

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

CHRISTOPHER SMITHERS,

Defendant.

Case No. 9:12-cv-81165-KAM

**ORDER ENTERING FINAL
JUDGMENT BY DEFAULT
AGAINST CHRISTOPHER
SMITHERS**

This matter is before the Court on Plaintiff, U.S. Commodity Futures Trading Commission's (the "Commission" or "CFTC") Motion For Entry of Final Judgment By Default against Defendant Christopher Smithers ("Motion"). For the reasons stated below and good cause having been shown, the Commission's Motion is GRANTED.

I. INTRODUCTION

On October 22, 2012, the Commission filed a Complaint for Permanent Injunction, Civil Monetary Penalties, and Other Equitable Relief ("Complaint") against Christopher Smithers ("Defendant" or "Smithers"). Docket Entry ("D.E.") 1. The Complaint alleges that from at least October 2008 to March 2009 and from June 22, 2011, through November 2011, Smithers committed fraud and engaged in commodity-related activities in violation of two prior orders of permanent injunction entered against him by the Court in 2002 and 2006, and that this conduct violated provisions of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 1 *et seq.* (2006 & Supp. V 2011), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008), §§ 13101-13204, 122 Stat. 1651

(enacted June 18, 2008), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), Pub. L. No. 111-203, §§ 701-774, 124 Stat. 1376, 1641 *et seq.* (effective July 16, 2011), and the Commission’s Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2012) (“Commission Regulations”).

On October 23, 2012, Defendant was properly served with the Complaint and Summons. D.E. 5. Although properly served, Defendant has failed to enter an appearance or otherwise defend this action. On November 20, 2012, the Commission filed its Motion For Rule 55(a) Entry of Default against Defendant. D.E. 6. On November 26, 2012, the Clerk of the Court entered default against the Defendant for failure to respond to the Complaint or otherwise defend the action pursuant to Federal Rule of Civil Procedure 55(a). D.E. 7.

The Commission has submitted its Motion For Entry of Final Judgment By Default against Defendant pursuant to Federal Rule of Civil Procedure 55(b)(2) and Local Rule 7(a)(1)(E). The Court has carefully considered the Complaint, the factual allegations of which are well-pled and hereby taken as true, the Commission’s Motion and the Exhibit in support thereof and, being fully advised and familiar with the record in this matter, hereby enters findings of fact and conclusions of law, and issues a final order of permanent injunction that provides for restitution, a civil monetary penalty, and other equitable relief pursuant to Section 6c of the Act, as amended, 7 U.S.C. § 13a-1 (2006 & Supp. V 2011), as set forth herein.

II. FINDINGS OF FACT

A. Background

1. Plaintiff U.S. Commodity Futures Trading Commission is an independent federal regulatory agency that is charged by Congress with the administration and enforcement of the Act and the Regulations promulgated thereunder.

2. Defendant Christopher Smithers is an individual whose last known residence was in Jupiter, Florida. From July 22, 1998, to December 6, 2000, Smithers was registered with the Commission as an Associated Person (“AP”) of an Introducing Broker (“IB”), Matrix Trading Group, Inc. He is not currently registered with the Commission.

3. In 2002, Smithers was sanctioned by the Court for commodity options fraud and for supervisory failures in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2000), and Commission Regulations 33.10 and 166.3, 17 C.F.R. §§ 33.10, 166.3 (2002). *CFTC v. Matrix Trading Group, Inc., David Weeden and Christopher Smithers*, Civil Action No. 00-8880-CIV-ZLOCH (S.D. Fla. Oct. 3, 2002) (the “2002 Order”). Pursuant to the 2002 Order, Smithers and two other defendants were ordered to pay \$299,129.90 in restitution to 16 customers and were permanently enjoined from engaging in commodity-related activity.

4. In 2006, Smithers, his father, and an entity they owned, Prosperity Consultants, Inc., were sanctioned by the Court for commodity futures fraud in violation of Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (2000), and for violating the Court’s 2002 Order in violation of Section 6c of the Act, 7 U.S.C. § 13a-1(a) (2000). *CFTC v. Christopher Smithers, Prosperity Consultants, Inc., and Jack Smithers*, Case No. 05-80592-CIV-Hurley (S.D. Fla. Nov. 6, 2006) (the “2006 Order”). Pursuant to the 2006 Order, Smithers was permanently enjoined from: (a) engaging in commodity-related activity; (b) further violations of the Court’s 2002 Order; and (c) further violations of Sections 4o(1) and 6c of the Act, 7 U.S.C. §§ 6o(1) and 13a-1 (2000), and Commission Regulation 4.30, 17 C.F.R. § 4.30 (2004).

5. Smithers was subsequently ordered to disgorge \$206,046.61 in ill-gotten gains and to pay a civil monetary penalty of \$206,046.61 in *CFTC v. Christopher Smithers, Prosperity Consultants, Inc., and Jack Smithers*, Case No. 05-80592-CIV-Hurley (S.D. Fla. Aug.

18, 2009) (Order Adopting Magistrate’s Report and Recommendation & Final Judgment of Disgorgement and Assessment of Civil Monetary Penalties).

6. From approximately August 2010 to October 2011, Smithers was employed by Lloyds Commodities, LLC (“Lloyds”), a firm that claims to be a precious metals dealer in Palm Beach Gardens, Florida.

7. John Zirpolo (“Zirpolo”) resides in Jupiter, Florida and was employed as Smithers’ personal assistant from approximately June 2011 to November 2011.

8. Zirpolo was listed as the sole managing member of Zirpolo Consulting, LLC (“Zirpolo Consulting”), a Florida limited liability company that was incorporated on August 3, 2011, and whose principal place of business shares the same address as Zirpolo’s residence according to filings with the State of Florida. Zirpolo Consulting has never been registered with the Commission.

9. Zirpolo has little or no experience in trading commodity futures, and has never been registered with the Commission.

B. The 2008-09 Fraud

10. Smithers made false and misleading misrepresentations to two customers, “Customer JM” (and an entity Customer JM controlled, M318, LLC) (collectively “M318”) and Lawyers Realty, LLC (“Lawyers Realty”), while trading E-mini S&P 500 futures contracts (“E-minis”)¹ on their behalf from approximately October 2008 to March 2009.

¹ The S&P 500 Stock Price Index is a commodity within the meaning of Section 1a(9) of the Act, as amended, 7 U.S.C. § 1a(9) (2006 & Supp. V 2011). The E-mini, in turn, is a futures contract traded on the Chicago Mercantile Exchange, which settles to the value of the S&P 500 Stock Price Index.

11. Based on Smithers' misrepresentations that he had been trading profitably, M318 and Lawyers Realty deposited \$195,000 and \$25,000, respectively, into futures trading accounts controlled by Smithers.

12. Smithers created a "dummy" account that contained false profit representations and showed the "dummy" account to M318 for the purpose of hiding trading losses and to encourage M318 to provide additional funds for Smithers to trade futures on M318's behalf.

13. Smithers misrepresented to Lawyers Realty that his commodity futures trading activity that was funded by its \$25,000 deposit had been profitable when, in fact, Smithers had lost the entire deposit within two weeks through his trading activity.

14. Smithers blocked Lawyers Realty's attempt to withdraw its deposited funds from the Futures Commission Merchant ("FCM")² where its account was traded and subsequently misrepresented to Lawyers Realty that withdrawing its funds would take several days, but that its funds were "guaranteed."

15. In a sworn affidavit and in sworn testimony before the National Futures Association ("NFA"), Smithers admitted that he made misrepresentations to M318 and Lawyers Realty.

² An FCM is defined under Section 1a(28) of the Act, as amended, 7 U.S.C. § 1a(28) (2006 & Supp. V 2011), in relevant part, as an individual, association, partnership, corporation, or trust that is engaged in soliciting or accepting orders for the purchase or sale of a commodity for future delivery that accepts any money, securities, or property to margin, guarantee, or secure any trades or contracts that result or may result therefrom or that is registered with the Commission as an FCM.

C. The 2011 False Representations

16. From June 22, 2011, through November 2011, Smithers misrepresented who had opened and who controlled six commodity futures trading accounts at five registered FCMs. While using the personal information of his personal assistant, Zirpolo, Smithers opened the six accounts in Zirpolo's name or in the name of Zirpolo Consulting.

17. Smithers misrepresented the identity of the person who opened, and who was to control the trading of, these commodity futures trading accounts in an effort to conceal his identity because his commodity futures trading violated the permanent injunctions contained within the 2002 and 2006 Orders that permanently prohibited him from engaging in any commodity-related activity.

D. The 2011 Retail Customer Fraud

18. During September and October 2011, while employed at Lloyds, Smithers made misrepresentations to North American Asset Management ("NAAM"), a Lloyds retail dealer, and NAAM's two managers ("NAAM Managers 'One' and 'Two'"). Additionally, Smithers misappropriated \$162,980 given to him by NAAM Managers One and Two on behalf of a NAAM retail customer ("Retail Customer") who was seeking to buy gold bullion.

19. Smithers misrepresented to NAAM Managers One and Two that Zirpolo Consulting was a gold refinery that was physically located in Texas, repeatedly misrepresented that gold bullion had been purchased and shipped to NAAM for physical delivery to the Retail Customer, and provided a phony United Parcel Service ("UPS") tracking number to NAAM.

20. Smithers misappropriated the \$162,980 in order to conduct commodity futures trading for his own benefit, to pay for his personal expenses, and to pay fictitious profits to NAAM Manager Two, who previously provided Smithers with funds to trade on his behalf.

E. The NAAM Manager Fraud

21. In September 2011 Smithers solicited NAAM Manager Two while representing that his commodity futures trading at the time was profitable, when in actuality it was not.

22. Smithers misrepresented that he had made trading profits on the \$20,000 that NAAM Manager Two had provided to him for the purpose of trading commodity futures, when in actuality Smithers used the \$20,000 to pay for his own personal expenses.

23. Smithers subsequently provided NAAM Manager Two with \$11,000 that Smithers mischaracterized as trading profits; in actuality, Smithers had misappropriated the \$11,000 from funds the Retail Customer had provided to NAAM for the purchase of gold bullion on the Retail Customer's behalf.

F. Smithers' Trading in Violation of the Court's 2002 and 2006 Orders

24. In a sworn affidavit and in sworn testimony at an NFA arbitration hearing, Smithers admitted that he had engaged in commodity-related activity by trading E-minis on behalf of M318 and Lawyers Realty from October 2008 to March 2009.

25. From June 2011 through November 2011, Smithers again engaged in commodity-related activity by trading in E-minis under the name of Zirpolo and/or through Zirpolo Consulting.

26. By engaging in commodity-related activity in 2008 through 2009 and 2011, Smithers violated the 2002 and 2006 Orders. Additionally, Smithers' commodity-related activity violated the 2006 Order enjoining him from any further violations of the Court's 2002 Order.

III. CONCLUSIONS OF LAW

A. Jurisdiction and Venue are Proper

This Court possesses jurisdiction over this action pursuant to Section 6c of the Act, as amended, 7 U.S.C. § 13a-1 (2006 & Supp. V 2011), which authorizes the Commission to seek injunctive and other relief against any person whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of the Act or any rule, regulation, or order thereunder. As set forth in paragraphs 1 - 26 above, Defendant has engaged, is engaging, or is about to engage in acts or practices that constitute a violation of the Act and Commission Regulations. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2006), because Smithers resides in and transacted business within this District and the acts and practices in violation of the Act occurred, are occurring, or are about to occur, within this District.

B. Entry of Default Judgment Against Defendant is Appropriate

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that fact has been documented, the clerk must enter the party's default. *See* Fed. R. Civ. P. 55(a). The party seeking the default shall then apply to the court for an entry of default judgment. *See* Fed. R. Civ. P. 55(b). Entry of default judgment is within a district court's sound discretion. *See CFTC v. Gutterman*, No. 12-21047-CIV, 2012 WL 2413082, at *4 (S.D. Fla. June 26, 2012) (citing *Hamm v. DeKalb Cnty.*, 774 F.2d 1567, 1576 (11th Cir. 1985)). After default has been entered, the defendant is deemed to have admitted all well-pled factual allegations in the complaint, except those relating to unspecified damages. *Id.* (citing *Sampson v. Brewer, Michaels & Kane, LLC*, No. 6:09-cv-2114-Orl-31DAB, 2010 WL 2432084 (M.D. Fla. May 26, 2010)); *see Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987) (quoting

Nishimatsu Const. Co., Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975)); *see also* Fed. R. Civ. P. 8(b)(6) (effect of failure to deny an allegation).

The Clerk, upon prior motion by the Commission, has entered a default against Smithers. D.E. 7. Accordingly, this Court hereby finds that the Commission's allegations in the Complaint against Defendant are well-pled and thereby taken as true, that these allegations support finding of violations of the Act and Commission Regulations, and in accordance with Federal Rule of Civil Procedure 55(b)(2), a default judgment is hereby entered against Defendant.

C. Defendant Violated the Commodity Exchange Act

1. By Committing The 2008-09 Fraud and NAAM Manager Fraud, Defendant Violated Section 4b(a)(1)(A), (C) of the Act

Pursuant to Section 4b of the Act, it is a violation of the Act for any person, in or in connection with any order to make, or the making of, any on-exchange futures contract, for or on behalf of any other person, "(A) to cheat or defraud or attempt to cheat or defraud the other person . . . [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" Section 4b(a)(1)(A), (C) of the Act, as amended, 7 U.S.C. § 6b(a)(1)(A), (C) (2006 & Supp. V. 2011).

Generally, in order to establish liability for fraud, the Commission possesses 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). In addition to misrepresentations, misleading statements, and deceptive omissions serving as the basis for allegations of fraud, "[M]isappropriation of customer funds constitutes 'willful and blatant fraudulent activity'" that violates Section 4b of the Act. *CFTC v. Machado*, No. 11-22275-Civ., 2012 WL 2994396, at *5 (S.D. Fla. Apr. 20,

2012) (quoting *CFTC v. Noble Wealth Data Info. Servs.*, 90 F. Supp. 2d 676, 687 (D. Md. 2000), *aff'd in part, rev'd in part sub nom. CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002)). As shown below, all three elements of fraud are met in this case.

As discussed above, Smithers admitted under oath to making misrepresentations to M318 and Lawyers Realty concerning the profitability of his trading and the value of their trading accounts from approximately October 2008 to March 2009, the period Smithers traded commodity futures on their behalf. Specifically, Smithers misrepresented to M318 that he was trading profitably and, in order to convince M318 that it was making money and, thus, encourage it to deposit more funds with him, Smithers used a “dummy account” for the purpose of hiding Smithers’ actual trading losses of M318’s funds. Smithers also admitted that he misrepresented to Lawyers Realty the profitability of Smithers’ trading with Lawyers Realty’s initial deposit of \$25,000 and that he blocked Lawyers Realty’s attempt to withdraw its funds while later representing to Lawyers Realty that its funds were “guaranteed.”

Subsequently, in September and October 2011, Smithers misrepresented the profitability of his commodity futures trading to another customer, NAAM Manager Two, misappropriated the funds NAAM Manager Two had deposited with him for trading commodity futures, and used NAAM Manager Two’s funds to pay for his own personal expenses. Smithers also provided NAAM Manager Two with funds that were supposedly profits from Smithers’ trading of his deposited funds when, in fact, the purported profits were actually funds that Smithers had misappropriated from a Retail Customer’s funds that had been provided to him for the purchase of gold bullion on behalf of the Retail Customer.

Smithers’ fraud of M318 and Lawyers Realty, and later NAAM Manager Two, plainly meets the Eleventh Circuit’s test for establishing scienter in this circumstance. *See R.J. Fitzgerald*

& Co., 310 F.3d at 1328 (“For purposes of fraud or deceit in an enforcement action, scienter 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.”) (citation omitted). Scienter in the present case is manifest: Smithers knowingly lied about the profitability of his trading and intentionally created a “dummy” account for the purpose of deceiving M318 into concluding that Smithers’ trading of its deposited funds had been profitable when, in fact, it had not. Smithers admitted to making these misrepresentations in the NFA proceeding noted above.

Similarly, Smithers admitted that he knowingly lied to Lawyers Realty regarding the profitability of the funds it had deposited with him for commodity futures trading on its behalf, and that Smithers had purposely blocked Lawyers Realty’s attempt to withdraw its funds. Finally, Smithers intentionally misrepresented the profitability of his trading to NAAM Manager Two while purposely misappropriating his funds, which Smithers used to pay for his own personal expenses. Smithers’ misrepresentations regarding the profitability of his trading with NAAM Manager Two’s funds were intentional because he misappropriated all of those funds; because no trading occurred, it could not have been profitable.

Smithers’ misrepresentations to both M318 and Lawyers Realty during the 2008-09 Fraud and to NAAM Manager Two during the September and October 2011 Fraud were material. *Id.* at 1328-29 (“A representation or omission is ‘material’ if a reasonable investor would consider it important in deciding whether to make an investment.”) (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972); *R&W Technical Servs., Ltd. v. CFTC*, 205 F.3d 165, 169 (5th Cir. 2000)). Smithers’ misrepresentations to M318 were material because, prior to making the decision to provide Smithers with funds for commodity futures trading on its behalf, M318 would reasonably have wanted to consider Smithers’ unprofitable trading at the

time. M318 would also have reasonably wanted to know that it was being shown false account activity in a “dummy” trading account reflecting fictitious profits, rather than the actual account activity reflecting real trading losses, prior to making the decision to keep its funds with Defendant. Additionally, it would have been reasonable for M318 to have refused to deposit additional funds with Smithers had it known that Smithers had previously lost M318’s initial deposit through his commodity futures trading, or that Smithers had shown it a fictitious trading account when soliciting M318 to deposit additional funds with him.

Regarding Lawyers Realty, it reasonably would have wanted to know the true losses associated with its account, that its funds were not guaranteed, and that Smithers had intentionally blocked its instructions to withdraw its funds because, if it had possessed such knowledge, Lawyers Realty reasonably would have demanded the immediate return of its funds.

Finally, NAAM Manager Two would have reasonably wanted to know that Smithers’ trading had not been profitable, that Smithers had misappropriated his funds, and that Smithers later provided him with misappropriated money – from another individual – disguised as trading profits because, had he been in possession of such information, he reasonably would have sought the return of his funds that he had previously entrusted to Defendant.

2. By Committing The 2011 Retail Customer Fraud Defendant Violated Section 6(c)(1) of the Act and Commission Regulation 180.1(a)

Section 6(c)(1) of the Act, as amended, 7 U.S.C. §§ 9, 15 (2006 & Supp. V 2011), provides, among other things, that it is unlawful for any person “to use or employ . . . in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in

contravention of [Commission rules and regulations].”³ Commission Regulation 180.1(a), 17 C.F.R. § 180.1(a) (2012), in relevant part, makes it unlawful for any person:

in connection with any . . . contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly: (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud; (2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading; [or] (3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person

As a threshold matter, pursuant to Section 1a(9) of the Act, as amended, 7 U.S.C. § 1a(9) (2006 & Supp. V 2011), gold bullion is within the definition of a “commodity.” Thus, the agreement to purchase gold bullion on behalf of the Retail Customer in this case constituted a contract of sale of a commodity in interstate commerce. Smithers misrepresented to NAAM Managers One and Two that the source of the gold bullion was Zirpolo Consulting and that Zirpolo Consulting was a gold refinery in Texas. He also provided NAAM Managers One and Two with a false UPS tracking number supposedly showing that the gold bullion had been shipped from Texas. Instead Smithers used the funds intended for the purchase of gold bullion on behalf of the Retail Customer to trade commodity futures for his own benefit and for payment of his own personal expenses.

The discussion and case law set forth above (*see supra* Section III.C.1) regarding the fraud charge under Section 4b(a)(1)(A), (C) of the Act against Defendant are equally applicable to the similar Section 6(c)(1) charge. As shown below, all three elements of fraud: (1) the making of a

³ Section 6(c)(1) was added to the Act by the Dodd-Frank Act (effective July 16, 2011). Commission Regulation 180.1(a), which effectuates Section 6(c)(1) of the Act, became effective August 15, 2011.

misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality; are met in this case as well.

In committing the 2011 Retail Customer Fraud, Smithers made material misrepresentations to NAAM Managers One and Two by misrepresenting that Zirpolo Consulting was a gold refinery and that he had purchased and shipped gold bullion. In reality, Smithers misappropriated the Retail Customer's \$162,980 that had been provided to him for the purchase of the gold bullion on the Retail Customer's behalf and never shipped any gold bullion on behalf of the Retail Customer.

Additionally, in committing the 2011 Retail Customer Fraud, Smithers acted with scienter. Specifically, Smithers made false representations to NAAM Managers One and Two without any intention of buying gold bullion from a gold refinery that did not exist, and then made false statements regarding the gold bullion's supposed delivery via UPS. Accordingly, Smithers' misrepresentations were knowingly and intentionally made, demonstrating that he acted with the requisite scienter.

Finally, Smithers' misrepresentations to NAAM Managers One and Two were material. Smithers' misrepresentations were plainly material because the NAAM managers never would have wired \$162,980 to Smithers had they known that: (1) Smithers had no intention of purchasing the gold bullion for the Retail Customer; (2) Smithers had misrepresented that Zirpolo Consulting was a gold refinery; and (3) Smithers intended to misappropriate the funds provided to him for the purchase of the gold bullion.

3. Defendant Violated the 2002 Order and the 2006 Order and Therefore Violated Section 6c(a) of the Act

In relevant part, Section 6c(a) of the Act, as amended, 7 U.S.C. § 13a-1(a) (2006 & Supp. V 2011), states that, "[w]henver 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 Act . . . or order thereunder,” the Commission may bring an action in the appropriate United States District Court to enjoin such practice or enforce compliance with the Act or order thereunder.

In the 2006 Order, the Court found that Smithers’ violations of the 2002 Order also constituted a violation of Section 6c and enjoined him from further violations of this provision and the 2002 Order. As noted above, by engaging in commodity futures trading from October 2008 to March 2009 and from June 2011 to November 2011, Smithers violated the 2002 and 2006 Orders. Accordingly, Smithers’ violations of the 2002 and 2006 Orders also violated Section 6c(a) of the Act.

IV. RELIEF

A. Permanent Injunction

Section 6c of the Act, as amended, 7 U.S.C. § 13a-1 (2006 & Supp. V 2011), authorizes and directs the Commission to enforce the Act and Regulations and allows United States District Courts, upon a proper showing, to grant a permanent injunction. *See CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1346 (11th Cir. 2008). In an action for permanent injunctive relief, the Commission is not required to make a specific showing of irreparable injury or inadequacy of other remedies. *See Fleury*, 2010 WL 5146283, at *18 (citing *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978); *United States v. Quadro Corp.*, 928 F. Supp. 688, 697 (E.D. Tex. 1996) (citations omitted), *aff’d*, *United States v. Quadro Corp.*, 127 F.3d 34 (5th Cir. 1997); *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 141-42 (2d Cir. 1977)). “Rather, the Commission makes the requisite showing for issuance of injunctive relief when it presents a *prima facie* case that the defendant has engaged, or is engaging, in illegal conduct, and that there

is a likelihood of future violations.” *Id.* (citing *CFTC v. Am. Bd. of Trade, Inc.*, 803 F.2d 1242, 1250-51 (2d Cir. 1986); *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979)).

“Whether such a likelihood of future violations exists depends on the ‘totality of the circumstances.’” *Id.* (quoting *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975)). “Foremost among these circumstances is the past illegal conduct of Defendants, from which courts may infer likelihood of future violations.” *Id.* (citing *British Am. Commodity Options Corp.*, 560 F.2d at 142; *Mgmt. Dynamics, Inc.*, 515 F.2d at 807; *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982)). Under these standards, permanent injunctive relief, including a comprehensive trading ban, is clearly warranted against the Defendant.

IT IS THEREFORE ORDERED that Defendant and any other person or entity associated with him are permanently restrained, enjoined and prohibited from directly or indirectly:

- a. Engaging in conduct in violation of Sections 4b(a)(1)(A), (C), 6(c)(1), and 6c(a) of the Act, as amended, 7 U.S.C. §§ 6b(a)(1)(A), (C), 9, 15, and 13a-1(a) (2006 & Supp. V 2011), and Commission Regulation 180.1(a), 17 C.F.R. § 180.1(a) (2012);
- b. Trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(40) of the Act, as amended, 7 U.S.C. § 1a(40) (2006 & Supp. V 2011);
- c. Entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Commission Regulation 1.3(hh), 17 C.F.R. § 1.3(hh) (2012)) (“commodity options”), swaps (as that term is defined in Section 1a(47) of the Act, 7 U.S.C. § 1a(47) (Supp. V 2011), and as further defined by Commission Regulation 1.3(xxx), 17 C.F.R. § 1.3(xxx) (2012)) (“swaps”), security futures products, and/or foreign currency (as described in Sections 2(c)(2)(B)

- and 2(c)(2)(C)(i) of the Act, as amended, 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i) (2006 & Supp. V 2011)) (“forex contracts”), for his own personal or proprietary accounts or for any account in which he has a direct or indirect interest;
- d. Having any commodity futures, options on commodity futures, commodity options, swaps, security futures products, and/or forex contracts traded on his behalf;
 - e. 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, swaps, security futures products, and/or forex contracts;
 - f. 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, swaps, security futures products, and/or forex contracts;
 - g. 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 Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2012); and
 - h. Acting as a principal (as that term is defined in Commission Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2012)), agent, or any other officer or employee of any person registered, exempted from registration, or required to be registered with the Commission, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2012).

B. Restitution and Appointment of a Monitor

Pursuant to Section 6c(d)(3) of the Act, as amended, 7 U.S.C. § 13a-1(d)(3) (2006 & Supp. V 2011), enacted as part of the Dodd-Frank Act, “the court may impose, on a proper showing . . . (A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses)” Prior to the enactment of this provision, in this case the period of the 2008-09 Fraud, the Eleventh Circuit found that the unqualified grant of statutory authority to issue an injunction under the Act carries with it the full range of equitable remedies, among which is the power to grant restitution. *See Wilshire Inv. Mgmt. Corp.*, 531 F.3d at 1344. Under *Wilshire*, however, the proper measure of restitution for the time period prior to enactment of Section 6c(d)(3) of the Act is the amount of a defendant’s unjust enrichment. *See id.* at 1345. In that case, the Eleventh Circuit reversed a district court order that based a restitution award solely on the total amount of customers’ losses. *See Id.*; *see also CFTC v. Fleury*, Case No. 03-61199-CIV-MARRA, 2010 WL 3835134, at *1-*2 (S.D. Fla. Sept. 29, 2010) (citing *Wilshire* in finding that the defendants’ ill-gotten gains was the proper measure of restitution).

The facts with respect to the 2008-09 Fraud, the period prior to the enactment of Section 6c(d)(3) of the Act, demonstrate that the \$25,000 Smithers defrauded from Lawyers Realty constituted ill-gotten gains.⁴ Smithers not only misrepresented the profitability of his trading to Lawyers Realty, but he also blocked Lawyers Realty’s attempt to withdraw its funds while subsequently telling Lawyers Realty that its funds were “guaranteed.” In effect, Smithers deceitfully obtained Lawyers Realty’s money in order to continue his trading in violation of the

⁴ M318’s loss of \$195,000 during the 2008-09 Fraud is not subject to restitution under *Wilshire*.

2002 and 2006 Orders and of the Act. Thus, the amount of ill-gotten gains from the 2008-09 Fraud, and the attendant amount of restitution under *Wilshire* for the 2008-09 Fraud is \$25,000.

The amount of restitution for the NAAM Manager Fraud and the 2011 Retail Customer Fraud, which Smithers committed during the period following enactment of Section 6c(d)(3) of the Act, is measured by the amount of customer losses. During the NAAM Manager Fraud and the 2011 Retail Customer Fraud, the total amount of customers' losses was \$171,980. In sum, based on Smithers' \$25,000 in ill-gotten gains and \$171,980 in customer losses, the total amount of restitution is \$196,980.

Accordingly, this Court orders Defendant to pay restitution in the amount of \$196,980, plus post-judgment interest ("Restitution Obligation"). Post-judgment interest on the Defendant's Restitution Obligation shall accrue beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2006). That rate is 0.11%.

To effect payment by Defendant and the distribution of restitution, the Court hereby appoints the National Futures Association as Monitor. The Monitor shall collect restitution payments from Defendant and shall make distributions as set forth below. Because the Monitor would not be specially compensated for these services, and these services are outside the normal duties of the Monitor, the Monitor shall not be liable for any action or inaction arising from its appointment as Monitor, other than actions involving fraud. Defendant shall make his required restitution payments payable in the name of "Smithers – Restitution Fund" and shall send such restitution payments by either electronic funds transfer or by U.S. postal money order, certified check, bank cashier's check, or bank money order to the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois, 60606, under a

cover letter that identifies the paying Defendant and the name and docket number of this proceeding. The paying Defendant shall simultaneously transmit copies of the cover letter and the form of payment to (a) Director, Division of Enforcement, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, and (b) Chief, Office of Cooperative Enforcement, Division of Enforcement, at the same address.

The Monitor shall oversee Defendant's Restitution Obligation and shall have the discretion to determine the manner of distribution of funds in an equitable fashion to the Defendant's customers. In the event that the amount of restitution payments to the Monitor are of a *de minimis* nature such that the Monitor determines that the administrative costs of making a restitution distribution to eligible customers is impractical, the Monitor may, in its discretion, treat such restitution payments as civil monetary penalty payments, which the Monitor shall forward to the Commission following the instructions for civil monetary penalty payments set forth in Section IV.C below. To the extent that any funds accrue to the U.S. Treasury as a result of Defendant's Restitution Obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth in the preceding paragraphs.

Any amount paid to any customer pursuant to this judgment shall not limit the ability of that customer to independently prove in a separate action that a greater amount is owed from any person or entity, and nothing herein shall be construed in any way to limit or abridge the rights of any customer that exist under federal, state, or common law to assert a claim for recovery against Defendant, subject to any offset or credit that Defendant may be entitled to claim under the law governing that customer's claim. Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each customer is hereby explicitly made an intended third-party beneficiary of this judgment and may seek to enforce compliance with this judgment to obtain satisfaction of any portion of the

restitution amount that has not been paid, to ensure compliance with any provision of this judgment, and to hold Defendant in contempt for any violations of any provision of this judgment.

C. Civil Monetary Penalty

Pursuant to Section 6c(d)(1) of the Act, as amended, 7 U.S.C. § 13a-1(d)(1) (2006 & Supp. V 2011), a court may impose a civil penalty against any person, upon a proper showing, found to have violated the Act “in the amount of not more than the greater of \$100,000 or triple the monetary gain to the person for each violation.” Federal regulations promulgated pursuant to the statute allow for the civil penalty to be adjusted for inflation. Thus, the statutory penalty is \$130,000 for each violation occurring between January 1, 2007, and October 22, 2008, and \$140,000 for each violation occurring after October 23, 2008. Commission Regulation 143.8(a)(1)(iii)-(iv), 17 C.F.R. § 143.8(a)(1)(iii)-(iv) (2012). Although the specific dollar amount per violation has increased during the period covered by this matter, “the monetary gain” measure has remained the same.

The Commission has set forth several factors to consider in assessing a civil monetary penalty. These factors include the relationship of the violation at issue to the regulatory purposes of the Act and whether or not the violations involved core provisions of the Act; whether or not scienter was involved; the consequences flowing from the violative conduct; and financial benefits to a defendant. *See Fleury*, 2010 WL 5146283, at *19 (citing *In re Grossfeld*, [1996–1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,467–8 (CFTC Dec. 10, 1996), *aff’d*, 137 F.3d 1300 (11th Cir. 1998)). The civil penalty should be proportional to the gravity of the offenses committed. *See id.*

This case warrants the imposition of a substantial civil monetary penalty against Defendant because he knowingly engaged in fraud, which is a core violation of the Act. *See Grossfeld*, ¶ 26,921 at 44,467 and n.28 (citation omitted). Specifically, Defendant knowingly made material misrepresentations to customers and misappropriated funds. Because of Defendant's systemic deception of customers, a civil monetary penalty equal to triple the monetary gain (\$196,980)⁵ to Smithers is appropriate.

Accordingly, this Court orders Defendant to pay a civil monetary penalty in the amount of \$590,940, plus post-judgment interest ("CMP Obligation"). Post-judgment interest on this civil monetary penalty shall accrue beginning on the date of entry of this Order and shall be calculated using the Treasury Bill rate prevailing on the date of this Order pursuant to 28 U.S.C. § 1961 (2006). That rate is 0.11%.

Defendant shall pay his CMP Obligation by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order made payable to the U.S. Commodity Futures Trading Commission and sent to the address below:

U.S. Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivable—AMZ340
E-mail Box: 9-AMC-AMZ-AR-CFTC
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-5644

If payment by electronic transfer is chosen, contact Linda Zurhorst or her successor for instructions. The Defendant shall accompany payment of the penalty with a cover letter that

⁵ Monetary gain is calculated by the Court as follows: Cumulative deposits by customers (\$402,980) minus customer losses during the 2008-09 Fraud (\$195,000), minus funds paid to customers (\$11,000) = Ill-gotten gains and funds misappropriated for self (\$196,980); CMP is calculated as follows: Customer losses (\$196,980) x 3 = \$590,940.

identifies the Defendant and the name and docket number of this proceeding. The Defendant shall simultaneously transmit a copy of the cover letter and the form of payment to the Chief Financial Officer, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581.

D. Miscellaneous Provisions

1. Partial Payments: Any acceptance by the Commission or the Monitor of partial payment of Defendant's Restitution Obligation or CMP Obligation shall not be deemed a waiver of his obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.

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

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

Notice to Commission: Director
 Division of Enforcement
 U.S. Commodity Futures Trading Commission
 Three Lafayette Centre
 1155 21st Street, N.W.
 Washington, D.C. 20581


Notice to Monitor: Office of Administration
 National Futures Association
 300 South Riverside Plaza, Suite 1800
 Chicago, Illinois 60606

4. **Retention of Jurisdiction:** This Court shall retain jurisdiction over this case to assure compliance with this Order and for all other purposes related to this action.

V. CONCLUSION

Plaintiff, U.S. Commodity Futures Trading Commission's Motion For Entry of Final Judgment By Default against Defendant Christopher Smithers (DE 8) is **GRANTED**. Plaintiff Supplemental Motion for Entry of Final Judgment by Default Against Christopher Smithers (DE 9) is **GRANTED**. The Clerk shall **CLOSE** this case.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 31st day of July, 2013.



KENNETH A. MARRA
United States District Judge