Order is entered until the date full payment of restitution is made, or such other amount that the Plaintiff may prove is equitable and justly owed. The persons to whom the restitution amounts shall be paid, and pro rata distribution percentages by which each participant shall be paid from the Restitution Amount are set forth in Attachment A hereto. Omission from Attachment A shall in no way limit the ability of any participant from seeking recovery from BKF or any other person or entity.

Within thirty days of the date of this Order, BKF shall provide the Restitution Amount to the National Futures Association ("NFA") c/o Daniel A. Driscoll, Esq., Executive Vice President, Chief Compliance Officer, or his successor, at the following address: National Futures Association, 200 West Madison Street, Chicago, IL 60606, under cover of a letter that identifies that BKF is making payment and the name and docket number of the proceeding. Upon the receipt of funds for the payment of the Restitution Amount, the NFA will subsequently distribute the funds to investors in accordance with Attachment A and only after the NFA verifies

each participant's claim to a portion of the Restitution Amount. Further, any money paid to the NFA above and beyond the amount sufficient to pay full restitution to the participants identified on the distribution list, Attachment A, shall be converted to disgorgement and shall be sent by the NFA to the CFTC to the attention of Dennese Posey, or her successor, Division of Enforcement, Commodity Futures Trading CFTC, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581, under cover of a letter that identifies BKF as making payment and the name and docket number of the proceeding, as payment of disgorgement.

Within thirty (30) calendar days from the date of this Order, the CFTC shall file and serve additional declarations and documentary evidence regarding other customers allegedly defrauded by BKF, if available. The Court shall consider such additional evidence, if presented, and shall amend this restitution award, if necessary.

(d) Civil Monetary Penalty. Within thirty (30) days of the date of this Order, BKF shall pay a civil penalty of \$360,000 to the CFTC sent to Dennese Posey, or her successor, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581, under cover of a letter that identifies BKF making payment and the name and docket number of the proceeding. BKF shall simultaneously transmit a copy of the cover letter and the form of payment to Gregory G. Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, NW, Washington, DC 20581.

(e) Third -Party Beneficiaries: Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each of the customers identified in Attachment A are explicitly made an intended third-party beneficiary of this Order and each customer identified in Attachment A may

seek to enforce obedience of this Order to obtain satisfaction of any portion of the restitution amounts which have not been paid by defendant, to ensure continued compliance with any provision of this Order and to hold defendant in contempt for any past violations of any provision of this Order.

(f) Collateral Agreements: Defendant shall immediately notify the CFTC if it makes or has previously made any agreement with any customer obligating it to make payments outside of this Order. Defendant shall also provide immediate evidence to the Court and to the CFTC of any payments made pursuant to such agreement.

(g) BKF 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, or any officer that may be appointed by the Court.

(h) Notices: All notices required to be given by any provision in this Order shall be sent certified mail, return receipt requested, as follows:

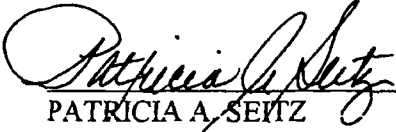
Notice to CFTC:

Director, Division of Enforcement
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

In the event that BKF, through its agents and representatives, changes its telephone number (s) and/or address(es) at any time, it shall provide written notice of the new number(s) and/or address(es) to the CFTC within twenty (2) calendar days thereof.

(2) This Court shall retain jurisdiction of this action for all purposes, including the implementation and enforcement of this Default Judgment.

DONE AND ORDERED in Miami, Florida, this 14th day of July, 2006.



PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc: All counsel of record/*pro se* parties

ATTACHMENT A

Francis Becton	\$17,498.14
Janis Cox	\$46,300.72
Benardo Flores	\$4,422.00
Robert Foresman	\$8,702.76
David Frawley	\$11,062.68
Areto Imonkhaede	\$6,321.36
Stacey Marchione	\$2,910.18
Anthony Palac	\$11,53.054
Cheu Shiu Pi	\$5,451.36