UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** **v.** **TOTAL CALL GROUP, INC., a Delaware corporation a/k/a TPFX, INC. a/k/a POWER PLAY FX; CRAIG B. POE, an individual; and THOMAS PATRICK THURMOND a/k/a Patrick Thurmond, an individual,** **Defendants.**	**CASE NO. 4:10-cv-00513-RAS -DDB**

FINAL DEFAULT JUDGMENT, PERMANENT INJUNCTION, CIVIL MONETARY PENALTY, AND ANCILLARY EQUITABLE RELIEF AGAINST ALL DEFENDANTS

On September 29, 2010, Plaintiff United States Commodity Futures Trading Commission ("CFTC" or "Commission") filed its Complaint for Injunctive Relief, Civil Monetary Penalties, and Other Equitable Relief ("Complaint") [D.E. 1] against the Defendants, Total Call Group, Inc., a.k.a. TPFX, Inc., a.k.a. Power Play FX ("Total Call Group"), Craig B. Poe ("Poe"), and Thomas Patrick Thurmond, a.k.a. Patrick Thurmond ("Thurmond"), (collectively the "Defendants").

The Complaint alleged that, between early 2006 and October 2008, the Defendants solicited and accepted at least $808,000 from at least four members of the general public (collectively the "Customers") for the purpose of trading off-exchange foreign currency contracts

("forex"). The Complaint further alleged that, from September through December 2008, Poe, acting individually and as an agent of Total Call Group, willfully made, and caused to be made, a total of at least twenty-five false reports and statements to at least three of Total Call Group's customers. As a result of this conduct, the Complaint alleged that Poe committed violations of Section 4b(a)(2)(A)-(C) of the Commodity Exchange Act (the "Act"), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 ("CRA")), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C). The Complaint also alleged that Total Call Group was liable as a principal for Poe's conduct pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2010). The Complaint went on to allege that Poe and Thurmond controlled Total Call Group and did not act in good faith or knowingly induced, directly or indirectly, Total Call Group's conduct alleged in this Complaint. As a result, the Complaint alleged that Poe and Thurmond were liable pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2006), for Total Call Group's violations of Sections 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A)-(C). The Complaint sought, *inter alia*, injunctive relief, disgorgement, restitution, and civil monetary penalties from the Defendants.

Total Call Group and Poe were served on October 9, 2010, and their respective Answers were due on or before November 1, 2010. [D.E. 11-12]. As of this date, neither Total Call Group nor Poe has filed or served an Answer. Thurmond was served on October 12, 2010, and his Answer was due on or before November 2, 2010. [D.E. 15]. Thurmond has not filed or served an Answer.

On March 23, 2011, the Commission, pursuant to Fed. R. Civ. P. 55(a), filed its Request for Clerk's Entry of Default against Total Call Group, Poe and Thurmond. [D.E. 18]. A Clerk's Entry of Default was subsequently entered on March 24, 2011. [D.E. 19].

The Commission also filed a Motion for Entry of Default Judgment, Permanent Injunction, Civil Monetary Penalty, and Ancillary Relief against the Defendants ("Motion") pursuant to Fed. R. Civ. P. 55(b)(2). [D.E. 17]. The court held a hearing on the Motion on May 17, 2011 and the Commission presented evidence and argument to support the Motion. At the hearing, the Commission admitted into evidence the trading account statements from July 2008 through November 2008 from Forex Capital Markets that reflected the trading losses sustained by Total Call Group, declarations of three of the customers of Total Call Group and twenty-four account statements that were sent to these three customers by Total Call Group, which the Commission demonstrated to be false through a comparison of these account statements to the trading account statements from Forex Capital Markets.[1]

The court has considered carefully the Complaint, the allegations of which are well-pleaded and hereby taken as true, the Motion, and the evidence and argument presented at the hearing on May 17, 2011, and being fully advised in the premises, hereby:

GRANTS the Commission's Motion and enters the following findings of fact and conclusions of law finding the Defendants liable as to all violations as alleged in the Complaint. Accordingly, the court now issues the following Order for Entry of Default Judgment, Permanent Injunction, Civil Monetary Penalty, and Ancillary Equitable Relief Against All Defendants ("Order"), which determines that the Defendants have violated Section 4b(a)(2)(A)-(C) of the

[1] At the hearing, the Commission presented evidence of twenty-four false statements and informed the Court that it was not going to seek to hold the Defendants liable for an account statement sent on November 3, 2008.

Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C) and imposes on the Defendants a permanent injunction, registration and trading bans, and civil monetary penalties.

I. FINDINGS OF FACT

A. Parties

The **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, as amended, to be codified at 7 U.S.C. §§ 1 *et seq.*, and the Commission Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2010). The Commission maintains its principal office at Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

Total Call Group, Inc. a.k.a. TPFX, Inc. a.k.a. Power Play FX is a Delaware corporation with its principal place of business at 5404 Golden Sunset Court, Frisco, Texas 75034. Total Call Group is engaged in the business of soliciting and accepting funds from investors for the purpose of entering into agreements, contracts or transactions in forex on behalf of Total Call Group's investors. Total Call Group has never been registered with the Commission. Total Call Group is not a financial institution, registered broker dealer, insurance company, bank holding company, investment bank holding company, or the associated person of any such entity.

Craig B. Poe resides in Frisco, Texas 75034. Poe has never been registered with the Commission. During the relevant period, Poe was a principal of Total Call Group.

Thomas Patrick Thurmond, a.k.a. Patrick Thurmond, resides in San Antonio, Texas. Thurmond has never been registered with the Commission. During the relevant period, Thurmond was a principal of Total Call Group.

B. The Defendants' Fraudulent Scheme

Beginning in at least early 2006 and continuing up until October 2008, the Defendants solicited approximately $808,000 from at least four customers, $10,000 of which was solicited after June 18, 2008, to trade forex. The Defendants deposited and/or pooled approximately $800,000 of these funds into three forex trading accounts held by the Defendants in the name of "Total Call Group, Poe B. Craig" at Forex Capital Markets, LLC ("FXCM"). The Defendants also deposited an additional $26,000, the source of which is unknown, into the FXCM trading accounts.

In soliciting these funds, Thurmond made false representations to one or more of Total Call Group's Customers. For instance, Thurmond falsely stated that Poe had been trading forex and living off the income for over four years. Poe's prior forex trading history reveals, however, that from at least January 2005 through October 2005, Poe did not maintain any domestic forex trading accounts and that, from November 2005 through June 2006, Poe traded a total of only $18,000 in forex and sustained losses and incurred trading fees of more than $17,000. Thurmond also falsely represented that he and Poe had personally provided over $1 million to Total Call Group. From January 2005 through December 2008, Poe and Thurmond provided Total Call Group with, at most, a total of less than $45,000.

The Customers provided funds to the Defendants for the express purpose of trading forex and the Customers and the Defendants agreed to share the profits from the Defendants' forex trading. In communications to Total Call Group's Customers, the Defendants referred to the Defendants' share of the profits as the "Performance Fee" or the "Fees to Trader."

From July 2007 through July 2008, the Defendants withdrew approximately $129,000 from the trading accounts, which amounts were purportedly equal in part to what the Defendants

were entitled to take as profits or fees under the terms of their agreements with the customers. The Defendants, however, were not entitled to at least some of these funds because the profits reported to the Customers, which were used to calculate the Defendants' fees or share of the profits, were false. During this time period, the Defendants also remitted funds from the trading accounts totaling approximately $144,000 to the Customers.

At the end of August 2008, the Defendants sustained trading losses and incurred trading fees amounting to approximately 90% of the then current balance of the trading accounts. However, the Defendants did not report these substantial losses to the Customers. Rather, in late September 2008, the Defendants continued to promote the profitability of trading and solicited additional funds from the Customers. In response, one customer provided an additional $10,000 to trade forex in October 2008, $6,500 of which was deposited into the FXCM trading accounts, the remaining $3,500 of which remains unaccounted for.

In September, October and November 2008, Defendants traded and lost almost all of the remaining funds in the trading accounts. On November 13, 2008, FXCM wire transferred the remaining balance of approximately $1,000 to Poe. In sum, from early 2007 through November 2008, the Defendants sustained trading losses and incurred trading fees totaling approximately $552,000 trading forex. Almost all of these losses and fees were incurred during the period from August through November 2008.

Despite these losses, beginning in at least July 2007 and continuing through December 2008, Poe sent account statements to customers which were false. These statements sometimes overstated profits or understated losses from trading and at other times failed to disclose unrealized or floating losses from open trades.

In September, October, November, and December 2008, Poe sent at least twenty-four account statements to at least three customers, which falsely reported purported profits and/or failed to disclose losses from trading and the Customers' respective balances in the forex trading accounts. Several of the false statements, which were sent to the Customers after the trading accounts were fully liquidated on November 13, 2008, collectively reflect a positive balance of over $750,000 in Total Call Group's forex trading accounts. For instance, Poe sent statements to three customers for the week ending December 12, 2008 which showed that, during the period from December 5 through December 12, 2008, the first customer sustained a loss of approximately $1,230 and had a balance of over $587,000, the second customer sustained a loss of approximately $117 and had a balance of over $66,000, and the third customer sustained a loss of approximately $42 and had a balance of over $101,000 in the trading accounts. In fact, 1) there were no trading losses during the week ending December 12, 2008 because there was no trading activity during that week; 2) the balances reported were false because all of the funds had been withdrawn on November 13, 2008; and 3) the collective balance in the trading accounts was $0.

The Customers relied on Defendants' representations and omissions in the false account statements in making their decisions to provide funds to Defendants to trade forex.

In late December 2008, after receiving requests for redemptions from at least two customers, Poe informed at least three of the customers that all of the money in the trading accounts had been lost. At that time, Poe acknowledged that: (i) statements he sent out to customers in late 2008 were incorrect; (ii) prior statements sent to customers, which failed to reflect the unrealized or floating losses from open trades, were inaccurate; (iii) he tried to hide bad trades; and (iv) what he did was not right.

During the relevant period, neither the Defendants nor FXCM, which was the counterparty to the forex transactions entered into by the Defendants on behalf of the Customers, were financial institutions, registered broker dealers, insurance companies, bank holding companies, or investment bank holding companies or the associated persons of any of these types of entities.

Total Call Group, as well as at least three of the four customers who provided funds to the Defendants, were not "eligible contract participants" as that term is defined in the Act. *See* Section 1a(12)(A)(v) of the Act, 7 U.S.C. § 1a(12)(A)(v) (2006) and Section 1a(12)(A)(xi) of the Act, 7 U.S.C. § 1a(12)(A)(xi) (2006) (an "eligible contract participant," as relevant here, is "a corporation . . . that has total assets exceeding $10,000,000 . . . ." or an individual with total assets in excess of (i) $10 million, or (ii) $5 million and who enters the transaction "to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual").

The Defendants traded foreign currency on a margined or leveraged basis in the trading accounts containing customer funds. The foreign currency transactions conducted by the Defendants neither resulted in delivery within two days nor created an enforceable obligation to deliver between a seller and a buyer that had the ability to deliver and accept delivery, respectively, in connection with their lines of business. Rather, these foreign currency contracts remained open from day to day and ultimately were offset without anyone making or taking delivery of actual currency (or facing an obligation to do so).

At all material times, Poe and Thurmond were the sole principals of Total Call Group and together were responsible for all of the corporation's acts. Poe was responsible for trading forex and sending account statements to customers, while Thurmond was responsible for soliciting

customers. Thurmond had the ability to examine the trading account records at FXCM and compare that data to the information reported in the false account statements sent to customers by Poe. Thus, Thurmond knew, consciously avoided learning, or acted recklessly in failing to learn that the customer account statements sent by Poe contained false information.

II. CONCLUSIONS OF LAW

Under Fed. R. Civ. P. 55(a), a default is entered when "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . ." Fed. R. Civ. P. 55(a). "A default occurs when a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules," and an "entry of default is what the clerk enters when the default is established by affidavit or otherwise." *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996). "After defendant's default has been entered, plaintiff may apply for a judgment based on such default. This is a default judgment." *Id.*

Fed. R. Civ. P. 55(b) provides that judgment by default may be entered by a district court. Fed. R. Civ. P. 55(b)(2). "Where a party fails to respond, after notice the court is ordinarily justified in entering a judgment against the defaulting party." *Natures Way Marine, LLC v. North American Materials, Inc.*, No. 08-0005-WS-B, 2008 WL 801702, at *2 (S.D. Ala. Mar. 24, 2008) (emphasis omitted) (quoting *F.T.C. v. 1263523 Ontario, Inc.*, 205 F. Supp. 2d 205, 208 (S.D.N.Y. 2002)). Further, the clerk's entry of default causes all well-pleaded allegations of facts to be deemed admitted. *J & J Sports Prods., Inc. v. Papania*, No. 09-1754, 2010 WL 1191807, at *2 (W.D. La. Mar. 26, 2010). Thus, if a district court determines that a defendant is in default, then the factual allegations in the complaint, except those relating to the amount of damages, will be taken as true. *See Sampson v. Brewer, Michaels & Kane, LLC*, No. 6:09-cv-2114-Orl-31DAB, 2010 WL 2432084, at *1 (M.D. Fla. May 26, 2010) ("[t]he effect of the entry of a

default is that all of the factual allegations in the Complaint are taken as true, save for the amount of unspecified damages. Thus, if liability is well-plead in the complaint, it is established by the entry of a default.") (citing *Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987)). Moreover, "[i]t is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly." *Pope v. United States*, 323 U.S. 1, 12 (1944).

In this matter, a Clerk's Entry of Default has been entered against Total Call Group, Poe and Thurmond pursuant to the Commission's Request. [D.E. 19]. As such, in accordance with Fed. R. Civ. P. 55(b)(2), the allegations in the Complaint [D.E. 1] will be taken as true and a default judgment is hereby entered against the Defendants.

A. Jurisdiction

The court has jurisdiction over the conduct and transactions at issue in this case pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), and Section 2(c)(2) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2). Section 6c(a)of the Act authorizes the Commission to seek injunctive 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 any provision of the Act or any rule, regulation, or order thereunder.

Venue properly lies with the court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1 (2006), in that the Defendants transacted business in the Eastern District of Texas, and the acts and practices in violation of the Act occurred within this District, among other places.

B. The Commodity Exchange Act

In analyzing the Commission's Motion, the court is mindful that a crucial purpose of the Act is "protecting the innocent individual investor – who may know little about the intricacies and complexities of the commodities market – from being misled or deceived." *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1329 (11th Cir. 2002). "*[C]aveat emptor* has no place in the realm of federal commodities fraud. Congress, the Commission, and the Judiciary have determined that customers must be zealously protected from deceptive statements by brokers who deal in these highly complex and inherently risky financial instruments." *Id.* at 1334.

C. Violation of Section 4b(a)(2)(A)-(C) of the Act, as Amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C)

Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C), makes 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 for future delivery, or other agreement, contract, or transaction subject to paragraphs (1) and (2) of section 5a(g), that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market – (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 or willfully to enter or cause to be entered for the other person any false record; [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 or, in the case of paragraph (2), with the other person.

Defendant Poe, through the issuance of false account statements, violated Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C).

D. Defendant Poe Violated Section 4b(a)(2)(B) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(B)

Poe violated Section 4b(a)(2)(B) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(B), by knowingly providing false account statements to the Customers. The account statements falsely stated the profits, losses, and balances in the Customers' accounts. Poe admitted to the Customers that the account statements he created and sent to the Customers were false and that he intended to mislead the Customers into believing that their forex trading was profitable when it was not profitable.

Delivering, or causing the delivery of, false account statements to customers relating to forex trades (or other transactions regulated by the Commission) constitutes a violation of Section 4b(a)(2)(B) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(B). *See, e.g., CFTC v. Weinberg*, 287 F. Supp. 2d 1100, 1107 (C.D. Cal. 2003) (false and misleading statements as to the amount and location of investors' money violated Section 4b(a) of the Act); *CFTC v. Noble Wealth Data Info. Servs., Inc.*, 90 F. Supp. 2d 676, 685-87 (D. Md. 2000), *aff'd sub nom. CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002) (defendants violated Section 4b(a) of the Act through the delivery of false account statements); *CFTC v. Skorupskas*, 605 F. Supp. 923, 932-33 (E.D. Mich. 1985) (finding that defendant violated Section 4b(a) by issuing false monthly statements to customers). By Poe's own admission, Defendant Poe issued false account statements and thereby violated Section 4b(a)(2)(B) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(B).

E. Defendant Poe Violated Section 4b(a)(2)(A) and (C) of the Act as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A) and (C)

The false account statements provided to the Customers also constitute fraud by misrepresentation in violation of Section 4b(a)(2)(A) and (C) of the Act, as amended by the

CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A) and (C). To establish that Defendant Poe violated Section 4b(a)(2)(A) and (C), as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A) and (C), through misrepresentations, the Commission must prove that: (1) a misrepresentation was made; (2) with scienter; and (3) the misrepresentation was material. *R.J. Fitzgerald & Co.*, 310 F. 3d at 1328. All three elements are present in this case, therefore, Defendant Poe violated Section 4b(a)(2)(A) and (C) of the Act.

