

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

U.S. COMMODITY FUTURES TRADING )  
COMMISSION, )  
 )  
Plaintiff, )  
 )  
v. ) 1:16CV226  
 )  
TRACY LEE THOMAS, a/k/a TREYTON )  
L. THOMAS, a/k/a TRAYTON L. )  
THOMAS, a/k/a TREY THOMAS, a/k/a )  
TRAY THOMAS, a/k/a T. L. THOMAS, )  
And MARBURY ADVISORS INC., )  
 )  
Defendants. )

**ORDER AND JUDGMENT**

This matter is before the Court on the Motion for Final Judgment by Default, Permanent Injunction, Civil Monetary Penalty, and Other Statutory and Equitable Relief against Defendants. (ECF No. 18.)

On March 22, 2016, Plaintiff U.S. Commodity Futures Trading Commission (“CFTC”) filed a Complaint charging Defendants Tracy Lee Thomas, a/k/a Treyton L. Thomas, a/k/a Trayton L. Thomas, a/k/a Trey Thomas, a/k/a Tray Thomas, a/k/a T.L. Thomas (“Thomas”) and Marbury Advisors Inc. (“Marbury”) (collectively “Defendants”) with fraudulent misrepresentations and omissions in violation of Section 4b(a)(1)(A)-(C) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. § 6b(a)(1)(A)-(C) (2012).

Defendant Thomas was timely and personally served a copy of the Summons and Complaint in this action on December 5, 2016, (ECF No. 12), and also via publication in *The*

*(Charlottesville) Daily Progress* and *Greensboro News Record* with the last date of publication on October 22, 2016. (ECF Nos. 14, 15). Defendant Marbury was served a copy of the Summons and Complaint via its designated agent, Interactive Brokers LLC (“Interactive”)<sup>1</sup> on August 1, 2016, and also via its agent Thomas on December 5, 2016. (ECF Nos. 13, 16). Defendants’ Answer was due December 27, 2016 and Defendants failed to answer or otherwise plead, therefore, on January 9, 2017, the Clerk of the Court entered defaults against Defendants Thomas and Marbury. (ECF No. 17.)

The CFTC has moved this Court to grant final judgment by default against Defendants, order permanent injunctive relief, and impose a restitution obligation and a civil monetary penalty.

The Court, having carefully considered the Complaint, the allegations which are well-pleaded and hereby taken as true, the CFTC’s memorandum in support of its motion for default judgment, the declarations and exhibits thereto, the record in this case, and the Court being otherwise advised in the premises,

Accordingly, the Court makes findings of fact, conclusions of law, and enters an Order of Final Judgment by Default, Permanent Injunction, Civil Monetary Penalties, and Other Statutory and Equitable Relief (“Order”) pursuant to Section 6c and 6d of the Act, 7 U.S.C. § 13a-1 (2012), as set forth herein.

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<sup>1</sup> CFTC Regulation 15.05(b) designates the futures commission merchant (“FCM”) for accounts of foreign brokers or foreign traders as the agent for service of process. 17 C.F.R. § 15.05(b) (2016).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### *I. Findings of Fact*

#### A. The Parties

1. U.S. Commodity Futures Trading Commission is an independent federal regulatory agency charged by Congress with the responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.*, and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 *et seq.*

2. Defendant Tracy Lee Thomas (“Thomas”) was a resident of Naples, Florida, during the Relevant Period charged in the Complaint, February 2011 through August 2012 (“Relevant Period”). Thomas was the Managing Director of Defendant Marbury. Thomas has never been registered with the CFTC in any capacity.

3. Defendant Marbury Advisors Inc. (“Marbury”) was a Cayman Islands corporation during the Relevant Period and has never been registered with the CFTC in any capacity.

#### B. Defendants’ Fraudulent Scheme

4. During the Relevant Period, Defendants engaged in a fraudulent scheme by soliciting approximately \$1,189,000 from customers by misrepresenting that Defendants would invest in Treasury Bills on their behalf, misrepresenting Defendants’ prior investment and trading success, and misrepresenting that Thomas would manage customer funds in a conservative manner; and by not disclosing that Defendants used customers’ funds to trade Chicago Mercantile Exchange (“CME”) E-mini S&P 500 futures contracts (“E-mini”) and Chicago Board of Trade (“CBOT”) 2-Year Treasury Note futures contracts, not disclosing the

substantial risk of loss associated with commodity futures trading in which all of the customers' funds could be lost, and not disclosing the net losses that Defendants sustained trading commodity futures with customers' funds.

5. Between 2006 and 2010, Marbury opened several accounts at Interactive, a registered Futures Commission Merchant ("FCM"). Thomas maintained trading authority over Marbury's accounts at Interactive. None of Marbury's accounts at Interactive, including account ending 0342, were net profitable.

6. In or around March 2009, Defendants obtained control over a trust account at Fidelity Bank (as trustee) in the name of N.C. & VA. Warranty Inc. ("NCVA"). NCVA is a North Carolina corporation owned by Thomas' late father, Ronnie Thomas, which sold automobile warranty policies to car dealerships and was located in Roxboro, North Carolina. Thomas represented to his late father that Defendants were successful investing in Treasury Bills ("T-Bills") for other customers using an algorithm designed by Thomas and that Defendants would invest the money in this trust account to obtain higher returns through safe (non-risky) investments in T-Bills.

7. Beginning in or around April 2010, Thomas solicited Steven Matthews ("Matthews"), to invest in T-Bills through Defendants. Matthews owns Matthews Motors Inc., a car dealership in Clayton, North Carolina, which conducted business with NCVA. In an email dated February 14, 2011, Thomas represented to Matthews that Thomas would use Matthews' funds to conservatively invest in the "T-Bill/Treasury program," which would average 4% profitable returns. Thomas also told Matthews that Defendants had been successful in their prior investments and trading. Between December 2011 and August 2012,

Matthews made several investments totaling approximately \$595,000 with Thomas by wiring or providing funds to NCVA's bank account, which Thomas controlled, and with the expectation that Defendants would invest in T-Bills.

8. In or around December 2010, Thomas solicited his father-in-law, William Stone ("Stone"), to invest in Treasury Bills or "T-Bills" through Marbury. Thomas falsely represented to Stone that Defendants were successful in their prior business and trading activities and the funds would be used to invest in "safe" and "conservative" T-Bills. Between February 2011 and August 2011, Stone made several investments with Defendants and wired a total of approximately \$594,000 to the NCVA trust account controlled by Thomas.

9. However, Defendants never invested the customer funds in Treasury Bills or T-Bills. Instead, Defendants diverted customer funds by wiring the funds first to Marbury's bank account in the Cayman Islands and then to Marbury's futures trading account ending 0342 at Interactive. Defendants primarily traded 2-year Treasury Note futures and E-mini futures with these customers' funds in this account and ultimately lost their funds.

10. Defendants misrepresented to customers that their prior investments and trading activities were successful, when in fact, Defendants prior investment and trading activities were net unprofitable.

11. Defendants misrepresented to customers that they would use customer funds to invest T-Bills, when in fact, Defendants intended and did trade on-exchange commodity futures with the customers' funds.

12. Defendants never disclosed to these customers that their investments were used to trade on-exchange commodity futures.

13. During the Relevant Period, Defendants provided Stone and Matthews with false reports or statements indicating their investments were profitable in Treasury Bills or T-Bills. These false statements caused Stone and Matthews to make investments throughout the Relevant Period.

14. Defendants also attempted to conceal their fraudulent conduct from others. Thomas provided Fidelity Bank, the trustee of the NCVA trust account, with fabricated Interactive account statements showing investments in Treasury Bills when, in fact, no such accounts or investments existed. Thomas also falsely represented to Interactive that Marbury had no U.S. customers when, in fact, Defendants had transferred funds from U.S. resident customers (Stone and Matthews) to Marbury's account at Interactive.

15. At all times described herein, Thomas acted knowingly or recklessly when he made the above-referenced misrepresentations and omissions of material facts..

16. In total, Defendants used approximately \$1,189,000 from customers to engage in commodity futures trading on the Chicago Mercantile Exchange. Defendants returned \$78,587 to the defrauded customers. Customers' net losses proximately caused by Defendants are \$1,110,413. Defendants' net gain, therefore, was \$1,110,413.

## *II. Conclusions of Law*

### A. Jurisdiction and Venue

17. This Court has jurisdiction over this action pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1, which provides that whenever it shall appear to the CFTC that any 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 the Regulations, the CFTC may bring an action in the proper

district court of the United States against such person to enjoin such practice, or to enforce compliance with the Act, or any rule, regulation, or order thereunder.

18. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2012), because certain of the transactions, acts, practices, and courses of business occurred, are occurring, and/or are about to occur in this District, among other places.

B. Fraud by Misrepresentations and Omissions (Count I)

19. Sections 4b(a)(1)(A)-(C) of the Act, 7 U.S.C. § 6b(a)(1)(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 in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person (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 thereof; 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 the other person.

20. By the conduct described in paragraphs 1 through 16 above, Defendants, in connection with commodity futures transactions subject to the rules of a designated contract market and made for or on behalf of other persons, cheated and defrauded or attempted to cheat and defraud other persons, willfully made or caused to be made to other persons false reports or statements, and willfully deceived or attempted to deceive other persons by:

- a) Misrepresenting Defendants' prior investment and trading

successes which were actually net unprofitable;

b) Misrepresenting that Defendants would manage funds in a conservative manner by investing in T-Bills when Defendants intended and did trade on-exchange commodity futures; and

c) Failing to disclose: i) that Defendants misused customer funds to trade on-exchange commodity futures, ii) the substantial risks associated with futures trading, and iii) that Defendants lost customer funds through futures trading;

all in violation of Sections 4b(a)(1)(A)-(C) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)-(C).

21. Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and CFTC Regulation 1.2, 17 C.F.R. § 1.2 (2016), provide that the “act, omission, or failure of any official, agent, or other person acting for any [...] partnership [...] within the scope of his employment or office shall be deemed the act, omission, or failure of such [...] partnership ....” Strict liability is imposed upon principals for the actions of their agents acting within the scope of their employment. Because Thomas committed his fraudulent violations while acting as an official, employee or agent of Marbury acting within the scope of his employment or office, Defendant Marbury is also liable for Thomas’ violations of the Act 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.

22. CFTC’s Motion for Final Judgment by Default, Permanent Injunction, Civil Monetary Penalties, and Other Statutory and Equitable Relief against each Defendant is GRANTED, and pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, Defendants are permanently restrained, enjoined and prohibited from directly or indirectly:



- a. Cheating or defrauding or attempting to cheat or defraud other persons, willfully making or causing to be made to other persons any false report or statement or causing to be entered for other persons any false record, and/or willfully deceiving or attempting to deceive other persons by any means whatsoever, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made or to be made on or subject to the rules of a designated contract market, for or on behalf of any other person in violation of Sections 4b(a)(1)(A)-(C) of the Act, 7 U.S.C. § 6b(a)(1)(A)-(C).

23. Defendants are also permanently restrained, enjoined and prohibited from directly or indirectly:

- a. Trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012));
- b. Entering into any transactions involving "commodity interests" (as that term is defined in Regulation 1.3(yy), 17 C.F.R. § 1.3(yy) (2016)) for their personal account or for any account in which they have a direct or indirect interest;
- c. Having any commodity interests 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 interests;

- e. Soliciting, receiving or accepting any funds from any person for the purpose of purchasing or selling any commodity interests;
- 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) (2016); and/or
- g. Acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2016)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012)) 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).

24. Defendants shall pay restitution, jointly and severally, in the amount of \$1,110,413 (one million, one hundred ten thousand, four hundred thirteen dollars) plus post-judgment interest (the “Restitution Obligation”). Post-judgment interest shall accrue on the Restitution Obligation 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 (2012).

25. To effect payment of the Restitution Obligation and the distribution of any restitution payments to customers, the Court appoints the National Futures Association (“NFA”) as Monitor (“Monitor”). The Monitor shall collect restitution payments from

Defendants and make distributions as set forth below. Because the Monitor is acting as an officer of this Court in performing these services, the NFA shall not be liable for any action or inaction arising from NFA's appointment as Monitor, other than actions involving fraud.

26. Defendants shall make Restitution Obligation payments under this Order to the Monitor in the name "Tracy L. Thomas/Marbury Advisors Fund" and shall send such Restitution Obligation payments by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's, or bank money order, to the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606 under cover letter that identifies the paying Defendants and the name and docket number of this proceeding. Defendants shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

27. The Monitor shall oversee the Restitution Obligation and shall have the discretion to determine the manner of distribution of such funds in an equitable fashion to the defrauded customers identified by the CFTC or may defer distribution until such time as the Monitor deems appropriate. In the event that the amount of Restitution Obligation payments to the Monitor are of a *de minimis* nature such that the Monitor determines that the administrative cost of making a 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 CFTC following the instructions for civil monetary penalty payments set forth in below.

28. Defendants shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify customers to whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any Restitution Obligation payments. Defendants shall execute any documents necessary to release funds that Defendants have in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment toward the Restitution Obligation.

29. The Monitor shall provide the CFTC at the beginning of each calendar year with a report detailing the disbursement of funds to customers during the previous year. The Monitor shall transmit this report under a cover letter that identifies the name and docket number of this proceeding to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

30. To the extent that any funds accrue to the U.S. Treasury for satisfaction of Defendants' Restitution Obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth above.

31. Defendants shall pay, jointly and severally, a civil monetary penalty in the amount of \$3,331,239 (three million three hundred thirty-one thousand two hundred thirty nine dollars) plus post-judgment interest (the "CMP Obligation"), which represents triple the monetary gain of \$1,110,413 to Defendants. Post-judgment interest 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.

32. Defendants shall pay the CMP Obligation by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, Defendants shall make the payment payable to the Commodity Futures Trading Commission and send it to the following address:

Commodity Futures Trading Commission  
Division of Enforcement  
Attention: Accounts Receivables  
DOT/FAA/MMAC/AMZ-341  
CFTC/CPSC/SEC  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169  
Telephone: (405) 954-7262  
Fax: (405) 954-1620

If the payment is to be made by electronic funds transfer, Defendants shall contact Nikki Gibson or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Defendants shall accompany the payment of the CMP Obligation with a cover letter that identifies the payer, the name and docket number of this proceeding, and the name of the Court. Defendants shall simultaneously transmit copies of the cover letter and form of payment to: (a) the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21<sup>st</sup> Street, NW, Washington, DC 20581; and (b) the Chief, Office of Cooperative Enforcement, Division of Enforcement, 1155 21<sup>st</sup> Street, NW, Washington, D.C. 20581.

33. Partial Satisfaction: Acceptance by the CFTC of any partial payment of Defendants' Restitution Obligation or CMP Obligation shall not be deemed a waiver of their obligation to make further payments pursuant to this Order, or a waiver of the CFTC's right to seek to compel payment of any remaining balance.

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

Notice to the CFTC:

Manal Sultan, Deputy Director  
CFTC Division of Enforcement  
140 Broadway, 19th Floor  
New York, NY 10005

Notice NFA:

Daniel Driscoll, Vice President/COO  
National Futures Association  
300 S. Riverside Plaza, Suite 1800  
Chicago, IL 60606-3447

35. Change of Address/Phone: Until such time as Defendants satisfy in full the Restitution Obligation and CMP Obligation as set forth in this Order, Defendants shall provide written notice to the CFTC by certified mail of any change to their telephone number and mailing address within ten (10) calendar days of the change.

36. Invalidation: If any provision of this Order or if the application of any provision or circumstance is held invalid, then the remainder of this Order and the application of the provision to any other person or circumstance shall not be affected by the holding.

37. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this action to ensure compliance with this Order and for all other purposes related to this action, including any motion by Defendants to modify or for relief from the terms of this Order.

38. Injunctive and Equitable Relief Provisions: The injunctive and equitable relief provisions of this Order shall be binding upon Defendants, upon any person under the authority or control of any of the Defendants, and upon any person who receives actual notice

of this Order, by personal service, e-mail, facsimile or otherwise insofar as he or she is acting in active concert or participation with Defendants.

IT IS SO ORDERED.

This, the 11<sup>th</sup> day of April, 2017.

/s/ Loretta C. Biggs  
United States District Judge