IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. JAMES FREDERICK WALSH, Defendant.	§ § § § § § § § § §	1:20-CV-725-RP

ORDER

Before the Court is Plaintiff Commodity Futures Trading Commission's (the "CFTC") Motion for Default Judgment. (Dkt. 19). Having considered the CFTC's motion, the record, and the relevant law, the Court finds that the motion should be granted.

I. BACKGROUND

The CFTC alleges the following facts in its complaint. (Dkt. 1). From at least September 2019 through at least October 22, 2020, Defendant James Frederick Walsh ("Walsh") fraudulently solicited members of the public for the purported purpose of trading off-exchange leveraged or margined retail foreign currency ("forex") on their behalf. (*See* Compl., Dkt. 1, at 4–15). Through a series of false representations, Walsh fraudulently marketed himself as a highly successfully forex trader who generated for his clients "average monthly returns of 8% -11%" or "a flat 3% guaranteed profit each month." (*Id.*). Walsh knowingly omitted material facts in his communications with prospective clients, including that: (1) he had no U.S.-based forex trading accounts and was not listed on any U.S.-based forex trading account as holding discretionary trading authority on behalf of the account holder(s); (2) despite marketing himself as a commodity trading advisor ("CTA") he had failed to register as a CTA as required under the Commodities Exchange Act ("CEA") and therefore was not authorized to lawfully trade forex on behalf of U.S. clients; (3) he was operating an unlawful

business venture because he was not registered to act as a CTA; (4) no CTA can minimize or control the risks associated with trading forex, or guarantee profitable trading; and (5) the Texas State Securities Board ("SSB") had issued him a cease and desist letter due to his fraudulent solicitations and failure to register. (*Id.* at ¶¶ 19, 26, 32, 56).

The CFTC served Walsh on October 14, 2020 through alternative means of service authorized by the Court, but Walsh has not appeared. (*See* Order, Dkt. 6; Dkt. 7). The Clerk of the Court entered default against Walsh on November 9, 2020, (Dkt. 15), and the CFTC now moves for default judgment against him. (Dkt. 19). Walsh has not appeared; the CFTC's motion is unopposed.

II. LEGAL STANDARD AND DISCUSSION

Under Rule 55 of the Federal Rules of Civil Procedure, federal courts have the authority to enter a default judgment against a defendant that has failed to plead or otherwise defend itself. Fed. R. Civ. P. 55(a)–(b). That said, "[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations." *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989). A party is not entitled to a default judgment simply because the defendant is in default. *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996). Rather, a default judgment is generally committed to the discretion of the district court. *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977).

In considering the CFTC's motion, the Court must determine: (1) whether default judgment is procedurally warranted, (2) whether the CFTC complaint sets forth facts sufficient to establish that it is entitled to relief, and (3) what form of relief, if any, the CFTC should receive. *United States v. 1998 Freightliner Vin #: 1FUYCZYB3WP886986*, 548 F. Supp. 2d 381, 384 (W.D. Tex. 2008); *see also J & J Sports Prods., Inc. v. Morelia Mexican Rest., Inc.*, 126 F. Supp. 3d 809, 813 (N.D. Tex. 2015) (using the same framework).

A. Procedural Requirements

To determine whether entry of a default judgment is procedurally warranted, district courts in the Fifth Circuit consider six factors: "[1] whether material issues of fact are at issue, [2] whether there has been substantial prejudice, [3] whether the grounds for default are clearly established, [4] whether the default was caused by a good faith mistake or excusable neglect, [5] the harshness of a default judgment, and [6] whether the court would think itself obliged to set aside the default on the defendant's motion." *Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998).

On balance, the *Lindsey* factors weigh in favor of entering a default judgment against Walsh. Because Walsh has not filed a responsive pleading, there are no material facts in dispute. *See Nishimatsu Const. Co., Ltd. v. Hous. Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("The defendant, by his default, admits the plaintiff's well-pleaded allegations of fact."). Walsh's failure to appear and respond has ground the adversary process to a halt, prejudicing the CFTC's interest in pursuing its claim for relief. *See J & J Sports*, 126 F. Supp. 3d at 814 ("Defendants' failure to respond threatens to bring the adversary process to a halt, effectively prejudicing Plaintiff's interests.") (citation and quotation marks omitted). The grounds for default are established: Walsh was properly served and has failed to appear and participate at all, much less timely file a responsive pleading. There is no indication that the default was caused by a good faith mistake or excusable neglect. Although a default judgment in this case is not insignificant—the CFTC seeks a permanent injunction and over $500,000 as a civil monetary penalty under the CEA—the Court is not aware of any facts that would obligate it to set aside the default if challenged by Walsh. The Court therefore finds that default judgment is procedurally warranted.

B. Sufficiency of the CFTC's Complaint

Default judgment is proper only if the well-pleaded factual allegations in the CFTC's complaint establish a valid cause of action. *Nishimatsu Constr. Co.*, 515 F.2d at 1206. By defaulting, a

defendant "admits the plaintiff's well-pleaded allegations of fact." *Id.* In determining whether factual allegations are sufficient to support a default judgment, the Fifth Circuit employs the same analysis used to determine sufficiency under Rule 8. *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 498 (5th Cir. 2015). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The factual allegations in the complaint need only "be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Wooten*, 788 F.3d at 498 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While "detailed factual allegations" are not required, the pleading must present "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The CFTC asserts that Walsh violated certain antifraud and registration provisions of the CEA, 7 U.S.C. § 1 et seq., and CFTC Regulations, 17 C.F.R. pts. 1−190 (2019). First, it is unlawful under the CEA for any person "to cheat or defraud or attempt to cheat or defraud" another person in connection with a commodity futures contract, CEA § 4b(a)(2)(A), 7 U.S.C. § 6b(a)(2)(A) (2018); or "willfully to deceive or attempt to deceive the other person" in connection with such a commodity futures contract or order, or in acting as an agent for such commodity futures contracts or orders, CEA § 4b(a)(2)(C), 7 U.S.C. § 6b(a)(2)(C) (2018); *see also* CFTC Regulations 5.2(b)(1) and (3), 17 C.F.R. § 5.2(b)(1), (3) (fraud in retail forex transactions). "'In order to establish liability for fraud, [the] CFTC ha[s] 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. Kratville*, 796 F.3d 873, 891 (8th Cir. 2015) (quoting *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002) (citations omitted)). "Whether a misrepresentation has been made depends on the overall message and the common understanding of the information conveyed." *R.J. Fitzgerald*, 310 F.3d at 1328 (internal quotation marks omitted). In a CFTC civil enforcement action, "scienter is

met when [the d]efendant's conduct involves highly unreasonable omissions or misrepresentations that present a danger of misleading customers which is either known to the [d]efendant or so obvious that [the d]efendant must have been aware of it." *Id.* (internal quotation marks and alterations omitted). A stated or omitted fact is material if "there is a substantial likelihood that a reasonable investor would consider the information important in making a decision to invest." *R&W Tech. Servs. Ltd. v. CFTC*, 205 F.3d 165, 169 (5th Cir. 2000).

The CFTC alleges that Walsh violated 7 U.S.C. § 6b(a)(2)(A) and (C) by both attempting to cheat or defraud other persons and willfully attempting to deceive other persons in connection with the offering of off-exchange leveraged or margined forex transactions with non-eligible contract participants ("ECPs"). (Compl., Dkt. 1, at 4–5; Mot. Default, Dkt. 19, at 6). Further, the CFTC has alleged that Walsh made material misrepresentations and omissions knowingly or with reckless disregard for the truth to induce people to give him money. (Compl., Dkt. 1, at 4–5; Mot. Default, Dkt. 19, at 6). The CFTC has alleged that these misrepresentations and omissions are material because they relate to the kind of information that enables prospective clients to independently assess the risk inherent in forex trading and the likelihood of profit. (Mot. Default, Dkt. 19, at 8) (citing *CFTC v. Driver*, 877 F. Supp. 2d 968, 977 (C.D. Cal. 2012)).

Additionally, a CTA is any person who "for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in futures contracts." *R&W Tech. Servs.*, 205 F.3d at 174 (quoting 7 U.S.C. § 1a(5)(a)(12) (2018)) (alteration omitted). With certain exemptions and exclusions not applicable here, all CTAs must register with the CFTC. *See* CEA §§ 4m(1) and 2(c)(2)(C)(iii)(I)(bb), 7 U.S.C. §§ 6m(1), 2(c)(2)(C)(iii)(I)(bb) (2018). The CFTC has alleged that Walsh operated as a CTA in that he, for compensation, engaged in the business of advising others as

to the value or the advisability of trading forex, including with individuals who are not eligible contract participants. (Compl., Dkt. 1, at ¶¶ 68−69).

Further, the CEA § 4*o*(1), 7 U.S.C. § 6*o*(1) (2018), in pertinent part, prohibits CTAs from using the means or instrumentalities of interstate commerce to: (A) employ any device, scheme, or artifice to defraud any client or prospective client; or (B) engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. The CFTC has alleged that Walsh used email, the telephone, text messages, and the internet to defraud prospective forex trading clients. (Compl., Dkt. 1, at ¶¶ 75−76).

The CFTC has supported these allegations with a declaration from a CFTC Futures Trading Investigator, documentation of communications from Walsh, and transcripts of calls with Walsh. (Dkts. 19-1, 19-2, at 19-3). These allegations are enough to raise the CTFC's right to relief above a speculative level. *Wooten*, 788 F.3d at 498. Default judgment is substantively warranted.

C. Relief

Federal Rule of Civil Procedure 54(c) states that "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c). In other words, the relief prayed for in a complaint defines the scope of relief available on default judgment. *Id.* In its complaint, the CFTC seeks a permanent injunction and civil monetary penalty under the CEA. (Compl., Dkt. 1, at 20–23).

The CEA authorizes the CFTC to obtain a statutory injunction against any person whenever it appears that such person "has engaged, is engaging, or is about to engage in any act or practice constituting a violation of" any provision of the CEA or CFTC Regulations. CEA § 6c, 7 U.S.C. § 13a–1 (2018); *see U.S. CFTC v. Rice*, 498 F. App'x 462, 465 (5th Cir. 2012). The CFTC in civil enforcement "actions for a statutory injunction . . . need not prove irreparable injury or the inadequacy of other remedies as required in private injunctive suits." *CFTC v. Muller*, 570 F.2d 1296,

1300 (5th Cir. 1978). Rather, the CFTC is entitled to injunctive relief upon a showing of illegality, *id.*, and a "reasonable likelihood" of future violations, *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979).

As discussed above, the CFTC has sufficiently alleged that Walsh violated the CEA and CFTC Regulations and that there is a reasonable likelihood that Walsh will continue to violate the CEA and CFTC Regulations unless enjoined by this Court. Courts have used the defendant's past unlawful conduct to assess whether there is a reasonable likelihood of future violations. *See, e.g.*, *CFTC v. Shakespeare Guardian Futures, Inc.*, No. A-09 Civ. 260 (SS), 2010 WL 11506667, at *6 (W.D. Tex. Mar. 17, 2010) (quoting *Hunt*, 591 F.2d at 1220). Indeed, past violations of the CEA have been found to be "highly suggestive of the likelihood of future violations." *Shakespeare Guardian Futures*, 2010 WL 11506667, at *6 (quoting *Hunt*, 591 F.2d at 1220); *see also CFTC v. Crown Colony Commodity Options, Ltd.*, 434 F. Supp. 911, 919 (S.D.N.Y. 1977) ("[P]ast actions speak louder than . . . present words."). Moreover, courts "should be more willing to enjoin future misconduct" when the past misconduct constitutes "systematic wrongdoing rather than an isolated occurrence." *Hunt*, 591 F.2d at 1220.

Here, the CFTC has sufficiently alleged that Walsh systematically violated the CEA and continued to fraudulently solicit clients while unregistered even after receipt of a cease and desist letter from the Texas SSB. The CFTC has sufficiently demonstrated that there is a strong likelihood that Walsh will continue to violate the CEA and CFTC Regulations unless enjoined by this Court. Accordingly, the Court will permanently enjoin Walsh from further violations of the CEA or CFTC regulations.

Additionally, the CEA authorizes the Court to impose, on any person found to have violated the CEA, a civil monetary penalty in an amount not more than the greater of $185,242 per violation or triple the defendant's monetary gain for each violation. See 7 U.S.C. § 13a−1(d)(1)(A) (2018) and

17 C.F.R. § 143.8(b)(1) (2018). The Court may "fashion a civil monetary penalty appropriate to the gravity of [the defendant's] offenses and sufficient to act as a deterrent." *Miller v. CFTC*, 197 F.3d 1227, 1236 (9th Cir. 1999). In determining civil monetary penalties, courts consider the nature of the violation, whether scienter was present, the consequences of the violation, the financial benefit to the defendant, and the harm to clients. *See CFTC v. Am. Bullion Exch. ABEX Corp.*, No. 8:10 Civ. 1876, 2014 WL 3896023, at *18 (C.D. Cal. Aug. 7, 2014) (citing *CFTC v. Arrington*, 998 F. Supp. 2d 847, 875 (D. Neb. 2014)). "The Court is free to fashion a civil monetary penalty appropriate to the gravity of the offense and sufficient to act as a deterrent." *CFTC v. Cloud*, No. H-10 Civ. 706, 2011 WL 1157530, at *12 (S.D. Tex. Mar. 24, 2011).

The CFTC requests a civil monetary penalty of $555,726—the statutory maximum amount of $185,242 for each of the three counts in the CFTC's complaint. The CFTC argues that such "a penalty is within the Court's statutory authority to impose, will protect the CFTC's regulatory scheme and the integrity of the markets, and will send a clear message to Walsh and to others who may be contemplating similar schemes." (Mot. Default, Dkt. 19, at 11) (citing *Cloud*, 2011 WL 1157530, at *12 (imposing statutory maximum for each customer defrauded by Defendants); *CFTC v. Millennium Trading Grp., Inc.*, No. 07 Civ. 11626, 2007 WL 2639474, at *13−14 (E.D. Mich. Sept.6, 2007) (same)). Because Walsh was so blatant in his fraudulent conduct and to serve as a future deterrent, the Court orders Walsh to pay the statutory maximum for each of the three counts pleaded in the complaint, for a total of $555,726.

III. CONCLUSION

Accordingly, **IT IS ORDERED** that the CFTC's Motion for Default Judgment, (Dkt. 19), is **GRANTED**.

The Court will enter final judgment in a separate order.

SIGNED on May 24, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE