

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

Case No.: 8:99-cv-1558-T-MSS

R.J. FITZGERALD & CO. et al.,

Defendants.

ORDER

Defendant Leiza Fitzgerald (“Defendant” or “Fitzgerald”), having signed her Consent to this Order of Permanent Injunction and Ancillary Relief (“Consent Order”), which Consent has been filed with the Court and is incorporated herein by reference, the Parties have stipulated as follows:

I.

INTRODUCTION

On October 27, 2000, the Commodity Futures Trading Commission (“Commission”) filed an Amended Complaint in this civil action against Defendant Leiza Fitzgerald (“Fitzgerald” or “Defendant”) and others. The Amended Complaint seeks injunctive and other equitable relief for violations of the antifraud provisions of the Commodity Exchange Act (the “CEA” or “Act”), 7 U.S.C. § 1 *et seq.* (2002), and the Regulations promulgated thereunder, 17 C.F.R. § 1.1 *et seq.* (2004).

II.

CONSENTS AND AGREEMENTS

To effect settlement of the matters alleged in the Amended Complaint without a trial on the merits, Leiza Fitzgerald, individually, hereby:

1. Consents to the entry of this *Consent Order of Permanent Injunction and Other Equitable Relief Against Defendant Leiza Fitzgerald* ("Consent Order");

2. Affirms that the Defendant has agreed to this Consent Order voluntarily and that no promise or threat has been made by the Commission or any member, officer, agent or representative thereof, or by any person, to induce consent to this Consent Order, other than as set forth specifically herein;

3. Admits that this Court has jurisdiction over her and the subject matter of this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002);

4. Admits that venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. §13a-1 (2002);

5. Waives:

(a) all claims that she may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000);

(b) any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief; and

(c) all rights of appeal from this Consent Order;

6. Consents to the continued jurisdiction of this Court for the purpose of enforcing the terms and conditions of this Consent Order and for any other purposes relevant to this case;

7. Agrees that neither the Defendant nor her agents, employees or representatives acting under her control shall take any action or make any public statement denying, directly or indirectly, any allegations in the Amended Complaint or creating or tending to create the impression that the Amended Complaint is without factual basis; provided, however, that nothing in this provision shall affect the Defendant's: i) testimonial obligations, or ii) right to take legal positions in other proceedings to which the Commission is not a party. The Defendant will undertake all steps to assure that all of her agents, employees and representatives understand and comply with this agreement.

8. By consenting to the entry of this Consent Order, the Defendant neither admits nor denies the allegations of the Amended Complaint or the Factual Allegations of the Plaintiff contained in this Consent Order, except as to jurisdiction and venue. However, the Defendant agrees and intends that the allegations of the Amended Complaint and Factual Allegations set forth herein and contained in Part III of this Consent Order shall be taken as true and correct and be given preclusive effect as against her, without further proof, in the course of any subsequent bankruptcy proceeding filed by, on behalf of, or against the Defendant, or any proceeding to enforce this Judgment, or any other proceeding relating to the fitness of the Defendant to act in various capacities governed by the Act. The Defendant shall provide immediate notice of any bankruptcy filed by, on behalf of, or against the Defendant in the manner required

by Part VI of this Consent Order. No provision of this Consent Order shall in any way limit or impair the ability of any person to seek any legal or equitable remedy against the Defendant or any other person in any other proceeding. Except as specifically set forth in Paragraph 54 herein, nor shall any provision of this Consent Order be binding on any party not a party to the stipulation or acting on behalf of or in concert with the Defendant in the entry of the Consent Order.

9. On stipulation or concession of the parties, the Court therefore directs the entry of a Consent Order of permanent injunction and ancillary equitable relief, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), as set forth herein.

III.

STATEMENTS OF FACT AND APPLICABLE LAW

A. STATEMENTS OF FACT

a. The Parties

10. The **Plaintiff Commodity Futures Trading Commission** (the "Commission") is an independent federal regulatory agency charged with administering and enforcing the provisions of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1 *et seq.* and the Regulations promulgated thereunder, 17 C. F. R. §§ 1 *et seq.*

11. **Defendant R. J. Fitzgerald & Co. Inc.** ("RJFCO") was "a full service Introducing Broker." See *CFTC v. RJ Fitzgerald*, 310 F. 3d 1321, 1325 (11th Cir. (Fla.) Oct. 29, 2002), *rehearing and rehearing en banc denied*, *CFTC v. R. J .Fitzgerald & Co., Inc.*, 103 Fed. Appx. 668, (11th Cir. (Fla.) Apr. 12, 2004), *cert. denied*, *R. J. Fitzgerald & Co., Inc. v. CFTC*, 125 S. Ct. 808, 160 L. Ed. 2d 597, 73 USLW 3121 (U.S. Dec. 13, 2004).

12. **Defendant Leiza Fitzgerald**, was an employee of RJFCO and was responsible for the content and implementation of a series of promotional seminars (the "Seminar") given more than three (3) times. *Id.* Defendant Leiza Fitzgerald currently resides at 501 68th Avenue, St. Petersburg, Florida, 33701. Leiza Fitzgerald was registered an associated person during the relevant time period.

b. The Defendants' Fraudulent Solicitation Devices

13. Defendants Raymond Fitzgerald and RJFCO ("Defendants") used two solicitations devices in 1998 to attract customers to invest in options on futures contracts: a television commercial "appeared about eight or nine times" discussing the El Nino weather phenomenon and touting potential profits as high as 200 to 300 percent on a \$5,000 investment in the commodities markets (the "Commercials"); and the Seminar. *Id.* at 1325-1326. Defendant Leiza Fitzgerald was responsible for the content of the Seminar and the implementation of each Seminar. *Id.* at 1326, n.4.

c. Defendant Leiza Fitzgerald's Fraudulent Solicitations and Omissions Via Seminars

14. The Seminar was developed by Defendant Leiza Fitzgerald and RJFCO brokers Scott Campbell and Tom West after they attended a training session on the topic conducted by the National Introducing Brokers Association. *Id.*

15. Defendant Leiza Fitzgerald was in charge of putting on the Seminar to potential customers in 1998.

16. Under the direction of Defendant Leiza Fitzgerald, other RJFCO employees "would read the promotional scripts given to them by Leiza Fitzgerald *verbatim*" at the Seminar. *Id.* at n. 4.

17. The Seminar provided general background on RJFCO and how the commodities market operates. *Id.*

18. The Seminar informed customers that weather patterns, political events, and historical trends can affect the prices of certain commodities. *Id.* at 1326.

19. “The Seminar also told customers that technical analysis could assist them in the commodity options market, since ‘history often repeats itself’ and ‘past price action can provide you with clues to future action.’ Customers were told they could ‘take advantage’ of ‘fundamental’ market moves such as weather events and political events and ‘technical theory’ such as past market movements through either futures or options investing.” *Id.* at 1326-27.

20. “The Seminar also drew a distinction between investment instruments based on the quantum of risk involved: ‘Which one you choose depends on how aggressive or what degree of risk you wish to take on. If you are highly aggressive and looking for unlimited profit potential as well as unlimited risk than [sic] it would be the futures. But most would like something less aggressive, something offering unlimited profit potential but limited risk – option trade [sic].’” *Id.* at 1327.

21. “On the topic of risk, the Seminar additionally told potential customers: ‘options on futures allow investors and risk managers to define risk and limit it to the loss of a premium paid for the right to buy or sell a futures contract while still providing ... unlimited profit potential.’” *Id.*

22. The RJFCO employees who conducted the Seminar, including Defendant Leiza Fitzgerald, “offered what the Seminar script deemed a ‘very exciting’ illustration of how profits could be made on options. Specifically, the Seminar focused on the

commodity heating oil, explaining that for the last eighteen years, there was an average increase in that commodity 'of 22 cents from the low to the high in the price range' and that a \$5,000 investment on a heating oil futures contract would result in \$46,200 if there was a 22 cent move in the price. Customers were told that if they wanted 'limited risk,' they could invest in an options contract, where they would receive 'approximately 50% of that profit – 46,200 divided by 2 equals \$23,100.'" *Id.*

23. Defendant Raymond Fitzgerald testified at the trial of this matter that the Seminar was held "three or four times." See Transcript of Bench Trial before Honorable Mary S. Scriven, United States Magistrate Judge, Volume XIX, p. 2556, line 4. 27.

24. Witness Newton Thomas West testified at the trial of this matter that the Seminar was held "six to ten" times. See Transcript of Bench Trial before Honorable Mary S. Scriven, United States Magistrate Judge, March 6, 2001, p. 27, line 22.

d. Defendant Leiza Fitzgerald's Fraudulent Omissions: Non-Disclosure of the Firm's Success Record

25. At each presentation of the Seminar in 1998, Defendant Leiza Fitzgerald did not inform potential RJFCO customers that "more than 95% of the firm's clientele lost money in the types of investments being advertised." See *CFTC v. RJ Fitzgerald*, 310 F. 3d 1321,1332.

B. STATEMENTS OF APPLICABLE LAW

a. Jurisdiction and Venue

26. This Court has subject matter jurisdiction over this action and the allegations in the Amended Complaint pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (2002).

27. This Court has personal jurisdiction over Defendant Leiza Fitzgerald pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (2002).

28. Venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1(e) (2002), because Defendant Leiza Fitzgerald resided in and transacted business in the Middle District of Florida.

b. The Seminar

The Eleventh Circuit Court of Appeals made the following findings:

29. The three (3) Seminars overseen by Defendant Leiza Fitzgerald contained deceptive and misleading statements. *See CFTC v. RJ Fitzgerald*, 310 F. 3d 1321, 1331-32. *Id.* at 13331-32 (subsequent history omitted).

30. The three (3) Seminars conducted by the Defendant Leiza Fitzgerald were “fraudulent and deceptive as a matter of law.” *Id.* at 1331.

31. “Like the Commercial, the Seminar, when viewed in its entirety, suggests to a reasonable listener that RJFCO has a reliable strategy in place for increasing profits and limiting losses. Like the Commercial, it presents a distinctly unbalanced picture between the potential for profit and the potential for loss in options, inflating one while downplaying the other. The Seminar also impermissibly suggests that profits on options on futures contracts (the specific type of investment [Defendant Leiza Fitzgerald was] promoting) are proportionally related to the cash market.” *Id.*

32. “Furthermore, as with the Commercial, the Seminar in its heating oil mathematical illustration, misleads potential customers by suggesting that historical movements and known and expected seasonal patterns can be used reliably to predict profits on options.” *Id.* at 1332.

33. “The Seminar gave those in attendance a deceptive impression that known seasonal trends will lead to their quick success and that options provide a scenario of ‘limited risk.’” *Id.*

34. “Despite the Seminar’s use of risk disclosure material, the overall impression is that RJFCO is going to make customers money if they invest in options. Such conduct simply cannot survive the CEA, its underlying purpose, its regulation, and the interpretive case law.” *Id.*

35. “As with the Commercial, the statements in the Seminar are clearly material because an objectively reasonable investor’s decision-making process would be substantially affected by the Seminars’ discussion on limited risk, cyclical heating oil weather patterns, and examples and illustrations of large profits. Such representations, as a matter of law, impermissibly alter the total mix of relevant information available to the potential commodity option investor.” *Id.*

36. “Scienter is also established on this record as a matter of law for the same reasons as with the Commercial. Precedent has condemned materially similar representations in the past, including specific representations on heating oil. We hold that [Defendant Leiza Fitzgerald] acted with the requisite recklessness and departed in an extreme manner from the ordinary standards of care.” *Id.*

37. “Given the extremely rosy picture for profit potential painted in the Seminar... a reasonable investor would surely want to know – before committing money to a broker – that 95% or more of RJFCO’s investors lost money....It would have done much to counteract the assertion of ‘limited risk’ in the Seminars.” *Id.* at 1332-33.

38. “It is misleading and deceptive to speak of ‘limited risk’ and ‘200-300’ percent profit without also telling the reasonable listener that the overwhelming bulk of firm customers lose money.” *Id* at 1333.

39. The underlying remedial purpose of the CEA is protecting the individual investor from being misled or deceived in the highly risky arena of commodities investment. *Id.*

40. “The omission of highly material information is pernicious because it strikes at the very core of individual autonomy. The law vigorously protects the right of private individuals to exercise free choice in the marketplace. Such freedom of choice is eviscerated, and the autonomy of the individual severely undermined, if decision-altering information is withheld” *Id.*

41. “The CEA and its accompanying regulations directly proscribe attempts to deceive and defraud in connection with futures and options trading. 17 C. F. R. § 33.10 provides:

It shall be unlawful for any person to directly or indirectly:

(a) To cheat or defraud or attempt to cheat or defraud any other person;

(c) To deceive or attempt to deceive any other person by any means whatsoever in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.

See also 7 U. S. C. § 6b(a)(i)(iii) (proscribing similar conduct in connection with a futures contract.)” *Id.* at 1328.

42. During 1998, in each of the Seminars, Defendant Leiza Fitzgerald: (i) cheated or defrauded or attempted to cheat or defraud other persons; and (ii) willfully

deceived or attempted to deceive other persons, in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, commodity option transaction, all in violation of 7 U. S. C. § 6c(b), and 17 C. F. R. § 33.10.

43. The Eleventh Circuit Court of Appeals found, "Leiza Fitzgerald is liable for her involvement with the Seminar under [7 U. S. C.]§ 6c(b) and [17 C.F.R.] § 33.10." *Id.* at 1335.

44. During 1998, in each Seminar, wherein Defendant Leiza Fitzgerald failed to disclose that more than 95% of RJFCO's clientele lost money in the type of investments being touted by Defendant Leiza Fitzgerald, Defendant Leiza Fitzgerald: (i) cheated or defrauded or attempted to cheat or defraud other persons; and (ii) willfully deceived or attempted to deceive other persons, in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, commodity option transaction, all in separate and additional violations of 7 U. S. C. § 6c(b) and 17 C. F. R. § 33.10.

45. As separate and additional violations of the CEA, the Seminar was fraudulent as a matter of law because it spoke of Defendant RJFCO's strategy for enormous profit potential without simultaneously informing potential RJFCO customers that more than 95% of the firm's clientele lost money in the types of investments being advertised. *Id.* at 1332.

Civil Monetary Penalties

46. The Parties have stipulated to or determined not to contest the imposition of equitable remedies, civil monetary penalties ("CMP") and trading bans, upon Defendant Leiza Fitzgerald.

47. Pursuant to 7 U.S.C. § 13a-1 and 17 C. F. R. § 143.8(a)(1)(i), for violations committed between November 27, 1996 and October 22, 2000, the Parties have stipulated to or determined not to contest the imposition of a CMP of not more than the greater of \$110,000 or triple the monetary gain to such person for each such violation.

48. The Parties have stipulated or determined not to contest that Defendant Leiza Fitzgerald shall be assessed a total CMP in the amount of \$25,000.

Injunctive Relief

49. The Commission's Amended Complaint seeks entry of a permanent injunction against Defendant Leiza Fitzgerald to prohibit her from future violations of the CEA and barring her from engaging in any commodity related activity.

50. This injunction would prohibit the Defendant from continuing to engage in the acts and practices alleged in the Commission's Amended Complaint for which she has already been found liable in *CFTC v. RJ Fitzgerald*, 310 F. 3d 1321 (11th Cir. 2004) as well as similar acts and practices.

51. The Parties have stipulated or determined not to contest that the requested relief, a permanent injunction against Defendant Leiza Fitzgerald, is appropriate in this case because liability is established as a matter of law. See *CFTC v. RJ Fitzgerald*, 310 F. 3d 1321, 1335.

IV.

ORDER FOR PERMANENT INJUNCTION

On stipulation or concession of the Parties, **IT IS HEREBY ORDERED:**

52. Defendant Leiza Fitzgerald is permanently restrained, enjoined, and prohibited from, directly or indirectly, cheating or defrauding or attempting to cheat or defraud other persons and willfully deceiving or attempting to deceive other persons by making false, deceptive or misleading representations of material facts, by failing to disclose material facts, and by misappropriating customer funds in or in connection with orders to make, or the making of, contracts of sale of any option on commodities for future delivery, made or to be made for or on behalf of any other person in violation of 7 U.S.C. §§ 6c(b) and 17 C.F.R. § 33.10.

53. Defendant Leiza Fitzgerald is permanently restrained, enjoined, and prohibited, directly or indirectly, from engaging in the following activities:

- A. Trading on or subject to the rules of any registered entity, as that term is defined in 7 U.S.C. § 1a(29);
- B. Engaging in, controlling, or directing the trading of any futures or options accounts for or on behalf of any other person or entity, whether by power of attorney or otherwise;
- C. Soliciting or accepting any funds from any person in connection with the purchase or sale of any commodity interest contract;
- D. Placing orders or giving advice or price quotations, or other information in connection with the purchase or sale of commodity interest contracts for themselves and others; introducing clients to any other person engaged in the business of commodity interest trading; issuing statements or reports to others concerning commodity interest trading, except as provided for in 17 C.F.R. § 4.14(a)(9);

- E. Directly or indirectly, offering to enter into, executing, confirming the execution of, or conducting an office or business in the United States for the purpose of soliciting, accepting any order for, or otherwise dealing in transactions in, or in connection with, a contract for the purchase or sale of a commodity interest contract; and
- F. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in 17 C.F.R. § 4.14(a)(9), or acting as a principal, agent, officer or employee of any person registered, required to be registered, or exempted from registration, except as provided for in 17 C.F.R. § 4.14(a)(9).

54. The injunctive provisions of this Consent Order shall be binding upon Defendant Leiza Fitzgerald and any person insofar as he or she is acting in the capacity of officer, agent, servant, or attorney of Defendant Leiza Fitzgerald, and any person who receives actual notice of this Consent Order by personal service or otherwise insofar as he or she is acting in active concert or participation with Defendant Leiza Fitzgerald.

V.

ORDER FOR EQUITABLE RELIEF

On stipulation or concession of the Parties, **IT IS FURTHER ORDERED THAT:**

55. **PAYMENT OF CIVIL MONETARY PENALTY:** Defendant Leiza Fitzgerald is liable to pay a civil monetary penalty of \$25,000. Defendant shall make such payment within 10 days of this Consent Order by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under a cover letter that identifies Defendant and the name and docket number of the proceedings. The

Commission may enforce the Consent Order for civil monetary penalty by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after ten days following its entry.

VI.

MISCELLANEOUS PROVISIONS

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

Notice to Commission:

Director of Enforcement
Commodity Futures Trading
Commission
1155 21st Street N.W.
Washington, DC 20581

Timothy J. Mulreany
Division of Enforcement
Commodity Futures Trading
Commission
1155 21st Street N.W.
Washington, DC 20581

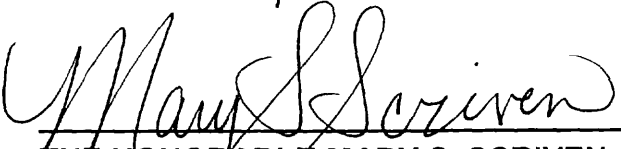
Notice to Defendants:

William Schifino, Jr.
Williams Schifino Mangione & Steady, P.A.
One Tampa City Center
201 North Franklin Street, Suite 2600
Tampa, Florida 33601
813-221-2626

61. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this cause to assure compliance with this Consent Order.

There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Consent Order of Permanent Injunction and Other Equitable Relief.

DONE AND ORDERED, in Tampa, Florida on this ^{19th} day of October 2006.



THE HONORABLE MARY S. SCRIVEN
UNITED STATES MAGISTRATE JUDGE

cc: All Counsel of Record