1. Poe Made Misrepresentations to Customers

Poe admitted to the Customers that he made misrepresentations by issuing false account statements. Account statements issued to Total Call Group's Customers misrepresented the profits, losses and Customers' account balances. *See CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 447 (D. N.J. 2000) (finding that defendant made material misrepresentations through the reporting of erroneous account balances, among other activities).

2. Poe Acted with Scienter

Poe acted with scienter. The scienter element is established when a defendant "intended to defraud, manipulate, or deceive, or if Defendant's conduct represents an extreme departure from the standards of ordinary care." *R.J. Fitzgerald & Co.*, 310 F.3d at 1328; *see also Wasnick v. Refco, Inc.*, 911 F.2d. 345, 348 (9th Cir. 1990) (citation omitted) (holding that scienter is established if the person's acts are performed "with knowledge of their nature and character"). Thus, the Commission must demonstrate only that a defendant's actions involve "highly unreasonable omissions or misrepresentations . . . that present a danger of misleading [customers] which is either known to the Defendant or so obvious that Defendant must have been aware of it." *R.J. Fitzgerald & Co.*, 310 F.3d at 1328; *see also Hammond v. Smith Barney, Harris Upham & Company, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,617 (CFTC Mar. 1, 1990) (scienter requires proof that a defendant committed the alleged

wrongful acts "intentionally or with reckless disregard for [his] duties under the Act"); *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988) (holding that recklessness is sufficient to satisfy Section 4b's scienter requirement and that a reckless act "is one that departs so far from the standards of ordinary care that it is very difficult to believe the [actor] was not aware of what he was doing.") (quoting *First Commodity Corp. v. CFTC*, 676 F.2d 1, 7 (1st Cir. 1982)).

At the end of August 2008, the Defendants sustained trading losses and incurred trading fees amounting to approximately 90% of the then current balance of the trading accounts. In September, October and November 2008, the Defendants traded and lost almost all of the remaining funds in the trading accounts. However, the Defendants did not report these substantial losses to the Customers. Rather, Poe sent out false account statements from September through December 2008 to Total Call Group's Customers, and he admitted sending false account statements to at least three of the Customers in late December 2008. Clearly, Poe had the requisite scienter.

3. Poe's Misrepresentations were Material

A statement 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 Technical Serv. Ltd. v. CFTC*, 205 F.3d 165, 169 (5th Cir. 2000); *see R.J. Fitzgerald & Co.*, 310 F.3d at 1328-1329; *Rosenberg*, 85 F. Supp. 2d at 447. Any fact that enables customers to assess independently the risk inherent in their investment and the likelihood of profit is a material fact. *CFTC v. Matrix Trading Group, Inc.*, No. 00-8880-Civ., 2002 WL 31936799, at *6 (S.D. Fla. Oct. 3, 2002); *see also SEC v. Mut. Benefits Corp.*, No. 04-60573-CIV-Merano/Garber, 2004 U.S. Dist. LEXIS 23008, at *59 (S.D. Fla. Nov. 10, 2004) (holding that a fact is "material" if a reasonable person would attach importance to the fact misrepresented or omitted in determining

his course of action); *Saxe v. E.F. Hutton & Co., Inc.*, 789 F.2d 105, 110 (2d Cir. 1986) ("'material misrepresentations about the nature of the organization handling [an] account, the people [dealt] with, and the type of trading [the] funds were used for' would be sufficient to state a cause of action pursuant to the [Act]"); *CFTC v. Commonwealth Fin. Group, Inc.*, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994) (holding that misrepresentations regarding the trading record of a firm or broker are fraudulent because past success and experience are material factors that a reasonable investor would consider when deciding to invest); *CFTC v. U.S. Metals Depository Co.*, 468 F.Supp. 1149, 1159 (S.D.N.Y. 1979) (holding that unreasonable predictions of profits constitute material misrepresentations and omissions).

From September to December 2008, Poe created and sent account statements that misrepresented the trading profits and losses and the beginning and ending monthly account values. The true value of a trading account is perhaps the single most important factor in making ongoing determinations as to whether to maintain or discontinue particular trading activity. It is beyond doubt that a reasonable customer would want to know the true value of his or her account, and that his or her account was losing money despite claims to the contrary. Lying about the value of the Customers' accounts was a material misrepresentation.

F. Total Call Group is Liable Under Section 2(a)(1)(B) of the Act , 7 U.S.C. § 2(a)(1)(B) and Commission Regulation 1.2, 17 C.F.R. § 1.2

Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Commission Regulation ("Regulation") 1.2, 17 C.F.R. § 1.2 (2010), provide that the "act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person." Under Section 2(a)(1)(B) of the Act and Regulation 1.2, strict liability is

imposed upon principals for the actions of their agents acting within the scope of their employment. *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986); *Dohmen-Ramirez and Wellington Advisory, Inc. v. CFTC*, 837 F.2d 847, 857-58 (9th Cir. 1988). The fraud of Poe as described above occurred within the course and scope of his employment at Total Call Group. Therefore, Total Call Group is liable for Poe's conduct pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2010).

G. Poe and Thurmond are Liable Under Section 13(b) of the Act, 7 U.S.C. § 13c(b)

Poe and Thurmond are controlling persons of Total Call Group and are therefore liable for Total Call Group's violations of the Act pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2006). Section 13(b) of the Act provides that a defendant who possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of an entity may be liable as a controlling person of that entity, provided that the defendant either knowingly induces, directly or indirectly, the violative acts or fails to act in good faith. *Monieson v. CFTC*, 996 F.2d 852, 858-860 (7th Cir. 1993); *R.J. Fitzgerald & Co.*, 310 F.3d at 1334. "This provision is construed to include individuals, associations, partnerships, corporations and trusts that exercise control over persons who violate the Act and fail to act in good faith." *CFTC v. Johnson*, 408 F. Supp. 2d 259, 269 (S.D. Tex. 2005). Indeed, "[a] fundamental purpose of Section 13(b) is to allow the Commission to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the Act directly on such individuals as well as on the corporation itself." *R.J. Fitzgerald & Co.*, 310 F.3d at 1334, quoting *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1567 (11th Cir. 1995).

"Control[ling] person liability will attach if such a person possessed the power or ability to control the specific transaction or activity upon which the primary violation was predicated,

even if such power was not exercised." *Monieson*, 996 at 859 (quoting *Donohoe v. Consolidated Operating & Production Corp.*, 982 F.2d 1130, 1138 (7th Cir. 1992)). Indeed, Congress has contemplated that even the chairperson of the board of a large conglomerate could be liable pursuant to Section 13(b), 7 U.S.C. § 13c(b). *Monieson,* 996 at 859 (citing H.R. REP. NO. 565, Part I, 97th Cong., 2d Sess. 142 (1982)). The statute is "remedial, to be construed liberally, and requir[es] only some indirect means of discipline or influence short of actual direction to hold a control[ling] person liable." *Monieson*, 996 at 859 (quoting *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 880-881 (7th Cir. 1992)).

Pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), the Commission "has the burden here of establishing that 'the controlling person did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation.'" *JCC, Inc. v. CFTC*, 63 F.3d at 1567. Knowing inducement requires a showing that "the controlling person had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue." *R.J. Fitzgerald & Co.*, 310 F.3d at 1334; *JCC, Inc.*, 63 F.3d at 1568; *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103 at 34,767 (CFTC Jan. 12, 1988). Controlling persons cannot avoid liability by deliberately or recklessly avoiding knowledge about potential wrongdoing. *See Monieson*, 996 at 861. Indeed, constructive knowledge of wrongdoing is sufficient for a finding of knowing inducement. *See JCC, Inc. v. CFTC*, 63 F.3d at 1568-1569. To support a finding of constructive knowledge, the Commission must show that a defendant "lacked actual knowledge only because he consciously avoided it." *Id*. at 1569 (citations omitted). A controlling person fails to act in good faith if he does not "maintain a reasonably adequate system of internal supervision and control…or [does] not enforce with any reasonable diligence such system." *Monieson*, 996 F.2d at 860. "The

controlling person must also act recklessly; negligence alone is not sufficient." *Id.* (citations omitted).

At all material times, Poe and Thurmond were the sole principals of Total Call Group and together were responsible for all of the corporation's acts. Poe was responsible for trading forex and sending account statements to customers, while Thurmond was responsible for soliciting customers. Poe had actual knowledge of the acts that constituted the violations of the Act. Poe admitted that he defrauded the Customers by creating and sending the false account statements. Thurmond had the ability to examine the trading account records at FXCM and compare that data to the information reported in the false account statements sent to customers by Poe. Thus, Thurmond knew, consciously avoided learning, or acted recklessly in failing to learn that the customer account statements sent by Poe contained false information. Poe and Thurmond thus had the requisite control of Total Call Group and knowingly induced, direct or indirectly, the violative acts or did not act in good faith. Poe and Thurmond, therefore, are liable for Total Call Group's violations of the Act pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2006).

H. <u>There is a Reasonable Likelihood of Continued Misconduct by the Defendants</u>

In addition to a violation of the Act, to be entitled to permanent injunctive relief, the Commission must also make "a proper showing" that there is a "reasonable likelihood that the defendant is engaged or about to engage in practices that violate" the Act. *SEC v. First Fin. Group of Texas*, 645 F.2d 429, 434 (5th Cir. 1981) (citing *Aaron v. SEC*, 446 U.S. 680, 699 (1980); *SEC v. Mize*, 615 F.2d 1046, 1051 (5th Cir. 1980); *SEC v. Savoy Indust., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978)). Showing whether a defendant is "about to engage" in violations of the Act "is usually made with proof of past substantive violations that indicate a reasonable likelihood of future substantive violations." *Id.* (citing *Savoy Indust.*, 587 F.2d, at 1168).

The Defendants' repeated violations of the Act indicate a likelihood of continued violations absent a permanent injunction. The Defendants began soliciting customers to trade in forex between early 2006 and October 2008. From September through December 2008, Poe sent out at least twenty-four false account statements. Thurmond, as a controlling person of Total Call Group, knowingly induced, directly or indirectly, the distribution of these false statements or did not act in good faith. This conduct presents a "reasonable likelihood" of future violations.

III. REMEDIES

A. Permanent Injunction Against Defendants

Pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), the CFTC has made a showing that the Defendants have engaged in acts and practices which violated Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C). Unless restrained and enjoined by this court, there is a reasonable likelihood that the Defendants will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of the Act. Based on the conduct described above, the court enters an injunction against the Defendants permanently restraining, enjoining, and prohibiting them from directly or indirectly:

1. Engaging in conduct that violates Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010), §§ 701-774, 124 Stat. 1376 (enacted July 21, 2010), to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C);
2. Engaging in any activity involving :

(a) trading on or subject to the rules of any registered entity (as that term is defined in Section 1a of the Act, as amended, to be codified at 7 U.S.C. § 1a);

(b) entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2011)), ("commodity options"), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i)) ("forex contracts") for their own personal account or for any account in which they have a direct or indirect interest;

(c) having any commodity futures, options on commodity futures, commodity options, and/or forex contracts 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 futures, options on commodity futures, commodity options, and/or forex contracts;

(e) soliciting, receiving, or accepting any funds from any person for purposes of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;

(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) (2010); and

(g) acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2010)), agent, officer or employee of any person (as that term is defined in Section 1a of the Act, as amended, to be codified at 7 U.S.C. §1a) 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) (2010).

B. Civil Monetary Penalties

Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1) (2006), provides that "the [CFTC] may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation [of the Act] a civil penalty." For the time period at issue in the case at bar, the maximum civil monetary penalty ("CMP") that may be ordered is $140,000 for each violation of the Act, as amended by the CRA, committed on or after October 23, 2008, and $130,000 for each violation committed before October 23, 2008, or triple the monetary gain to the Defendants. *See* Regulation 143.8(a)(1)(iii)-(iv), 17 C.F.R. § 143.8(a)(1)(iii)-(iv) (2010). Here, there were 12 false statements sent before October 23, 2008 and 12 false statements sent after October 23, 2008. Accordingly, the maximum CMP that the court may order against each individual Defendant is $3.24 million (12 x $130,000 + 12 x $140,000). *See CFTC v. Levy*, 541 F.3d 1102 (11th Cir. Fla. 2008) (holding that the CFTC may allege multiple violations in a single count and that the maximum civil monetary penalty calculation is dependent on the number of violations alleged and proved).

The Commission is free to fashion a civil monetary penalty appropriate to the gravity of the offense and sufficient to act as a deterrent. *See Miller v. CFTC*, 197 F.3d 1227, 1236 (9th

Cir. 1999). "In determining how extensive the fine for violations of the Act ought to be, courts and the Commission have focused upon the nature of the violations." *Noble Wealth*, 90 F. Supp. 2d at 694. In this regard, the Commission has stated that:

> Civil monetary penalties serve a number of purposes. These penalties signify the importance of particular provisions of the Act and the Commission's rules, and act to vindicate these provisions in individual cases, particularly where the respondent has committed violations intentionally. Civil monetary penalties are also exemplary; they remind both the recipient of the penalty and other persons subject to the Act that noncompliance carries a cost. To effect this exemplary purpose, that cost must not be too low or potential violators may be encouraged to engage in illegal conduct.

CFTC v. Emerald Worldwide Holdings, Inc., 2005 WL 1130588 *11 (C.D. Cal. 2005) (citing *In re GNP Commodities, Inc.* [1990-92 Transfer Binder] Com. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (CFTC Aug. 11,1992) (citations omitted)).

This case warrants imposition of a substantial CMP against the Defendants. *See CFTC v. United Investors Group, Inc.*, 440 F. Supp. 2d 1345, 1361 (S.D. Fla. 2006) (determining that, among other things, "the gravity of the offenses, the brazen and intentional nature of the violations, [and] the vulnerability of the victims" justified "imposition of a substantial and meaningful CMP"). Beginning in 2006 and continuing until October 2008, the Defendants solicited and accepted at least $808,000 from the Customers for the purpose of trading forex. From September through December 2008, Poe sent the Customers at least twenty-four (24) account statements representing that the Customers were making profits trading forex, with 12 of these false statements occurring before October 23, 2008 and 12 occurring after October 23, 2008. Thurmond failed to maintain an adequate system of internal supervision and control to prevent Poe from sending these false statements to Customers.

Conduct that violates the core provisions of the Act, such as customer fraud, should be considered extremely serious. *JCC, Inc.*, 63 F.3d at 1571. In *JCC, Inc.*, the U.S. Court of

Appeals for the Eleventh Circuit upheld the district court order imposing a civil monetary penalty, finding that "[c]onduct that violates the core provisions of the Act's regulatory system – such as manipulating prices or defrauding customers should be considered very serious even if there are mitigating facts and circumstances." *Id.* at 1571-72 (emphasis omitted). In the case at hand, there are no mitigating facts or circumstances. Instead, the fraudulent conduct was blatant.

The Commission has respectfully urged this court to impose a serious and significant sanction and order Defendants to pay a substantial monetary penalty and the court will do so accordingly. The court orders that Defendant Poe pay a CMP of $3.24 million, that Defendant Thurmond pay a CMP of $1.62 million and that Defendant Total Call Group be held jointly and severally liable for these amounts.

The Defendants shall pay their respective CMPs within ten (10) days of the date of entry of this Order (the "CMP Obligation"). Should Defendants not satisfy their CMP Obligation within ten (10) days of the date of entry of this Order, post-judgment interest shall accrue on the CMP 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 this Order pursuant to 28 U.S.C. § 1961.

Defendants shall pay their CMP Obligation by electronic funds transfer, or by U.S. Postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
Attn: Marie Bateman – AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, Oklahoma 73169
Telephone: 405-954-6569

If payment is to be made by electronic funds transfer, Defendant shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Defendant shall accompany payment of the penalty with a cover letter that identifies the paying Defendant and the name and docket number of the proceedings. The Defendant shall simultaneously transmit copies of the cover letter and the form of payment to the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581, and the Chief, Office of Cooperative Enforcement, Division of Enforcement, at the same address.

C. Miscellaneous Provisions

Equitable Relief: The injunctive and equitable relief provisions of this Order shall be binding upon the Defendants and upon any persons who are acting in the capacity of agent, officer, employee, servant, attorney, successor and/or assign of any of the Defendants, and upon any person acting in active concert or participation with any of the Defendants who receives actual notice of this Order by personal service or otherwise.

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

Director of Enforcement
Commodity Futures Trading Commission
Division of Enforcement
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581.

Continuing Jurisdiction of this court: This court shall retain jurisdiction of this case to assure compliance with this Order and for all other purposes related to this action.

SIGNED this the 30th day of March, 2012.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE