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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

COMMODITY FUTURES TRADING)
COMMISSION,)

Plaintiff,)

v.)

WHITE PINE TRUST CORPORATION,)
a California corporation; RICHARD)
MATTHEWS, an individual; and)
STEPHAN BAERE, an individual,)

Defendants,)

LUCIA MATTHEWS, an individual,)
Relief Defendant.)

Civil No. 04cv2093 J (NLS)

**ORDER ENTERING DEFAULT
JUDGMENT AGAINST
DEFENDANT WHITE PINE TRUST
CORPORATION [DOC. NO. 210.]**

Before the Court is Plaintiff Commodity Futures Trading Commission (“Plaintiff CFTC”) Motion for Default Judgment against Defendant White Pine Trust Corporation (“Defendant WPT”). [Doc. No. 210.] Defendant has not filed an opposition to the Motion. After reviewing the submissions, the Court determined that the issues presented were appropriate for decision without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons discussed below, the Court **GRANTS** Plaintiff’s Motion for Default Judgment against Defendant White Pine Trust.

Background

1
2 WPT was a foreign currency trading firm operating out of San Diego, California. (See
3 First Amended Complaint (“FAC”) ¶ 1.) WPT was incorporated in July of 2000 in the state of
4 California. (See FAC ¶ 14.) Defendant Richard Matthews was the founder and Managing
5 Director of WPT. (See FAC ¶ 15.) Defendant Stephan Baere was the Director of Business
6 Development or Director of Client Development of WPT. (See FAC ¶ 16.) Plaintiff CFTC is an
7 independent federal regulatory agency charged with the responsibility of enforcing the
8 provisions of the Commodity Exchange Act (“the Act”) and regulations promulgated thereunder.
9 (See FAC ¶ 13.) Plaintiff asserts that “through direct solicitations and a web site, [D]efendants
10 have solicited retail customers to trade purported foreign currency contracts and foreign currency
11 options contracts.” (FAC ¶ 1.)

12 On both the WPT web site and in other solicitation materials for the Pinnacle Capital
13 Fund (“PCF”), Defendant boasted an eight-year cumulative performance record of 591% while
14 simultaneously guaranteeing that 75% of its customers’ investments are protected from loss each
15 month. (See FAC ¶ 24.) However, Defendant Matthews testified that the performance record
16 was fictitious. (See FAC ¶¶ 27-28.) WPT’s promotional materials also indicated that “your
17 account manager [is] at least on the same educational plateau as corporate treasurers and
18 international bankers.” (FAC ¶ 26.) Yet, Defendant Matthews testified that he knew little about
19 foreign currency trading. (See FAC ¶ 24.)

20 Plaintiff asserts that “in soliciting these customers purportedly to trade foreign currency
21 options on their behalf, first through direct solicitation materials and subsequently by referring
22 customers to its web site, [WPT] made the following misrepresentations of material facts:

- 23 a. All funds are separated and maintained in a “client funds account” and are not
24 commingled with White Pine’s operating accounts;
- 25 b. All customer accounts are held outside White Pine at regulated broker dealers;
- 26 c. White Pine has been in the business for eight years with a cumulative
27 performance record of 591%, covering the time period of 1995 to 2004; and
- 28 d. White Pine account managers have specialized expertise in trading foreign
currency options.

1 (FAC ¶ 31.) However, Plaintiff asserts that these statements were false, in that:

- 2 a. Customer funds are neither separated nor maintained in the clients' name;
3 rather, funds are deposited into operating accounts in White Pine's name or
4 otherwise commingled with other funds, where some funds are
5 misappropriated and used for business and personal expenses;
- 6 b. White Pine was not in existence in 1995-1999, since it was incorporated in
7 July 2000; and
- 8 c. Matthews had little knowledge of trading foreign currency options.

9 (FAC ¶ 32.)

10 WPT customers sent money directly to WPT either by wiring money to WPT's operating
11 accounts or through personal checks made out to WPT. (See FAC ¶ 34.) Plaintiff asserts that
12 WPT misappropriated customer funds by using the funds for purported business expenses and
13 personal purposes. (See FAC ¶ 3.) During the relevant period, Defendant solicited customers
14 with the opportunity to trade in options. (See FAC ¶ 35.) The promotion materials used by
15 WPT stated that "We also trade in FX options[,]” and explained how WPT uses options as a
16 hedging strategy purportedly to minimize the investment risk faced by prospective investors.
17 (See FAC ¶ 35.) Plaintiff asserts that the foreign currency options contract offered by WPT have
18 not been conducted or subject to the rules of a contract market or foreign board of trade, WPT
19 was not an appropriate counterparty under the Act, and customers solicited by WPT were not
20 eligible contract participants. (See FAC ¶ 36.)

21 On October 20, 2004, Plaintiff filed a Complaint against WPT and Richard Matthews,
22 alleging fraudulent activities in connection with foreign currency investments. [Doc. No. 1.]
23 Simultaneously, Plaintiff filed a Motion for Statutory Restraining Order, Expedited Discovery
24 and Appointment of Receiver, seeking primarily to freeze all assets associated with WPT. [Doc.
25 No. 4.] That same day, the Motion came on for *ex parte* hearing before Judge John A. Houston
26 and was granted the next day. [Doc. No. 11.] A preliminary injunction hearing was noticed for
27 and held on October 28, 2004. However, no one appeared on behalf of WPT. On November 2,
28 2004, Judge Houston extended the Restraining Order's provisions indefinitely by granting the
Preliminary Injunction. [Doc. No. 14.]

On November 19, 2004, the CFTC filed its FAC, adding Stephan Baere as a Defendant.
[Doc. No. 15.] On April 24, 2006, the Clerk of the Court entered default against WPT. [Doc.

1 No. 145.] Plaintiff now brings this Motion for the entry of default judgment against WPT
2 requesting a permanent injunction against WPT and ancillary relief in the form of restitution,
3 disgorgement, and civil monetary penalties. (*See* Pl.’s Mot. at 9.)

4 *Legal Standard*

5 Pursuant to Rule 55(b)(2), a court may enter default judgment when: (1) the defendant
6 has been served with the complaint and summons and has failed to respond within the time
7 prescribed, (2) default has been entered against the defendant, (3) the defendant is neither a
8 minor nor incompetent, and (4) the defendant is not in the military service. *See* Fed. R. Civ. P.
9 55(b)(2).

10 A default judgment is appropriate where the defendant “has received actual or
11 constructive notice of the filing of the action and failed to answer.” *Direct Mail Specialists, Inc.*
12 *v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 690 (9th Cir. 1988). Entry of default
13 judgment is at the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

14 Courts consider the following factors when deciding a plaintiff’s motion for entry of
15 default judgment:

16 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s substantive
17 claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the
18 action; (5) the possibility of a dispute concerning material facts; (6) whether the
default was due to excusable neglect, and (7) the strong policy underlying the Federal
Rules of Civil Procedure favoring decisions on the merits.

19 *Id.* at 1471-72. When evaluating the *Eitel* factors and assessing liability, the “ ‘factual
20 allegations of the complaint, except those relating to the amount of damages, [are] taken as true.’
21 ” *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) (quoting *Geddes v.*
22 *United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977)). A default judgment can be entered
23 without a hearing if the “amount claimed is a liquidated sum or capable of mathematical
24 calculation.” *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981). In assessing damages, the
25 court must review facts of record, requesting more information if necessary, to fix the amount to
26 which plaintiff is lawfully entitled. *Pope v. United States*, 323 U.S. 1, 12 (1944).

1 *Discussion*

2 Having examined Plaintiff's moving papers as well as the Complaint, the Court finds that
3 Plaintiff has met the threshold requirements for default judgment. *See* Fed. R. Civ. P. 55(b)(2).
4 Defendant has been timely served with the Complaint and has failed to respond within the time
5 prescribed. Plaintiff has secured a clerk's entry of default against Defendant. [Doc. No. 145.]
6 Finally, Defendant, a California corporation, is not a minor, incompetent, or in military service.
7 The Court now turns to the factors delineated in *Eitel* to determine whether to grant default
8 judgment.

9 **I. Analysis of the *Eitel* Factors**

10 **A. *Plaintiff Will Suffer Prejudice Without Entry of Default Judgment***

11 A plaintiff will suffer prejudice if, absent default judgment, the plaintiff would "be denied
12 the right to judicial resolution of the claims presented[] and would be without other recourse for
13 recovery." *Elektra Entm't Group Inc. v. Crawford*, 226 F.R.D. 388, 392 (C.D. Cal. 2005).
14 Here, absent default judgment, Plaintiff has no other recourse for recovery against WPT.
15 Defendant WPT has failed to take any action with respect to Plaintiff's complaint.
16 Consequently, the Court **FINDS** that denial of default judgment would be prejudicial to Plaintiff.

17 **B. *Plaintiff's Complaint Sufficiently Pleads and Substantiates Claims Upon Which***
18 ***Plaintiff May Recover***

19 Plaintiff's Complaint alleges violations of Section 4c(b) of the Act, 7 U.S.C. § 6c(b)
20 (2002), and Commission Regulations Sections 1.1, 32.9(a) and (c), and 32.11(a). (*See generally*
21 FAC ¶¶ 12-14.) In order for the Court to enter default judgment against Defendants, the
22 Complaint must state a claim upon which Plaintiff may recover. *See Cripps v. Life Ins. Co. of N.*
23 *Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992). Facts not established by the pleadings, or claims that
24 are not well-pleaded, are not binding and cannot support judgment. *See id.*

25 Pursuant to Section 6c(b), "[n]o person shall *offer* to enter into, enter into or confirm the
26 execution of, any transaction involving any commodity . . . commonly known to the trade as, an
27 'option' . . . contrary to any rule, regulation, or order of the Commission prohibiting any such
28 transaction 7 U.S.C. § 6c(b) (2000) (emphasis added). 17 C.F.R. Section 32.9 makes it

1 “unlawful for any person directly or indirectly” to cheat or defraud or attempt to cheat or defraud
2 “in or in connection with an offer to enter into, the entry into, or the confirmation of the
3 execution of, any commodity option transaction.” 17 C.F.R. § 32.9 (1994); *see also* 17 C.F.R. §
4 1.1 (2001). In order to establish liability for fraud under the Act, Plaintiff has the burden of
5 proving three elements: “(1) the making of a misrepresentation, misleading statement, or a
6 deceptive omission; (2) scienter; and (3) materiality.” *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d
7 1321, 1328 (11th Cir. 2002). “Failure to establish any one of these elements is dispositive and
8 would preclude” summary judgment on Plaintiff’s claims. *See id.* “In applying these elements
9 to the present case, [the Court] is guided by the principle that the [Commodity Exchange Act] is
10 a remedial statute that serves the crucial purpose of protecting the innocent individual
11 investor—who may know little about the intricacies and complexities of the commodities
12 market—from being misled or deceived.” *Id.* at 1329.

13 In determining whether a misrepresentation has been made, the Court should look at “the
14 ‘overall message’ and the ‘common understanding of the information conveyed.’ ” *Id.* at 1328.
15 Scienter may be established by showing that Defendant “intentionally violated the Act or acted
16 with ‘careless disregard’ of whether his actions violated the Act.” *CFTC v. Noble Metals Int’l,*
17 *Inc.*, 67 F.3d 766, 774 (9th Cir. 1995). However, “[m]ere negligence, mistake, or inadvertence
18 fails to meet” the scienter requirement. *Id.* (citing *Wasnick v. Refco, Inc.*, 911 F.2d 345, 348 (9th
19 Cir. 1990)). As stated by the Eleventh Circuit, “scienter is met when Defendant’s conduct
20 involves ‘highly unreasonable omissions or misrepresentations . . . that present a danger of
21 misleading which is either known to the Defendant or so obvious that Defendant must have been
22 aware of it.” *R.J. Fitzgerald & Co.*, 310 F.3d at 1328. Finally, a representation or omission is
23 material “if a reasonable investor would consider it important in deciding whether to make an
24 investment.” *Id.* at 1328-29 (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S.
25 128, 153-54 (1972)).

26 Here, Plaintiff pleads and substantiates a valid claim for fraud under the Act. As
27 described above, Plaintiff alleges that Defendant WPT made misrepresentations to customers
28 regarding the earning record and history of WPT, the education of WPT employees, and the

1 segregation of customer accounts. (See FAC ¶ 31.) Plaintiff has also alleged that such
2 statements were false. (See FAC ¶ 32.) Read for its “overall message” and how that message
3 would be interpreted by an objectively reasonable customer, such statements constitute
4 misrepresentations regarding WPT’s operations. Plaintiff has also adequately shown that WPT
5 possessed the requisite scienter. Plaintiff alleges that “in sworn testimony taken on January 29,
6 2004, before the Division of Enforcement for the [CFTC], Defendant Matthews unequivocally
7 admitted that White Pine’s performance record was fictitious.” (See FAC ¶ 27.) Plaintiff also
8 asserts that “Matthews . . . admitted he had little expertise in trading foreign currency and
9 explicitly denied the existence of any customers[,]” and “stated at least five times during his
10 testimony that White Pine was a fictitious company” (See FAC ¶ 27.) Plaintiff also asserts
11 that WPT misappropriated customer funds by using the funds for purported business expenses
12 and personal purposes rather than maintain them in segregated accounts and not commingled
13 with WPT operating funds. (See FAC ¶ 3.) Accordingly, Plaintiff has asserted that Defendant
14 made “highly unreasonable . . . misrepresentations . . . that present[ed] a danger of misleading
15 which [was] either known to the Defendant or so obvious that Defendant must have been aware
16 of it.” *R.J. Fitzgerald & Co.*, 310 F.3d at 1328.

17 Lastly, such misrepresentations were material. Misrepresentations regarding the
18 experience or profitability of a firm or account manager are material because historical success
19 and experience would be considered extremely important factors to a reasonable investor when
20 deciding to invest. See *CFTC v. Commonwealth Fin. Group, Inc.*, 874 F. Supp. 1345, 1353-54
21 (S.D. Fla. 1994); *CFTC v. J.S. Love & Assoc. Options, Ltd.*, 422 F. Supp. 652, 655 (S.D.N.Y.
22 1976); *CFTC v. Next Fin. Serv. Unltd.*, 2006 WL 889421 *4 (S.D. Fla. 2006).

23 Misrepresentations as to the earning record and history of WPT, the education of WPT
24 employees, and the segregation of customer accounts would weigh heavily on a reasonable
25 investor in deciding whether to invest and, in particular, whether to make an investment in a
26 potentially high risk market.

27 Plaintiff has also alleged a claim of vicarious liability on behalf of WPT for the acts of
28 Richard Matthews. Pursuant to Section 2(a)(1)(B), “[t]he act, omission, or failure of any

1 official, agent, or other person acting for any individual, association, partnership, corporation, or
 2 trust within the scope of his employment or office shall be deemed the act, omission, or failure
 3 of such individual, association, partnership, corporation, or trust, as well as of such official,
 4 agent, or other person.” 7 U.S.C. § 2(a)(1)(B) (2002). Accordingly, Plaintiff has adequately
 5 pleaded that WPT is vicariously liable for the acts of misappropriation and fraudulent
 6 solicitation by Defendant Matthews during the scope of his employment with WPT.

7 The Court, thus, **ENTERS** default judgment as to Plaintiff’s claim of fraudulent
 8 solicitation of customers and potential customers in violation of 7 U.S.C. § 6c(b) and 17 C.F.R.
 9 §§ 1.1, 32.9.

10 Plaintiff also pleads and substantiates a valid claim for a violation of Commission
 11 Regulation 32.11(a). Commission Regulation 32.11(a) read pursuant to Section 4c(b) of the Act,
 12 7 U.S.C. § 6c(b), makes it unlawful “for any person to solicit or accept orders for . . . the
 13 purchase or sale of any commodity option,” except for commodity option transactions conducted
 14 or executed on or subject to the rules of a contract market. 17 C.F.R. § 32.11(a). Pursuant to
 15 Section 2(c)(2)(B):

16 [T]he Commission shall have jurisdiction over, an agreement, contract, or transaction
 17 in foreign currency that--

18 (I) is a contract of sale of a commodity for future delivery (or an option on
 19 such a contract) or an option (other than an option executed or traded on a
 20 national securities exchange registered pursuant to section 6(a) of the
 21 Securities Exchange Act of 1934 [15 U.S.C. 78f(a)]); and

22 (ii) is offered to, or entered into with, a person that is not an eligible contract
 23 participant, [unless the counterparty is one of the six designated regulated
 24 entities]

25 7 U.S.C. § 2(c)(2)(B) (2002).

26 Here, Plaintiff alleges that “through written materials provided to customers and
 27 prospective customers, White Pine stated that “We also trade in FX options[,]” and explained
 28 how WPT uses options as a hedging strategy purportedly to minimize the investment risk faced
 by prospective investors. (See FAC ¶ 35.) Additionally, Plaintiff asserts that the foreign
 currency options contracts offered by WPT have not been conducted or subject to the rules of a
 contract market or foreign board of trade, WPT was not an appropriate counterparty under the

1 Act, and customers solicited by WPT were not eligible contract participants. (*See* FAC ¶ 36.)
2 Accordingly, the Court **ENTERS** default judgment as to Plaintiff's claim of a violation of
3 Regulation 32.11(a) since the alleged solicitation of options by Defendant were not conducted or
4 subject to the rules of a designated contract market or foreign board of trade.

5 **C. *The Sum of Money at Stake Is Not Unreasonable***

6 In determining the next *Eitel* factor, whether the sum of money at stake is reasonable, the
7 Court must consider the amount of money sought in relation to the seriousness of Defendant's
8 conduct. *See Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002). In
9 the instant case, Plaintiff seeks restitution and disgorgement in the amount of \$14,857,546.62,
10 which Plaintiff alleges was the amount of money misappropriated by Defendant. (*See* Pl.'s Mot.
11 at 10.) Given the alleged fraudulent conduct by Defendant, the amount requested is not
12 excessive because it would return customers to their financial state had Defendant not
13 fraudulently solicited their funds. Accordingly, the Court **FINDS** that the sum of money at stake
14 is not unreasonable.

15 **D. *There is No Dispute Concerning Material Facts***

16 Because Defendant did not appear in this action and did not respond to Plaintiff's
17 Complaint, there is nothing to suggest a possibility of dispute concerning material facts.
18 Defendant was properly served with the Complaint. However, Defendant has presented no
19 arguments or evidence opposing Plaintiff's allegations. Accordingly this Court **FINDS** that
20 there is no possibility of dispute concerning material facts.

21 **E. *There is No Evidence that Defendant's Default Was Due to Excusable***
22 ***Neglect***

23 In *Elektra*, the district court found no excusable neglect when a properly noticed
24 defendant did not answer the plaintiff's complaint. *See Elektra*, 226 F.R.D. at 393. As already
25 noted, Defendant received proper notice of the present action. Despite Plaintiff's service of the
26 Complaint on Defendant's registered agent, Defendant did not file an answer with the Court or
27 make an appearance. Accordingly, the Court **FINDS** no indication that entry of default was due
28 to excusable neglect.

1 **F. *A Decision on the Merits is Impractical Due to Defendant's Failure to Respond***

2 As a general rule, cases should be decided on the merits whenever reasonably possible.
3 *See PepsiCo, Inc.*, 238 F. Supp. 2d at 1177. However, “[w]hile the public policy favoring
4 disposition of cases on their merits weighs against default judgment, that single factor is not
5 enough to preclude imposition of this sanction when the other . . . factors weigh in its favor.”
6 *Rio Properties, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002). When a
7 defendant fails to answer a plaintiff’s complaint, it “makes a decision on the merits impractical,
8 if not impossible.” *PepsiCo.*, 238 F. Supp. 2d at 1177. Due to Defendant’s failure to appear in
9 this matter, and because the other *Eitel* factors weigh in Plaintiff’s favor, the Court **FINDS** a
10 decision on the merits is impractical.

11 **II. The Appropriateness of the Relief Sought**

12 Plaintiff seeks relief in the form of a permanent injunction against future violations of the
13 Act, restitution, disgorgement, and civil monetary penalties. A judgment by default shall not be
14 different in kind from or exceed the amount that prayed for in the demand for judgment. Fed. R.
15 Civ. P. 54(c). For the reasons discussed below, the Court **PERMANENTLY ENJOINS**
16 Defendant WPT from committing any future violations of the Commodity Exchange Act or the
17 Commission’s Regulations, either directly or indirectly; **AWARDS** restitution to investors in the
18 amount of \$14,857,546.62, less any amount already returned to these investors; and **ASSESSES**
19 a civil monetary penalty against Defendant WPT in the amount of \$14,857,546.62.

20 **A. *Permanent Injunction***

21 Plaintiff is seeking a permanent injunction enjoining Defendant WPT from committing
22 future violations of the Act and Regulations. (*See* Pl.’s Mot. at 22.) “Pursuant to [S]ection 6c of
23 the Commodity Exchange Act, 7 U.S.C. § 13a-1, the Commodity Futures Trading Commission
24 is authorized to institute an action seeking injunctive relief whenever it appears that any person
25 “has engaged, is engaging, or is about to engage in any act or practice constituting a violation of
26 any provision of this Act or any rule, regulation, or order thereunder.” *CFTC v. Hunt*, 591 F.2d
27 1211, 1219 (7th Cir. 1979). Accordingly, upon a proper showing, district courts have
28 jurisdiction to enter “a permanent or temporary injunction.” 7 U.S.C. § 13a-1(b). Once a

1 violation has been established, in order to establish that an injunction should be issued, the
2 moving party need only show a reasonable likelihood of future violations of the Act. *See id.* at
3 1220; *S.E.C. v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir. 2004). Factors to be considered by the
4 court in making this determination include: “the egregiousness of the defendant’s actions, the
5 isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the
6 defendant’s assurances against future violations, the defendant’s recognition of the wrongful
7 nature of his conduct, and the likelihood that the defendant’s occupation will present
8 opportunities for future violations.” *Ginsburg*, 362 F.3d at 1304; *Hunt*, 591 F.2d at 1219
9 (“When the violation has been founded on systematic wrongdoing, rather than an isolated
10 occurrence, a court should be more willing to enjoin future misconduct.”)

11 Here, Plaintiff alleges that WPT’s misrepresentations were part of a pervasive, systematic
12 scheme to fraudulently solicit customers. According to the Declaration of Brick Kane, WPT
13 misappropriated more than \$14.8 million. (*See Pl.’s Mot., Kane Decl.*) Based on Plaintiff’s
14 allegations, Defendant Matthews admitted to running a fictitious company and representing a
15 fictitious performance history. Additionally, there is no evidence before the Court that
16 Defendant WPT has made assurances against future violations. Accordingly, the Court
17 **PERMANENTLY ENJOINS** Defendant WPT from committing any future violations of the
18 Commodity Exchange Act or the Commission’s Regulations, either directly or indirectly. This
19 includes, but is not limited to, making misrepresentations during the solicitation or promotion in
20 connection with options.

21 **B. Restitution and Disgorgement of Profits**

22 Plaintiff seeks restitution in the amount of \$14,857,546.62, representing the amount
23 misappropriated by Defendant WPT. (*See Pl.’s Mot., Kane Decl.* at 6.) Courts have authority to
24 order restitution under the “ancillary relief” provision in 7 U.S.C. § 13a-1. *See CFTC v. Co*
25 *Petro Marketing Group, Inc.*, 680 F.2d 573, 583-84 (9th Cir. 1982). However, relief in the form
26 of restitution on behalf of customers generally requires a showing of reliance by the customer.
27 *See Rosenberg*, 85 F. Supp. 2d at 447 (finding that “customer reliance on the defendant’s
28 misrepresentation is not a necessary element of the CFTC’s case in an enforcement action, but is

1 essential to restitution relief sought to compensate the injured party”); *see also Carnegie Trading*
2 *Group, Ltd.*, 450 F. Supp. 2d at 806 (“[T]he Court will grant restitution only to those customers
3 who testified at trial that they were misled by [defendants] regarding profit potential and risk of
4 loss, that they relied on those misstatements and or omissions and lost money on the trades.”).
5 Although proof of reliance is generally required in order to obtain relief in the form of
6 restitution, the Ninth Circuit has held that in some enforcement cases of pervasive or widespread
7 misrepresentation, reliance may be presumed. *See FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605
8 (9th Cir. 1993) (finding reliance to be presumed based on the use of promotional materials, as
9 well as defendant’s failure to rebut the presumption). In *Figgie*, the Ninth Circuit stated that in
10 a case brought under the Federal Trade Commission Act a “presumption of actual reliance arises
11 once the Commission has proved that the defendant made material misrepresentations, that they
12 were widely disseminated, and that consumers purchased the defendant’s product.” *Id.*; *see also*
13 *Blackie v. Barrack*, 524 F.2d 891, 905-08 (9th Cir. 1975).

14 Here, no dispute has been made as to the systematic and pervasive nature of Defendant
15 WPT’s fraudulent activities. Plaintiff asserts that Defendant WPT made several material
16 misrepresentations, as described above, during the solicitation of customers through solicitation
17 materials and by referring customers to its web site. (*See* FAC ¶ 31.) Plaintiff alleges that “in
18 sworn testimony taken on January 29, 2004, before the Division of Enforcement for the [CFTC],
19 Defendant Matthews unequivocally admitted that White Pine’s performance record was
20 fictitious.” (FAC ¶ 27.) Plaintiff also asserts that “Matthews . . . admitted he had little expertise
21 in trading foreign currency and explicitly denied the existence of any customers[,]” and “stated
22 at least five times during his testimony that White Pine was a fictitious company” (FAC ¶
23 27.) Plaintiff also asserts that WPT misappropriated customer funds by using the funds for
24 purported business expenses and personal purposes rather than maintaining them in segregated
25 accounts and not commingled with WPT operating funds. (*See* FAC ¶ 3.) Additionally, as
26 described above, Plaintiff has adequately pleaded that WPT is vicariously liable for the acts of
27 misappropriation and fraudulent solicitation by Defendant Matthews during the scope of his
28 employment with WPT.

1 Plaintiff has provided the Declaration of Brick Kane, Deputy to the Receiver, which
2 states that the attached “accounting shows that the Corporate Defendant misappropriated
3 \$14,857,546.62.” (Pl.’s Mot., Kane Dec.) The attached accounting outlines the total amount
4 attributable to each customer as referenced by account numbers. (*See id.*, Kane Decl. at 1-6).
5 Accordingly, the Court **AWARDS** restitution to investors in the amount of \$14,857,546.62, less
6 any amount already returned to these investors. Investors shall be repaid in the amounts set forth
7 in the attachment to the Declaration of Brick Kane, which is incorporated by reference. (*See id.*,
8 Kane Decl. at 1-6). Post-judgment interest after the date of this Order until the restitution is paid
9 in full shall be paid at the post-judgment interest rate set forth in 28 U.S.C. § 1961. The above
10 ordered restitution obligation shall be reduced by any amounts recovered pursuant to other legal
11 proceedings or collateral agreements.

12 With respect to Plaintiff’s request for disgorgement, Plaintiff admits that “in this case
13 there is no showing that the Corporate Defendant used the vast majority of customer funds it
14 received to achieve profits, [and thus] there is no real difference between the amount of
15 disgorgement and restitution.” (Pl.’s Mot. at 19.) Here, Plaintiff seeks disgorgement in the
16 amount of \$14,857,546.62. Plaintiff states that this amount “is coterminous with the restitution
17 award, so that the amounts need only be paid once[,]” and “any payment made by . . . the
18 Corporate Defendant towards its restitution obligation will reduce the outstanding disgorgement
19 obligation by the same amount.” (*See id.* at 20.) Since an award by the Court of disgorgement is
20 coterminous with that of restitution, the Court **DENIES** Plaintiff’s request for relief in the form
21 of disgorgement as redundant.

22 **C. *Civil Monetary Penalties***

23 Plaintiff also seeks the imposition of civil monetary penalties on Defendant WPT.
24 Pursuant to 7 U.S.C. § 13a-1, “the court shall have jurisdiction to impose, on a proper showing,
25 on any person found in the action to have committed any violation a civil penalty in the amount
26 of not more than the higher of \$100,000 or triple the monetary gain to the person for each
27 violation.” 7 U.S.C. § 13a-1(d)(1). Specifically, Plaintiff seeks the imposition of civil monetary
28 penalties in the same amount as misappropriated by Defendant. Pursuant to Section 13a-1, the

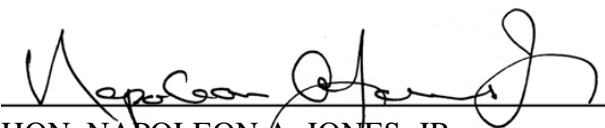
1 Court **FINDS** that the imposition of civil monetary penalties in the amount misappropriated by
2 Defendant WPT is an appropriate measure to deter the recurrence of such egregious conduct.
3 Accordingly, the Court **ASSESES** a civil monetary penalty against Defendant WPT in the
4 amount of \$14,857,546.62.

5 *Conclusion*

6 For the reasons set forth above, the Court **GRANTS** Plaintiff's Motion for Default
7 Judgment against Defendant White Pine Trust Corporation. Additionally, the Court
8 **PERMANENTLY ENJOINS** Defendant WPT from committing any future violations of the
9 Commodity Exchange Act or the Commission's Regulations, either directly or indirectly. The
10 Court **AWARDS** restitution to investors in the amount of \$14,857,546.62, less any amount
11 already returned to these investors. The Court **ORDERS** that such restitution obligation shall
12 be reduced by any amounts recovered pursuant to other legal proceedings or collateral
13 agreements. Lastly, the Court **ASSESES** a civil monetary penalty against Defendant WPT in
14 the amount of \$14,857,546.62. All sums collected from Defendant WPT pursuant to this Order
15 shall be applied first to Defendant's restitution obligation and then to the civil monetary penalty
16 once the restitution has been satisfied.

17
18 **IT IS SO ORDERED.**

19
20 DATED: April 20, 2007

21 
22 HON. NAPOLEON A. JONES, JR.
United States District Judge

23 cc: Magistrate Judge Stormes
24 All Counsel of Record
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