UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CLOSED CIVIL CASE

UNITED STATES COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** **v.** **FX PROFESSIONAL INTERNATIONAL SOLUTIONS, INC., a.k.a. FX PROFESSIONAL SOLUTIONS, LLC, a Florida corporation; GUILLERMO ROSARIO, a.k.a. GUILLERMO ROSARIO-COLON, an individual; and PEDRO DE SOUSA, a.k.a. PEDROIZ J. SANZ, an individual,** **Defendants.**	Civil Action No. 1:10-cv-22311-PCH **ORDER FOR ENTRY OF DEFAULT JUDGMENT, PERMANENT INJUNCTION, CIVIL MONETARY PENALTY, AND ANCILLARY EQUITABLE RELIEF AGAINST ALL DEFENDANTS**

On July 13, 2010, plaintiff United States Commodity Futures Trading Commission ("CFTC" or "Commission") filed its Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties ("Complaint") (D.E. 1) against the Defendants, FX Professional International Solutions, Inc., a.k.a. FX Professional Solutions, LLC ("FXP"), Guillermo Rosario, a.k.a. Guillermo Rosario-Colon ("Rosario") and Pedro de Sousa, a.k.a. Pedroiz J. Sanz ("de Sousa"), (collectively the "Defendants").

The complaint alleged that, between April 2005 and February 2009, the Defendants engaged in a fraudulent scheme and solicited and accepted at least $535,000 from four members of the general public (collectively the "Customers") for the purpose of trading off-exchange foreign currency contracts ("forex"). Specifically, the Complaint alleged violations of Section

4b(a)(2)(A)-(C) of the Commodity Exchange Act (the "Act")), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 ("CRA")), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), to be codified at 7 U.S.C. §§ 6b(a)(2)(A)-(C), and sought, inter alia, injunctive relief, disgorgement, restitution and civil monetary penalties.

Defendant Rosario's Answer was due on or before August 10, 2010. Rosario has not filed or served his Answer. On August 12, 2010, the CFTC, pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 55(a) served and filed its Request for Clerk's Entry of Default against Rosario (D.E. 12). The Clerk of the Court entered the default against Rosario on August 13, 2010 (D.E. 17).

Defendant FXP's Answer was due on or before August 10, 2010. FXP has not filed or served its Answer. On August 12, 2010, the CFTC, pursuant to Fed. R. Civ. P. 55(a) served and filed its Request for Clerk's Entry of Default (D.E. 13) against FXP. The Clerk of the Court entered the default against FXP on August 13, 2010 (D.E. 18).

Defendant de Sousa's Answer was due on or before August 24, 2010. De Sousa has not filed or served his Answer. On September 9, 2010, the CFTC, pursuant to Fed. R. Civ. P. 55(a) served and filed its Request for Clerk's Entry of Default (D.E. 20) against de Sousa. The Clerk of the Court entered the default against de Sousa on September 10, 2010 (D.E. 21).

The CFTC now has submitted its Application for Entry of Default Judgment, Permanent Injunction, Civil Monetary Penalty, and Ancillary Relief against the Defendants ("Application") pursuant to Fed. R. Civ. P. 55(b)(2). The Court has considered carefully the Complaint, the allegations of which are well-pleaded and hereby taken as true, the Application, and all oppositions thereto, and being fully advised in the premises, hereby:

GRANTS the CFTC's Application and enters the following findings of fact and conclusions of law finding the Defendants liable as to all violations as alleged in the Complaint. Accordingly, the Court now issues the following Order for Entry of Default Judgment, Permanent Injunction, Civil Monetary Penalty, and Ancillary Relief Against All the Defendants (Order), which determines that the Defendants have violated Sections 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A)-(C) and imposes on the Defendants a permanent injunction, registration and trading bans, and civil monetary penalties.

FINDINGS OF FACT

Parties

1. The **U.S. Commodity Futures Trading Commission** is an independent federal regulatory agency that is charged with the administration and enforcement of the Act, 7 U.S.C. §§ 1 et seq. (2006) and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 et seq. (2009). The CFTC maintains its principal office at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

2. **FX Professional International Solutions, Inc.** (a.k.a. FX Professional Solutions, LLC) was a Florida corporation with its principal place of business listed as 2795 Whisper Lakes Club Circle, Orlando, Florida 32837. FXP was incorporated on April 25, 2005, and dissolved on September 26, 2008, for failure to file an annual report. FXP has never been registered in any capacity with the Commission.

3. **Guillermo Rosario** (a.k.a. Guillermo Rosario-Colon) currently resides in Dania Beach, Florida. He was an incorporator, officer, director and registered agent of FXP. Rosario is also listed on the FXP disclosure documents and account statements as FXP's Director of Managed Accounts. Rosario has never been registered in any capacity with the Commission.

4. **Pedro de Sousa** (a.k.a. Pedroiz J. Sanz) resides in Orlando, Florida. He was an incorporator, officer, and director of FXP. De Sousa is also listed on the FXP disclosure documents and account statements as FXP's Director of Trading. De Sousa has never been registered in any capacity with the Commission.

Overview of the Defendants' Fraudulent Conduct

5. Beginning in April 2005, de Sousa and Rosario solicited the Customers to trade forex through FXP's predecessor, FX Professional Solutions, LLC, ("FX Professional") and later through FXP. De Sousa and Rosario approached the Customers through friends and acquaintances and told the Customers that they had been trading forex for a number of years and had been very successful.

6. De Sousa and Rosario represented to the Customers that between 2002 and 2005, they had annual forex trading profits of 21% to 85% with never a losing year. These figures were communicated to the Customers by, among other methods, various iterations of a "Risk Disclosure Document & Managed Account Agreement" ("Disclosure Document") given by the Defendants to each of the Customers. Yet, the various Disclosure Documents given to the Customers by the Defendants contained inconsistent profit representations for the same periods of time. In addition, Rosario asserted to one of the Customers that he had devised a system of trading forex that he was confident would, at a minimum, consistently return 20% in annual profits.

7. Even though the Defendants claimed that FXP and its predecessor, FX Professional, earned profits trading forex as early as 2002, FX Professional was not formed until 2004, and FXP was not incorporated until 2005. Further, the actual forex trading conducted by

Rosario and de Sousa for themselves or in the name of FXP during this time period resulted in consistent annual net losses.

8. Between April 2005 and September 2008, based on the de Sousa's and Rosario's' written and verbal claims of forex trading success, the Customers gave the Defendants a total of $535,000 with which to trade forex. This included $50,000 provided by one of the Customers to the Defendants in or about August 2008. During this period of time, the Defendants returned a total of $269,500 to the Customers as purported trading profits, redeemed principal, or other payments. It is unclear how much, if any, of the Customers' funds were ever traded by the Defendants as intended, thus the remaining $265,500 of the Customers' funds remain unaccounted for.

9. Beginning in May 2005 and continuing to February 2009, the Defendants sent false monthly account statements to the Customers. With very limited exceptions, these statements claimed profits of between 0.16% and 2.55% every month when, in fact, actual forex trading conducted by the Defendants during this period (with or without the Customers' funds) resulted in net monthly losses more than 75% of the time.

10. Between July 2008 and February 2009 alone, the Defendants issued at least thirty (30) separate account statements to the Customers containing false information regarding account activity, account balances, and profits earned. Specifically, these account statements reflected net trading profits that bore no relation to the actual forex trading conducted by the Defendants during this period. For example, the statements sent to the Customers in September 2008 (for trading purportedly conducted on behalf of the Customers in August 2008) reported a monthly net profit of 1.13% (or $1,965.05 total for all four Customers) when, in fact, the Defendants' actual forex trading that month resulted in total net losses of $37,145.25.

Conversely, while the Defendants reported a monthly net loss to the Customers in February 2009 (for purported trading in January), the Defendants' actual trading that month resulted in net profits of $940.38.

11. Beginning in February 2009, each of the Customers demanded that the Defendants return his/her money. The Defendants told at least three of the Customers that during the latter half of 2008 and into 2009, the Defendants had incurred substantial losses trading forex for the Customers and that all of the Customers' money was gone. When one of the Customers requested to see the Defendants' trading records showing the claimed losses, Rosario refused on the basis of "customer confidentiality."

12. In April 2009, one of the Customers to whom de Sousa had previously admitted that the Defendants were sustaining trading losses, asked de Sousa why FXP continued to send monthly statements indicating profitable trading during the latter half of 2008 if, in fact, FXP was losing money during this period. De Sousa replied that Rosario was afraid that if they told the Customers about the losses, the Customers would request to withdraw their money, and that the Defendants would not have the funds to honor the withdrawal requests. For this reason, according to de Sousa, beginning in or about September 2008, the Defendants "started faking the statements" that they sent to the Customers. In fact, the Defendants had been issuing false statements from as far back as 2005. Despite multiple requests to the Defendants, the Customers have not received the outstanding balance of the money they paid to the Defendants for forex trading.

13. At all times during the relevant period, de Sousa and Rosario were the agents or employees of FXP and acted within the scope of their employment with FXP.

Overview of the Underlying Forex Trading

14. Neither the Defendants nor the futures commission merchants that were the counterparties to the forex transactions entered into and/or contemplated by the Defendants and the Customers were financial institutions, registered broker dealers (or their associated persons), insurance companies, bank holding companies, or investment bank holding companies.

15. Neither the Defendants nor the Customers who provided funds to the Defendants were "eligible contract participants" as that term is defined in the Act. See Section 1a(12)(A)(v), and (xi) of the Act, 7 U.S.C. § 1a(12)(A)(v), (xi) (2006) (an "eligible contract participant," as relevant here, is a corporation or an individual with total assets in excess of $10 million).

16. The Defendants traded foreign currency on a margined or leveraged basis in the trading accounts containing customer funds. The foreign currency transactions conducted by the Defendants neither resulted in delivery within two days nor created an enforceable obligation to deliver between a seller and a buyer that had the ability to deliver and accept delivery, respectively, in connection with their lines of business. Rather, these foreign currency contracts remained open from day to day and ultimately were offset without anyone making or taking delivery of actual currency (or facing an obligation to do so).

CONCLUSIONS OF LAW

1. Fed. R. Civ. P. 55(b)(2) provides that judgment by default may be entered by a district court. A party may properly obtain a default judgment against a defendant upon the failure of that defendant to plead, or otherwise defend. Vaccaro v. Custom Sounds, Inc., 2009 U.S. Dist. LEXIS 113982 (M.D. Fla. Nov. 19, 2009) ("[t]he default is entered upon the defendant's failure to plead or otherwise defend"); United States v. Chambers, 1993 U.S. Dist. LEXIS 10241 (N.D. Ga. 1993) (same). The grant or denial of a motion for default judgment lies

within a district court's sound discretion. Georgia Power Project v. Georgia Power Co., 409 F. Supp. 332, 336 (M.D. Ga. 1975)). Where a party fails to respond, after notice, the court is justified in entering a judgment against the defaulting party. Natures Way Marine, LLC v. North American Materials, Inc. 2008 WL 801702 (S.D. Ala. 2008), (citing International Brands USA, Inc. v. Old St. Andrews Ltd., 349 F. Supp.2d 256, 261 (D. Conn. 2004). Further, if a district court determines that a defendant is in default, then the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true. Sampson v. Brewer, Michaels & Kane, LLC, 2010 WL 2432084 (M.D. Fla. 2010) ("[t]he effect of the entry of a default is that all of the factual allegations in the Complaint are taken as true, save for the amount of unspecified damages. Thus, if liability is well-plead in the complaint, it is established by the entry of a default") (citing Buchanan v. Bowman, 820 F.2d 359, 361 (11th Cir.1987)). Moreover, "[i]t is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly." Pope v. United States, 323 U.S. 1, 12 (1944).

2. This Court already has entered defaults against the Defendants (D.E. 17, 18 & 21). As such, in accordance with Fed. R. Civ. Pro. 55(b)(2), the allegations in the Complaint (D.E. 1) against the Defendants will be taken as true and a default judgment is hereby entered against the Defendants.

Jurisdiction

3. The Court has jurisdiction over the subject matter of this action and the Defendants pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), 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.

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

The Commodity Exchange Act

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

Violations of Sections 4b(a)(2)(A)-(C) of the Act, as Amended by the CRA, 7 U.S.C. §§ 6b(a)(2)(A)-(C)

6. Sections 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A)-(C), make it unlawful:

> for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or other agreement, contract, or transaction subject to paragraphs (1) and (2) of section 5a(g), that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market – (A) to cheat or defraud or attempt to cheat or defraud the other person; (B) willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record; [or] (C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for or, in the case of paragraph (2), with the other person.

De Sousa and Rosario through their misrepresentations and omissions of material fact violated Sections 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A)-(C).

De Sousa and Rosario Violated Section 4b(a)(2)(B) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(B)

7. De Sousa and Rosario violated Section 4b(a)(2)(B) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(B), by knowingly providing false account statements to the Customers. The FXP account statements falsely stated the trading activity, account growth information, account values, and returns on trading in the Customers' accounts. De Sousa admitted that the account statements that he and Rosario created and sent to the Customers were false and that they intended to mislead the Customers into believing that their forex trading was profitable when it was not profitable.

8. Delivering, or causing the delivery of, false account statements to customers relating to forex trades (or other transactions regulated by the CFTC) constitutes a violation of Section 4b(a)(2)(B) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(B). See, e.g., CFTC v. Weinberg, 287 F. Supp.2d 1100, 1107 (C.D. Cal. 2003) (false and misleading statements as to the amount and location of investors' money violated Section 4b(a) of the Act); CFTC v. Noble Wealth Data Info. Servs., Inc., 90 F. Supp.2d 676, 685-87 (D. Md. 2000), aff'd sub nom. CFTC v. Baragosh, 278 F.3d 319 (4th Cir. 2002) (defendants violated Section 4b(a) of the Act through the delivery of false account statements); CFTC v. Skorupskas, 605 F. Supp. 923, 932-33 (E.D. Mich. 1985) (finding that defendant violated Section 4b(a) by issuing false monthly statements to customers). By their own admission, the Defendants issued false account

statements and thereby violated Section 4b(a)(2)(B) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(B).

De Sousa and Rosario Violated Sections 4b(a)(2)(A) and (C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A) and (C)

9. The false account statements given to the Customers by the Defendants also constitute fraud by misrepresentation in violation of Sections 4b(a)(2)(A) and (C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A) and (C). To establish that the Defendants violated Sections 4b(a)(2)(A) and (C), as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A) and (C), through misrepresentations, the Commission must prove that: (1) a misrepresentation was made, (2) with scienter, and (3) the misrepresentation was material. R.J. Fitzgerald & Co., 310 F.3d at 1328.

De Sousa and Rosario Made Misrepresentations to the Customers

10. De Sousa admitted to the Customers that they made misrepresentations by issuing false account statements. Each account statement issued by the Defendants misrepresented the trading activity, account growth information, account values, and returns on investment in the Customers' accounts. See CFTC v. Rosenberg, 85 F. Supp.2d 424, 447 (D. N.J. 2000) (finding that defendant made material misrepresentations through the reporting of erroneous account balances among other activity).

De Sousa and Rosario Acted with Scienter

11. The Defendants acted with scienter. The scienter element is established when a defendant "intended to defraud, manipulate, or deceive, or if Defendant's conduct represents an extreme departure from the standards of ordinary care." R.J. Fitzgerald & Co., 310 F.3d at 1328; see also Wasnick v. Refco, Inc., 911 F.2d. 345, 348 (9th Cir. 1990) (scienter established if person's acts are performed "with knowledge of their nature and character") (citation omitted). Thus, the Commission must demonstrate only that a defendant's actions involve "highly

unreasonable omissions or misrepresentations . . . that present a danger of misleading [customers] which is either known to the Defendant or so obvious that Defendant must have been aware of it." R.J. Fitzgerald & Co., 310 F.3d at 1328; see also Hammond v. Smith Barney, Harris Upham & Company, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,617 (CFTC Mar. 1, 1990) (scienter requires proof that a defendant committed the alleged wrongful acts "intentionally or with reckless disregard for his duties under the Act"); Drexel Burnham Lambert, Inc. v. CFTC, 850 F.2d 742, 748 (D.C. Cir. 1988) (holding that recklessness is sufficient to satisfy scienter requirement and that a reckless act is one where there is so little care that it is "difficult to believe the [actor] was not aware of what he was doing") (quoting First Commodity Corp. v. CFTC, 676 F.2d 1, 7 (1st Cir. 1982)). De Sousa admitted that, beginning in or about August 2008, they had been losing money and, with Rosario's knowledge that the statements were false, intentionally generated and disseminated false account statements for the express purpose of deceiving customers and maintaining their confidence. Based upon this evidence, Rosario and de Sousa had the requisite scienter.

De Sousa's and Rosario's Misrepresentations were Material

12. A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment." R.J. Fitzgerald, 310 F.3d at 1328-1329 (internal quotation omitted); Rosenberg, 85 F. Supp.2d at 447. Any fact that enables customers to assess independently the risk inherent in their investment and the likelihood of profit is a material fact. CFTC v. Matrix Trading Goup, Inc., 2002 U.S. Dist. LEXIS 27639, 18-19 (S.D. Fla. 2002); see also SEC v. Mut. Benefits Corp., 2004 U.S. Dist. LEXIS 23008 at *59 (S.D. Fla. 2004) (holding that a fact is "material" if a reasonable person would attach importance to the fact misrepresented or omitted in determining his course of action); Saxe v. E.F. Hutton & Co., Inc., 789 F.2d 105, 110 (2d Cir. 1986) ("'material misrepresentations about the nature of the

organization handling [an] account, the people [dealt] with, and the type of trading [the] funds were used for' would be sufficient to state a cause of action pursuant to the [Commodity Exchange Act]"); CFTC v. Commonwealth Fin. Group, Inc., 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994) (holding that misrepresentations regarding the trading record of a firm or broker are fraudulent because past success and experience are material factors to reasonable investors); CFTC v. U.S. Metals Depository Co., 468 F. Supp. 1149, 1159 (S.D.N.Y. 1979) (holding that unreasonable predictions of profits constitute material misrepresentations).

13. De Sousa and Rosario created and sent account statements that misrepresented the overall account value, the trading profits and losses, and the beginning and ending monthly account values. The true value of a trading account is perhaps the single most important factor in making ongoing determinations as to whether to maintain or discontinue particular trading activity. It is beyond doubt that a reasonable customer would want to know the true value of his or her account, and that his or her account was losing money despite claims to the contrary. Lying about the value of the Customers' accounts was a material misrepresentation.

FXP is Liable Under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006) and Regulation 1.2, 17 C.F.R. § 1.2 (2010)

14. Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) and Regulation 1.2, 17 C.F.R. § 1.2, provide that 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." Rosario's and de Sousa's fraud, as described above, occurred within the course and scope of their employment at FXP. Therefore, FXP is liable for their conduct pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), and Regulation 1.2, 17 C.F.R. § 1.2.

REMEDIES

Permanent Injunction Against The Defendants

Pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, the CFTC has made a showing that the Defendants have engaged in acts and practices which violated Sections 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A)-(C). Unless restrained and enjoined by this Court, there is a reasonable likelihood that the Defendants will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of the Act, as amended by the CRA. Based on the conduct described above, the Court enters a permanent injunction against the Defendants enjoining them from:

1. violating Sections 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A)-(C);
2. engaging in any activity related to trading in any commodity, as that term is defined in Section 1a(4) of the Act, 7 U.S.C. § 1a(4) (2006) ("commodity interest"), or in any retail forex transaction, as that term is defined in Regulation 5.1(m), to be codified at 17 C.F.R. § 5.1(m) (2009), including but not limited to, the following:

    (a) trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29) (2006);

    (b) entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1)), 17 C.F.R. § 32.1(b)(1) (2006), ("commodity options"), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act as amended by the CRA, to be codified at 7 U.S.C.

§§ 2(c)(2)(B) and 2(c)(2)(C)(i)) ("forex contracts") for their own personal account or for any account in which they have a direct or indirect interest;

(c) having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on their behalf;

(d) controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, and/or forex contracts;

(e) soliciting, receiving, or accepting any funds from any person for purposes of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;

(f) 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, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2010); and

(g) acting as a principal (as that term is defined in Regulation 3.1(a) (2010)), agent, or any other officer or employee of any person registered, exempted from registration or required to be registered with the CFTC, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9).

The Court has Authority to Order Restitution

The Court has the authority to Order restitution in this matter,[1] and Rosario's and de Sousa's violations of the Act, as amended by the CRA, merit the award of restitution. On November 4, 2010, however, Rosario and de Sousa entered guilty pleas, in United States v. de Sousa, et al. 10-20524-cr-Gold (S.D. Fla. November 4, 2010) (Crim. D.E. 36 & 39) and are subject (in that case) to criminal restitution obligations for the same misconduct at issue in this civil action. 18 U.S.C. § 3663A (mandatory restitution to victims of certain crimes). Accordingly, the CFTC is not seeking, and this Court will not award additional restitution against Rosario and de Sousa in the instant matter.

Civil Monetary Penalty

Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1) (2006), provides that "the [CFTC] may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation [of the Act] a civil penalty." For the time period at issue in the case at bar, the civil monetary penalty ("CMP") shall be not more than $140,000 for each violation of the Act, as amended by the CRA, committed on or after October 23, 2008, and $130,000 for each violation committed before October 23, 2008, or triple the monetary gain to the Defendants. Regulation 143.8(a)(1)(iii-iv), 17 C.F.R. § 143.8(a)(1)(iii-iv) (2010).

"In determining how extensive the fine for violations of the Act ought to be, courts and the [CFTC] have focused upon the nature of the violations." CFTC v. Noble Wealth Data

[1] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader power and more flexible character than when a private controversy is at stake. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.'")

Information Svcs., Inc., 90 F. Supp. 2d 676, 694 (D. Md. 2000). In this regard, the CFTC has stated:

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

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

This case warrants imposition of a substantial CMP against defendant. See United Investors Group, Inc., 440 F. Supp.2d 1345, 1361 (S.D. Fla. 2008) (determining that, among other things, "the gravity of the offenses, the brazen and intentional nature of the violations, [and] the vulnerability of the victims" justified "imposition of a substantial and meaningful [civil monetary] penalty"). Between April 2005 and February 2009, the Defendants solicited and accepted at least $535,000 from the Customers for the purpose of trading forex. During this period of time, the Defendants sent account statements to the Customers representing that the Customers were making profits trading forex. These account statements were false. In particular, the Defendants sent out thirty (30) false statements between July 2008 and January 2009; the Defendants sent twelve (12) of these false statements before October 23, 2008, for which the Defendants are ordered to pay a CMP of $1,560,000, plus post-judgment interest. The Defendants also sent eighteen (18) of the thirty (30) false statements after October 23, 2008, for which the Defendants are ordered to pay a CMP of $2,520,000, plus post-judgment interest.

CFTC v. Levy, 541 F.3d 1102 (11th Cir. Fla. 2008) (holding that the Commodity Exchange Act provides for multiple civil monetary penalties for multiple violations even when those multiple violations are set forth in a single count). The Defendants will be held jointly and severally liable for the civil monetary penalties.

The Court believes that a CMP in the total amount of $4,080,000 against the Defendants is appropriate given the repeated and egregious nature of the Defendants' fraudulent scheme. United Investors Group, Inc., 440 F. Supp.2d at 1361. The CMP is immediately due and owing. Nonetheless, the Defendants are required to pay their CMP obligation only after satisfaction of their criminal restitution obligation. Further, post-judgment interest on this CMP is awarded and shall be calculated using the Treasury Bill rate prevailing on the date of the Court's final order in this matter.

Miscellaneous Provisions

Equitable Relief: The equitable relief provisions of this Order shall be binding upon the Defendants and any persons who are acting in the capacity of agent, employee, servant, or attorney of the Defendants, and any person acting in active concert or participation with the Defendants, who receives actual notice of this Order by personal service or otherwise.

Notices: All notices required to be given to the CFTC by any provision in this Order shall be sent certified mail, return receipt requested, as follows: Notice to CFTC: Attention - Director of Enforcement, Commodity Futures Trading Commission, Division of Enforcement, 1155 21st Street N.W., Washington, DC 20581.

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

SO ORDERED, this 24th day of November, 2010, at Miami, Florida

HONORABLE PAUL C. HUCK
UNITED STATES DISTRICT JUDGE