IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff,

v.

ELDON A. GRESHAM
doing business as
The Gresham Company
also known as
Eldon A. Gresham, Jr., et al.,

Defendants.

CIVIL ACTION FILE
NO. 3:09-CV-75-TWT

ORDER

This is an action seeking to enjoin an alleged Ponzi investment scheme. It is before the Court on the Plaintiff's Motion for Summary Judgment [Doc. 178]. For the reasons set forth below, the Court GRANTS the Plaintiff's Motion.

I. Background

Between 2004 and 2009, Eldon Gresham, Jr. ("Gresham") traded off-exchange foreign currency ("forex") on behalf of over 100 customers. Gresham convinced customers to invest money with him by representing that his forex trading program would generate large returns with very little risk. Specifically, Gresham told potential

customers that he was consistently profitable and had a strategy that allowed him to make money whether the market went "up, down, or sideways." (Shabay Aff., Ex. 1.) Gresham also stated that he was in contention for a forex trading award. (Beiersdoerfer Dep. at 126-128.) Finally, Gresham promised extremely high monthly returns between five and ten percent, guaranteeing a thirty-percent annual return to one customer. (Henry Aff. ¶ 5; Shabay Aff. ¶¶ 5-6; Beiersdoerfer Dep. at 96; Harmon Aff. ¶ 3.)

At the same time, Gresham downplayed the risks associated with his trading. He told customers that their money would be safe, stating that all funds would be insured by the federal government. (Harmon Aff. ¶ 4; Shabay Aff. ¶ 11 & Ex. A.) He also told customers that they could withdraw their funds at any time. (Henry Aff. ¶ 5; Beiersdoerfer Dep. at 131.) In exchange for the investments, Gresham provided promissory notes and investment agreements guaranteeing a certain percentage of his profits.

Although Gresham acquired over $15.9 million in customer funds, he traded only a small percentage of that total. The trades that Gresham did execute were entered into on a leveraged or margined basis. (Turley Aff. ¶ 10.) Further, the transactions did not result in delivery within two days and did not create an enforceable obligation to deliver. (Id.) Indeed, Gresham's forex transactions

remained open and were often offset without actual delivery or receipt of the currency being traded. Despite his representations to the contrary, from August 2007 on, Gresham traded at a cumulative loss. (Turley Aff. ¶¶ 15 & 18.) Ultimately, Gresham lost approximately $40,788.21 trading forex. (Id. ¶ 13.)

While Gresham was trading, he sent email and fax updates falsely reporting substantial gains. In March 2009, Gresham told his customers that he had made large profits. (See Levi Aff., Ex. 1; Turley Aff., Ex. 4; Shabay Aff., Ex. 1.) Gresham, however, did not trade forex in March 2009. (Turley Aff. ¶ 18.) Even in June 2009, Gresham's most successful month, he falsified reports to clients. (See Levi Aff., Ex. 1.) Gresham also forged letterhead by Forex Capital Markets, LLC to send statements indicating false gains. (Sayre Aff., Ex. 1.) Gresham stated that "[i]n the trading program, I didn't keep up well at all with how far behind I was getting. My false reporting was just a temporary means that justified the ultimate end that I believed in." (Pl.'s Mot. for Summ. J., Ex. M; Doc. 178-15.)[1]

Customers invested $15,900,245.97 with Gresham to trade forex. Of that amount, Gresham lost $40,788.21. (Turley Aff. ¶¶ 13 & 17.) He sent $13,149,003.46 to customers in "returns." (Id. ¶ 24.) Gresham misappropriated the remaining

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[1]Gresham contends that the letter he sent to his expert, Dr. Husted, is inadmissible. The Defendant, however, cites to no rule of evidence for this proposition. The letter is relevant and thus the Court will consider it.

$2,710,454.30, including spending or withdrawing $2,537,817.95 in customer money. (Id. ¶¶ 15 & 27.) When customers asked to withdraw their investment, Gresham used other customer funds to pay them. (Id. ¶ 27.)

On July 2, 2009, the U.S. Commodity Futures Trading Commission ("CFTC") filed suit against Gresham, Werner Beiersdoerfer, Interveston Wines, LLC, and Kirk M. Gresham [Doc. 1]. On March 30, 2011, the Court entered a Consent Order of Disgorgement and Other Ancillary Relief Against Relief Defendant Kirk M. Gresham disposing of the claims against Kirk Gresham [See Doc. 167]. The other relief defendants have agreed on settlement terms with the Division of Enforcement. (See Pl.'s Br. in Supp. of Pl.'s Mot for Summ. J., at 2.) Pending CFTC and Court approval, only the Plaintiff's claims against Gresham will remain. On June 3, 2010, Gresham filed an expert report raising a defense of lack of scienter due to mental illness [Doc. 134]. On January 31, 2011, the Court excluded that report [Doc. 156]. On May 31, 2011, the CFTC filed a Motion for Summary Judgment [Doc. 178]. The Plaintiff argues that there is no issue of material fact as to Gresham's violation of the Commodity Exchange Act (the "Act") as amended by the CFTC Reauthorization Act of 2008 (the "CRA").

I. Summary Judgment Standard

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

III. Discussion

A. CFTC Jurisdiction

1. Forex Transactions

Section 2(c)(2)(C) of the Act grants the CFTC jurisdiction over forex transactions that are entered into (1) with "a person that is not an eligible contract participant" or one of a list of enumerated persons, (2) are "offered, or entered into, on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis," and (3)

do not result in delivery within two days or create an enforceable obligation to make or take delivery. 7 U.S.C. § 2(c)(2)(C). If this test is met, the Court need not "decide whether forex transactions that meet these requirements are futures contracts in order to permit the Commission to pursue an action for fraud." H.R. Rep. No. 2419, at 978 (2008) (Conf. Rep.).

First, Gresham does not argue that he or his customers were "eligible contract participants" under the Section 1 of the Act. See 7 U.S.C. § 1a(12)(A). Further, neither Gresham nor his customers were financial institutions, registered broker dealers or their associated persons, insurance companies, financial holding companies, or investment bank holding companies. See 7 U.S.C. § 2(c)(2)(B)(i)(II)(aa), (bb), (dd), (ee), & (ff). Second, the transactions at issue were entered into on a leveraged or margined basis. (Turley Aff. ¶ 10.) Finally, the forex transactions did not result in delivery within two days or create an enforceable obligation to deliver or accept delivery. Indeed, the transactions remained open and were often offset without delivery or receipt of actual currency. (Id.) Thus, the CFTC has jurisdiction over Gresham's forex trades.

2. Promissory Notes

The Plaintiff also claims that it has jurisdiction over the promissory notes given by Gresham in exchange for client funds. Under the Act, the CFTC has jurisdiction

over all fraud perpetrated "in connection with" transactions "other than on or subject to the rules of a designated contract market." 7 U.S.C. § 6b(a)(2). "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. The plain meaning of such broad language cannot be ignored." Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 103-104 (7th Cir. 1977). Here, Gresham gave the promissory notes to secure the funds he used to trade forex. He obtained these funds by making fraudulent misrepresentations to his clients. Thus, the promissory notes were "in connection" with Gresham's fraudulent conduct. For this reason, the CFTC has jurisdiction over the promissory notes.

B. Violations of the Act

The Plaintiff argues that Gresham violated Section 4b(a)(2) of the Act. Section 4b of the Act makes it illegal:

> [F]or 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 7a(g) of this title, 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;

> (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;

7 U.S.C. § 6b(a)(2). The Plaintiff claims that Gresham violated subsections (A), (B), and (C) of the Act by making fraudulent statements, misappropriating funds, and transmitting false reports.

1. Section 4b(a)(2)(A) and (C)

First, the CFTC claims that Gresham violated Section 4b(a)(2)(A) and (C) by making material misrepresentations to customers. "In order to establish liability for fraud [by misrepresentation or omission], CFTC had the burden of proving three elements: (1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality." CFTC v. R.J. Fitzgerald & Co., 310 F. 3d 1321, 1328 (11th Cir. 2002). Here, Gresham made misrepresentations to customers. He said he was a profitable forex trader in contention for an award. He promised five - ten percent returns and stated that his investments were low risk.[2] Finally, he

[2]Gresham stated that "[a] good currency trading account is one of the best and safest places for money…. It's like God has put us in a 'cocoon' for protection and ongoing profitability." (Shabay Aff. ¶ 11.)

promised that investors could access their money at any time. Each of these statements was false. Thus, Gresham made misrepresentations to customers.

Gresham also acted with scienter. "[S]cienter is established if Defendant intended to defraud, manipulate, or deceive, or if Defendant's conduct represents an extreme departure from the standards of ordinary care." Id. "[S]cienter is met when Defendant's conduct involves '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.'" Id. (quoting Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001)).

Here, Gresham knew that the statements he made to customers were false. The Defendant was aware that since August 2007, he had traded at a cumulative loss. Nevertheless, he represented that his investments would generate large returns. Further, Gresham knew that he was not in contention for a forex trading award. Also, because he used customer funds to pay "returns" to other investors, Gresham knew that customers could not access their money at any time. See CFTC v. Fleury, No. 03-61199, 2010 WL 5146283, at *17 (S.D. Fla. June 18, 2010) ("Defendants[ ] conducted the losing trades and knew firsthand the tremendous losses they incurred. Yet . . . they continued to [make] statements on their website that created the false impression that they were successful at trading. Therefore, Defendants acted with scienter."); CFTC

v. Gibraltar Monetary Corp., No. 04-80132-CIV, 2006 WL 1789018, at *16 (S.D. Fla. May 30, 2006) ("Defendants have been found to possess the requisite level of scienter if they attract customers by . . . inflating profit expectations when downplaying the risks involved."). Gresham argues that he lacked scienter because he was under "grandiose delusions" at the time he made the misrepresentations. To support that claim, Gresham offers the expert report of Dr. David Shakespear Husted. The Court, however, excluded Dr. Husted's report in its January 31 order [Doc. 156]. The Court found that "[r]ather than negate scienter, the expert report simply explains why Defendant knowingly made these misrepresentations." Id. Thus, Gresham acted with scienter.

Finally, Gresham's statements were material. "A representation 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. Here, reasonable investors would want to know about the profitability and risk of their investments. See id. at 1330 ("It is too obvious for debate that a reasonable listener's choice-making process would be substantially affected by emphatic statements on profit potential."). Thus, Gresham's misrepresentations were material. For these reasons, there is no issue of material fact as to Gresham's violation of Section 4b(2)(A) and (C) by making fraudulent misrepresentations to customers.

The Plaintiff also argues that Gresham violated Section 4b(2)(A) and (C) by misappropriating customer funds. "[M]isappropriation of funds constitutes 'willful and blatant' fraudulent activity violative of Section 4b(a) of the Act." CFTC v. Noble Wealth Data Info. Servs., Inc., 90 F. Supp. 2d 676, 687 (D. Md. 2000) (quoting CFTC v. Cheung, No. CIV. 5598, 1994 WL 583169, at *1-2 (S.D.N.Y. Oct. 21, 1994)). Of the $15,900,245.97 customers invested, Gresham lost $40,788.21, including certain fees. Gresham paid only $13,149,003.46 in customer "returns," withdrawing the remaining $2,710,454.30 for his own use. (Turley Aff. ¶¶ 15 & 27); CFTC v. Skorupskas, 605 F. Supp. 923, 931-32 (E.D. Mich. 1985) (holding that defendant violated Section 4b by soliciting funds for trading and then trading only small percentage of those funds, while disbursing remaining funds to other investors, herself, and her family). For these reasons, there is no issue of material fact as to the Defendant's violation of Section 4b(a)(2)(A) and (C) of the Act.

2. Section 4b(a)(2)(B)

Next, the Plaintiff contends that Gresham violated Section 4b(a)(2)(B) by issuing false profit statements to customers. Section 4b makes it illegal to "willfully . . . make or cause to be made to [another] person any false report or statement or willfully to enter or cause to be entered for [another] person any false record." 7 U.S.C. § 6b(a)(2)(B). Here, Gresham sent account statements that falsely inflated

gains. In March, April, and February 2009, Gresham reported a total gain of more than $2 million. The Defendant, however, did not trade *at all* during March 2009. (Turley Aff. ¶ 18); see also CFTC v. King, No. 3:06-CV-1583, 2007 WL 1321762, at *3 (N.D. Tex. May 7, 2007) (finding Section 4b violation where defendant made false representations that "futures trading was actually taking place, that customer accounts actually contained funds, and that customer accounts earned profits and interest from purportedly traded commodity futures."); CFTC v. McLaurin, No. 95-C-285, 1996 WL 385334, at *4 (N.D. Ill. July 3, 1996) (finding Section 4b liability where account statements inflated profits and did not accurately reflect account activity). Thus, there is no issue of material fact as to Gresham's violation of Section 4b(a)(2)(B).

C. Remedies

1. Injunction

The Plaintiff requests an injunction to prevent Gresham from trading forex. Section 6c(a) of the Act states that:

> Whenever it shall appear to the Commission that any registered entity or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of the United States or the proper United States

> court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice.

7 U.S.C. § 13a-1(a). In deciding whether to grant an injunction, "the ultimate test ... is whether the defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future." SEC v. Caterinicchia, 613 F.2d 102, 105 (5th Cir. 1980). The Court should consider:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

SEC v. Carriba Air, Inc., 681 F.2d 1318, 1322 (11th Cir. 1982).

Here, Gresham's conduct was extensive. He solicited more than 100 customers over the course of 5 years. He made numerous *knowing* misrepresentations and misappropriated more that $2 million, much of it from customers' retirement funds. (Harmon Aff. ¶ 9; Henry Aff. ¶ 7.) Gresham has yet to take responsibility for his actions and continues to claim he was the victim of delusions. Finally, Gresham's most recent occupation was forex trading. These factors indicate "a reasonable likelihood of further violations in the future." Caterinicchia, 613 F.2d at 105. For that reason, the Defendant is permanently enjoined from violating Section 4b(a)(2)(A)-(C) of the Act. The Defendant is also permanently enjoined from (1) 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)); (2) entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1)) (commodity options), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act) (forex contracts), for his own personal account or for any account in which he has a direct or indirect interest; (3) having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on his behalf; (4) 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; (5) soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts; (6) 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); and (7) acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a)), 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).

2. Civil Penalties

The Plaintiff requests that the Court impose the maximum civil fine under the Act. The Court may impose a civil monetary penalty of up to triple the monetary gain to the Defendant for each violation of the Act. 7 U.S.C. § 13a-1(d)(1)(A); 17 C.F.R. § 143.8(a)(2)(iii) & (iv). "In evaluating civil penalties under the [Act], [courts] have considered the general seriousness of the violation as well as any particular mitigating or aggravating circumstances that exist." CFTC v. Wilshire Inv. Mgmt. Corp., 531 F.3d 1339, 1346 (11th Cir. 2008). "Defrauding customers is a violation of the core provisions of the CEA and 'should be considered very serious.'" Id. (quoting JCC, Inc. v. CFTC, 63 F.3d 1557, 1571 (11th Cir. 1995)).

Here, as discussed above, the violations were knowing and continuous. Gresham defrauded over 100 customers, collecting more than $15 million. See id. ("the violations of the Act at issue here were 'knowingly and repeatedly' committed; we are not dealing with a situation involving an isolated 'mistake' arising from an ambiguous statutory duty or from circumstances that are unique and unforeseeable."). Further, as discussed above, Gresham misappropriated $2,710,454.30 for his personal

use. Thus, the Court will impose the maximum civil penalty of triple the amount that Gresham gained, or $8,131,362.90.

3. Disgorgement

The CFTC also argues that Gresham should disgorge the $2,710,454.30 that he misappropriated from customers. "Disgorgement is an appropriate remedy when the CFTC demonstrates violations of the [Act]." Gibraltar, 2006 WL 1789018, at *28. "However, when the civil penalty is sufficient 'to ensure that the Defendants did not profit' from their fraudulent conduct, then disgorgement is not necessary." Id. (quoting CFTC v. Wilshire Inv. Mgmt. Corp., 407 F. Supp. 2d 1304, 1316 (S.D. Fla. 2005)). Here, the civil penalty is sufficient to ensure that Gresham does not profit from his wrongful conduct. See id. (finding no need for order of disgorgement where civil penalties were sufficient). For this reason, there is no need for an additional order for disgorgement.

IV. Conclusion

For the reasons set forth above, the Court GRANTS the Plaintiff's Motion for Summary Judgment [Doc. 178].

SO ORDERED, this 8 day of September, 2011.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge