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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. DAREN L. PALMER and TRIGON Group, INC., Defendant.	CIVIL ACTION NO.: CV-09-76-E- EJL **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DAREN L. PALMER**

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff, U.S. Commodity Futures Trading Commission ("Commission"), submits this Memorandum in Support of its Motion for Summary Judgment against Daren L. Palmer ("Palmer"). As set forth below, the undisputed facts prove that Palmer violated the antifraud provisions of the Commodity Exchange Act (the "Act") by operating a Ponzi scheme. The undisputed facts also demonstrate that Defendant Palmer violated the Act by operating as an unregistered Commodity Pool Operator ("CPO"). Accordingly, the Commission is entitled to summary judgment as a matter of law.

I. INTRODUCTION

Plaintiff Commission filed this action on February 26, 2009, charging that since at least September 2000, Defendant Daren L. Palmer violated, and unless enjoined, will continue to violate the anti-fraud provisions of Sections 4b(a)(2) and 4o(1) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 6(b)(a)(2) and 6o(1) (2006), and Section 4b(a)(1) of the Act as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act ("CRA")), § 13102, 122 Stat. 1651 (effective June 18, 2008), to be codified at 7 U.S.C. § 6(b)(a)(1), by fraudulently operating a commodity pool, misappropriating pool participant funds, and running a Ponzi scheme. Palmer recruited pool participants through material misrepresentations and omissions to facilitate the trading of stock index futures. Palmer also failed to register as a CPO, violating the registration provisions of Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2006). The Commission is seeking to enjoin such conduct by an order of permanent injunction, and other relief, including civil monetary penalties and disgorgement.

In his Answer to the Commission's Complaint, and again during the course of discovery, Palmer asserted his Fifth Amendment right against self-incrimination in response to the Commission's allegations and direct questions posed under oath. See generally, Docket Entry

("DE") # 9; Palmer Testimony attached as Exhibit 7 ("Ex. 7"). The Court should draw an adverse inference from Palmer's invocation of the Fifth Amendment in response to the Commission's questions and substantive allegations against him. Moreover, the attached declarations, documentary evidence, and Palmer's own sworn testimony before the Director of the Department of Finance of the State of Idaho prior to the filing of the Commission's Complaint establish the undisputed facts set forth below, which entitle the Commission to summary judgment as a matter of law.

II. STATEMENT OF UNDISPUTED FACTS

A. THE DEFENDANTS

1. **Defendant Daren L. Palmer** is an individual who resides in Idaho Falls, Idaho. See Investigative Testimony of Daren L. Palmer before the Director of the Department of Finance of the State of Idaho, attached as Exhibit 1 ("Ex. 1") at 4. Palmer attended Ricks College in Rexburg, Idaho, for two years, received a Finance degree from the University of Utah in 1995, and then worked as a financial representative at American General, a finance company. Id. at 8-9, 58. Palmer was the founder and President of Trigon Group, Inc. Id. at 10-11. Palmer has never been registered with the Commission as a Commodity Pool Operator ("CPO") or in any other capacity. See Declaration of George Malas, attached as Exhibit 3 ("Ex. 3").

2. **Defendant Trigon Group, Inc. ("Trigon")** is a Nevada corporation operating out of Idaho Falls, Idaho. See Articles of Incorporation, attached as Exhibit 2 ("Ex. 2") at 6. Trigon, through Palmer, was held out to be an investment business that traded in both futures and options on futures for clients, generating high annual returns of approximately 20-25% per year. Declaration of Stephen Crandall attached as Exhibit 4 ("Ex. 4") at ¶3; Declaration of Reed

Raymond attached as Exhibit 5 ("Ex. 5") at 2; Declaration of Bruce Jones attached as Exhibit 6 ("Ex. 6") at 2. Trigon has never been registered with the Commission as a CPO or in any other capacity. Ex. 3.

B. BACKGROUND

3. Palmer formed a corporation named Trigon in the state of Nevada with his father, Dean Palmer, in 1997. See Ex. 1 at 9. Palmer and his father organized this corporation for Palmer to facilitate his trading of stock index futures. Ex. 1 at 10. By his own admission, Palmer traded both futures and options on futures through his corporation, Trigon. Ex. 1 at 24. Since at least September 2000, Palmer, through Trigon, has solicited, accepted, or received funds for participation in a commodity pool from at least 55 pool participants in transactions amounting to over $68 million. Ex.7 (Palmer) at 26-32, 100; Declaration of Jay Lane Butler attached as Exhibit 8 ("Ex. 8"); at 4; Declaration of Kevin Taggart attached as Exhibit 9 ("Ex. 9") at ¶¶3, 6; Declaration of David K. Swenson attached as Exhibit 10 ("Ex. 10") at ¶8; Declaration of Darryl Harris attached as Exhibit 11 ("Ex. 11") at ¶5; Declaration of David Taylor attached as Exhibit 12 ("Ex. 12") at ¶¶4-5, 9; Declaration of Jack Larsen attached as Exhibit 13 ("Ex. 13") at ¶4; Declaration of Paul Ramsey attached as Exhibit 14 ("Ex. 14") at ¶7; see generally Declaration of R. Wayne Klein, Receiver, attached as Exhibit 15 ("Ex. 15").

4. Palmer used a number of commodity futures trading accounts to trade pool funds. Since at least January 2004, Palmer controlled commodity futures trading accounts in the name of Trigon at Rosenthal Collins Group LLC ("Rosenthal Collins"), a Futures Commission Merchant ("FCM") registered with the CFTC. See Declaration of Mary Kaminski, attached as Exhibit 16 ("Ex. 16") at ¶ 7. The accounts are introduced by Global Futures Exchange and Trading Co., an Introducing Broker ("IB") registered with the CFTC. Id. Between August 1998

and June 2002, Trigon held an account at MF Global, an FCM registered with the CFTC. The accounts are introduced by PTI, an IB registered with the CFTC. The MF Global Trigon account was funded with $65,000. Ex. 16 at ¶8. Between December 2001 and May 2001, Palmer opened two commodity trading accounts at Refco, an FCM registered with the CFTC, titled Trigon. The accounts were introduced to Refco by Global. Id. at ¶9. On or about September 2003, Palmer opened a commodity trading account in the name of Trigon at National Commodities Corporation Inc. ("NCCI"), an FCM registered with the CFTC. The account was introduced by Whitworth and Sullivan, an IB registered with the CFTC. Id. at ¶10.

C. PALMER'S MISREPRESENTATIONS

5. Palmer told pool participants that their funds would be combined and used for trading commodity futures and their guaranteed returns were based on the profitability of the Defendant's trading. Ex.14 at ¶5; Ex. 11 at ¶5; Ex. 10 at ¶5; Ex. 12 at ¶4; Ex. 13 at ¶4; Ex. 8 at ¶3. Palmer verbally guaranteed some pool participants as much as a 20% per annum rate of return. Ex. 11 at ¶3; Ex. 8 at ¶3; Ex. 13 at ¶4; Ex. 10 at ¶5. In fact, Palmer told some pool participants that he had been generating annual returns of 20 percent or greater for more than 12 years. Ex. 1 at 33, Ex. 8 at ¶3; Ex. 9 at ¶4; Ex. 10 at ¶7; Ex. 11 at ¶5; Ex. 12 at ¶6; Ex. 13 at ¶4.

6. Palmer told pool participants that he would retain a portion of the generated profits, when in fact Palmer paid his personal credit card bills and salary with flat monthly fees ranging between $25,000 and $35,000 per month (over $5.8 million total), regardless of the profitability of Trigon's futures trading. Ex. 1 at 71, 72, 99; Ex.9 at ¶4; Promissory Notes attached as Exhibit 17, ("Ex. 17"); Declaration of R. Wayne Klein, Receiver, attached as Exhibit 15 ("Ex. 15") at ¶16. Palmer also used pool funds for the construction of a new home (over $9 million). Ex. 15 at ¶16; see also Check Registry attached as Exhibit 18 ("Ex. 18").

7. Although Palmer led pool participants to believe that all money given to Palmer and Trigon would be invested through Trigon, Palmer used over $360,000 of pool participant money to charter private planes and more than $980,000 for business expenses. Ex. 15 at ¶16. Additionally, Palmer gave over $2.6 million to close family members. Ex. 15 at ¶16.

8. Through manufactured account statements sent to pool participants, Palmer made the false representation that, over time, the pool and customer accounts were increasing in value to a total of almost $60 million by June 2008, when Palmer's trading accounts in fact contained approximately $1 million. Ex. 16 at ¶14.

9. Despite taking in at least $68 million in participant funds since September 2000, Palmer only placed $4.5 million in the Trigon accounts at Rosenthal Collins and one other FCM between January 2004 and the present. Ex. 15 at ¶14; Ex. 16 at ¶¶2, 14. Of all of the money given to Palmer by pool participants, approximately $6.8 million total was deposited into trading accounts, approximately 10% of the total amount received from pool participants. See Initial Report by Wayne Klein Receiver (Docket Entry # 8) at ¶17.

10. Although Palmer did earn money in some of his trading accounts, commissions and fees paid to those who assisted Palmer in trading coupled with the costs of the trading services exceeded any profits actually earned from trading. DE #8 at ¶17.

11. Palmer told pool participants that he was licensed to sell securities when in fact he was never registered or licensed to do so. Ex. 1 at 51-52; Ex. 9 at ¶5. Palmer did not disclose to pool participants that neither he nor Trigon was registered with the National Futures Association or the CFTC in any capacity. Ex. 1 at 51-52; see Exhibit 3 at ¶4.

12. Palmer acknowledged most of the investment monies he received with a Promissory Note that he signed either as an individual or as the President of Trigon. Ex. 1 at 32; Ex. 17.

13. The Notes generally stated that Palmer owed the investor principal plus interest of 20 to 25 percent annually. Ex. 17. In some instances, the notes stated that the investor would be paid with interest "at the rate per performance from Trigon." Id.

14. If Palmer did not issue a Note, he verbally promised payment of 20 percent returns or greater per year. Ex. 6 at ¶9; Ex. 11 at ¶5.

D. THE END OF PALMER'S SCHEME

15. On December 15, 2008, Palmer told a group of pool participants that he had lost virtually all of the pool participants' funds due to the downturn in the market. Ex. 6 at ¶¶17, 18; Ex. 12 at ¶12; Ex. 8 at ¶9; Ex. 9 at ¶¶ 11, 12.

16. In or around January 2009, Palmer admitted to pool participants that he had lost or expended all funds and had been running a Ponzi scheme for many years. Ex. 1 at 47; Ex. 9 at ¶¶11-13; Ex. 12 at ¶13.

17. Although Palmer provided some pool participants with statements showing trading profits, and made payments to pool participants, the payments were actually made from the principal investments of later pool participants. Ex. 1 at 35, 66; Ex. 10 at ¶9; Ex. 14 at ¶8.

18. Palmer gave the last $500,000 of pool participant funds to several individuals who purported to be lenders and/or investors from Dubai. The Dubai-based lenders and/or investors scammed Palmer in what appears to be an advance fee scam. Ex. 1 at 90-92.

19. Pool participants gave Palmer over $68 million, more than $49 million of which was used to pay phony returns to other pool participants. Ex. 15 at ¶14; Ex. 1 at 46-48.

20. Palmer admitted to owing pool participants $35-45 million, but claims the participant funds are completely lost. Ex. 1 at 92, 100; Ex. 9 at ¶12; Ex. 12 at ¶13; Ex. 13 at ¶9; Ex. 14 at ¶12.

E. DEPOSITION OF PALMER

21. The Commission deposed Palmer on April 15, 2009, in accordance with the Federal Rules of Civil Procedure, during which time he asserted his Fifth Amendment privilege against self-incrimination to all questions of material significance. See Ex. 7.

III. ARGUMENT

The Commission is entitled to summary judgment. Defendant Palmer has not provided any evidence in this matter to show that there are any genuine issues of material fact for the finder of fact to decide. To the contrary, the undisputed facts show that Palmer violated the antifraud and registration requirements of the Act.

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the moving party submits evidence showing "that there is no genuine issue as to any material fact and . . . the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In other words, summary judgment must be entered "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Once the moving party establishes that there are no genuine issues of material fact, the burden shifts to the non-moving party who "must do more than simply show that there is some metaphysical doubt as to material facts." Id. at 586. Under Fed. R. Civ. P. 56(e)(2), the non-

moving party may not rely merely upon allegations or denials in its own pleadings but must set forth specific facts showing that there is a genuine issue for trial. To create a genuine issue of material fact, the non-moving party must cite competent, admissible evidence; there must be sufficient evidence for the jury to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50. If the non-moving party fails to produce the required evidence, the moving party must prevail on its Motion for Summary Judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000).

B. THE COURT SHOULD DRAW AN ADVERSE INVERENCE FROM PALMER'S INVOCATION OF THE FIFTH AMENDMENT

The Commission deposed Palmer on April 15, 2009. Palmer repeatedly asserted his Fifth Amendment privilege against self-incrimination to the Commission's questions and substantive allegations that he violated the antifraud and registration provisions of the Act. Accordingly, it is appropriate for the Court to draw an adverse inference from Palmer's invocation of the Fifth Amendment. The Supreme Court has held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). Palmer has had many opportunities to contest the Commission's assertions that he violated the antifraud and registration provisions of the Act. "Failure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question.'" Id. (quoting United States v. Hale, 422 U.S. 171, 176 (1975)).

The Court should draw an adverse inference against Palmer because the undisputed evidence proves that Palmer defrauded multiple pool participants through the operation of his

Ponzi scheme; and, as in Baxter and Hale, cited above, Palmer has refused to testify in response to assertions that he defrauded pool participants and questions regarding his investment activities. Instead, the defendant has repeatedly claimed his Fifth Amendment privilege against self-incrimination to all inquiries regarding his actions in question in this litigation, providing ample basis for this Court to draw an adverse inference against Palmer.

C. PALMER ACTED AS A COMMODITY POOL OPERATOR

A CPO is defined as:

> Any person[1] engaged in a business that is of the nature of an investment trust, syndicate, or similar enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property . . . for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market.

Section 1a(5) of the Act, 7 U.S.C. §1a(4) (footnote added).

Here, Defendant Palmer solicited, accepted or received funds from others and engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, for the purpose of trading in futures. As described more fully above, Palmer represented to potential investors that he would pool their funds for trading in futures, and to the extent that he traded pool participant funds at all, he did so in futures accounts at FCMs. Accordingly, Palmer acted as a CPO.

D. PALMER VIOLATED THE ANTIFRAUD PROVISIONS OF THE ACT

The record filed in support of the Commission's motion—most importantly the evidence that Palmer made material misrepresentations and omissions about the futures pool's earnings,

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[1] Section 1a(28), of the Act, 7 U.S.C. §1a(28), defines a "person" to include "individuals, associations, partnerships, corporations, and trusts."

the total value of the pool, and the use of the futures pool participants' funds —establishes that Defendant violated anti-fraud Sections 4b(a)(2) and 4o(1) of the Act.

1. **Violation of Sections 4b(a)(2)(i)-(iii) and 4b(a)(2)(A)-(C) of the Act:[2] Fraud in Connection with Futures**

To establish liability for fraud, the Commission need only show that (1) a misrepresentation, misleading statement, or omission was made; (2) with scienter; and (3) that the misrepresentation was material. CFTC v. R.J. Fitzgerald & Co., 310 F. 3d 1321, 1328-29 (11th Cir. 2002).

a. Defendant Made Misrepresentations and Omissions to Pool Participants and Misappropriated Pool Participants' Funds

As detailed above and as set forth in the attached declarations, Defendant Palmer violated Sections 4b (a)(2)(i)-(iii)[3] and 4b (a)(2)(A)-(C) (as amended by the CRA) of the Act through his continuous misrepresentations and omissions, his misappropriation of pool participants' funds, and his dissemination of false account statements.

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[2] Effective June 18, 2008, Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2) was modified and re-designated Section 4b(a)(2)(A)-(C), 7 U.S.C. §§ 6b(a)(2)(A)-(C), by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act ("CRA")), §§ 13101-13204, 122 Stat. 1651. However, the CRA's substantive modifications to that Section of the Act have no substantive effect on the application of Section 4b(a)(2) to the facts of this case. Accordingly, Section 4b (a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2), applies to violations occurring before June 18, 2008 and Section 4b (a)(2)(A)-(C), 7 U.S.C. §§ 6b(a)(2)(A)-(C), *as amended by the CRA*, applies to violations occurring on or after that date.

[3] Sections 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(1)-(iii) (2006), make it unlawful for any person to cheat or defraud or attempt to cheat or defraud; or willfully make or cause to be made to other persons false records; or willfully deceive or attempt to deceive by any means whatsoever other persons in or in connection with order to make, or the making of, contracts of sale of commodities, for future delivery were or may have been used for (a) hedging any transaction in interstate commerce in such commodity, or the produce or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof.

First, Palmer failed to disclose the fact that he is using investor funds for his own personal use, including paying himself as much as $35,000 per month, using pool funds for the construction of a new home, and paying personal credit card bills. Ex. 1 at 71, 72, 99. Second, Palmer made the false representation that the pool is consistently profitable. Ex. 11 at ¶3; Ex. 8 at ¶ 3; Ex. 13 at ¶4; Ex. 10 at ¶7. Palmer made the false representation that that the pool achieves positive returns of as much as 7% monthly and 20% annually. Ex. 11 at ¶3; Ex. 8 at ¶ 3; Ex. 13 at ¶4; Ex. 10 at ¶7. Third, Palmer made the false representation that, over time, the pool has increased in value to almost $60 million. Ex. 16 at ¶14.

Instead of investing the money he received from participants as promised, Defendant Palmer misappropriated pool participants' funds and used them to make payments to other participants and for business and personal use, including the construction of a new home and paying off personal credit card bills. Misappropriation of pool participants' funds constitutes "willful and blatant" fraudulent activity that violates the anti-fraud provisions of the Act and Regulations. CFTC v. Noble Wealth Data Info. Servs., Inc., 90 F. Supp. 2d 676, 687 (D. Md. 2000) (determining that defendants violated Section 4b (a)(2)(i) and (iii) of the Act by diverting investor funds for operating expenses and personal use); CFTC v. Skorupskas, 605 F. Supp. 923, 932 (E.D. Mich. 1985) (holding that defendant misappropriated customer funds entrusted to her by soliciting investor funds for trading and then trading only a small percentage of those funds, while disbursing the rest of the funds to other investors, herself, and her family); In re Lincolnwood Commodities, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 at 28,255 (CFTC January 31, 1984) (holding that defendant violated Section 4b when he "diverted to his own use funds entrusted to him by or on behalf of his customers"); CFTC v. Muller, 570 F.2d 1296, 1300-1301 (5th Cir. 1978) (affirming preliminary injunction where

CFTC made a prima facie showing that defendant had misappropriated customer funds in violation of Act). Palmer's years of using pool participants' funds for his own personal use constitute willful and blatant fraudulent activity.

b. Defendant Palmer Acted with Scienter

The scienter element is established when an individual's acts are performed "with knowledge of their nature and character." Wasnick v. Refco, Inc., 911 F.2d. 345, 348 (9th Cir. 1990) (citation omitted). The Commission need only show that a defendant's actions were "intentional as opposed to accidental." Lawrence v. CFTC, 759 F. 2d 767, 773 (9th Cir. 1985). Scienter only requires a showing 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) (finding that recklessness is sufficient to satisfy scienter requirement); Do v. Lind-Waldock & Co., [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,516 at 43,321 (CFTC Sept. 27, 1995) (determining that a reckless act is one where there is so little care that it is "difficult to believe the [actor] was not aware of what he was doing"); CFTC v. Noble Metals Int'l, Inc., 67 F. 3d 766, 774 (9th Cir. 1995).

Here, Palmer made, in connection with futures transactions, material misrepresentations or omissions of material fact with the requisite scienter. Defendant knew that his representations and reports regarding the commodity futures pool were false. Among other things, Palmer knew 1) he was misappropriating funds because he was writing checks to himself and family members; 2) that the pool was not in fact profiting and earning positive returns because he was handling and trading the customer funds; and 3) that the account statements sent to pool participants were false. Palmer, thus, acted with the requisite scienter.

c. Defendant's Misrepresentations Were Material

As demonstrated above, Palmer violated Sections 4b(a)(2)(i)-(iii) and 4b(a)(2)(A)-(C) (as amended by the CRA) of the Act by making misrepresentations and omissions to prospective and existing pool participants, misappropriating customer funds, and by issuing false reports. Such misrepresentations, misappropriation and false reports are material with respect to futures transactions under Section 4b(a)(2) in that a reasonable investor would want to know that he was receiving false account statements that grossly overstated the value of his investment and that his investment funds were being misappropriated. CFTC v. R.J. Fitzgerald, 310 F.3d 1321, 1328-29 (11th Cir. 2002) ("A representation or omission is 'material' if a reasonable investor would consider it important in deciding whether to make an investment."), Skorupskas, 605 F. Supp. at 932-33 (finding that sending false account statements is a material misrepresentation).

CPOs such as Palmer have a fiduciary relationship with their participants and clients. Weinberg v. NFA, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,087 at 32,219 (CFTC June 6, 1986) (CPO "held fiduciary relationships in soliciting and advising commodity clients and in handling the money of commodity pool participants"). The fiduciary nature of the relationship sets the bar of duty and loyalty that pool operators owe to their clients at a very high level.[4] The Commission has cited approvingly the Black's Law Dictionary definition that one

[4] Under common-law principles, a fiduciary relationship "imparts a position of *peculiar confidence placed by one individual in another*. A fiduciary is a person with a duty to *act primarily for the benefit of another*. A fiduciary is in a position to have and exercise, and does *have and exercise influence over another*. A fiduciary relationship implies a condition of *superiority of one of the parties over the other*." Rajala v. Allied Corp., 919 F.2d 610, 614 (10th Cir. 1990), quoting Denison State Bank v. Madeira, 230 Kan. 684, 691, 640 P.2d 1235, 1241 (Kan. 1982) (emphasis in the original). See also Richardson Greenshields Securities, Inc. v. Mui-Hin Lau, 693 F. Supp. 1445, 1456 (S.D.N.Y. 1988) ("A fiduciary relationship is one founded upon trust or other confidence reposed by one person in the integrity and fidelity of another . . ."), quoting DiMaio v. State of New York, 135 Misc. 2d 1021, 517 N.Y.2d 675, 678 (1987); City of Harrisburg v. Bradford Trust Co., 621 F. Supp. 463, 473 (M.D. Pa. 1985) ("A

acts in a "fiduciary capacity" to another person "as to whom he stands in a relation *implying and necessitating great confidence and trust* on the one part and *a high degree of good faith* on the other part . . ." Aronow v. First National Monetary Corp., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,282 at 29,429 n.4 (CFTC July 13, 1984), citing Black's Law Dictionary, 5th ed., 1979, at 564 (emphasis added). And the federal courts have concluded that Congress intended to hold fiduciaries to "a higher standard of care" under the CEA. First National Monetary Corp. v. Weinberger and CFTC, 819 F.2d 1334, 1342 (6th Cir. 1987), citing CFTC v. Savage, 611 F.2d at 285.

In Klatt v. International Trading Group, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,636 at 22,598, (CFTC June 21, 1978), the Commission stated:

> It is a well-settled principle of securities law that it is the duty of a person who holds a fiduciary relationship to another person to make full disclosure of all material facts regarding the transaction between the parties. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963). In the Commission's view, this proposition is no less applicable to the commodities field. Indeed, given the volatility and intricacy of the commodity market mechanisms, such a rule is an absolute necessity.

Accord, In re Commodities International Corp., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943 at 44,566 (CFTC January 14, 1997) (clients of registered CPO "were subjected to misleading material information from an entity that owed them a duty of complete and accurate disclosure").

2. Violations of Section 4o(1) of the Act and Regulation 4.41(a): Fraud by Commodity Pool Operators

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fiduciary relationship 'arises whenever a trust, continuous or temporary, is specially reposed in the skill or integrity of another . . .'"), quoting Consolidated Oil and Gas, Inc. v. Ryan, 250 F. Supp. 600, 604 (W.D. Ark. 1966), aff'd, 368 F.2d 177 (8th Cir. 1966).

Defendant Palmer acted as a CPO such that the same fraudulent conduct that violates Section 4b of the Act, as set forth above, also violates Section 4o(1)[5]. As described more fully above, Defendant Palmer, while acting as an unregistered CPO, solicited, accepted or received funds from others and engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, for the purpose of trading in futures. Section 4o(1) of the Act broadly prohibits fraudulent transactions by a CPO. Sections 4o(1)(A) and (B) apply to all CPOs, whether registered, required to be registered, or exempted from registration. Skorupskas, 605 F. Supp. at 932-33.

Significantly, unlike Section 4b and 4o(1)(A) of the Act, Section 4o(1)(B) has no scienter requirement. In re Kolter, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,262 at 42,198 (CFTC Nov. 8, 1994) (citing Messer v. E.F. Hutton & Co., 847 F.2d 673, 678-79 (11th Cir. 1988)).

Defendant Palmer acted as a CPO such that the same misappropriation, misrepresentations, and omissions that violate Section 4b of the Act, as set forth above, also violate Section 4o(1) and Regulation 4.41(a). Skorupskas, 605 F. Supp. at 932 (finding that the defendants' violation of Section 4(b) of the Act also violated Section 4o).

D. PALMER VIOLATED REGISTRATION REQUIREMENTS OF SECTION 4m(1) OF THE ACT BY ACTING AS AN UNREGISTERED COMMODITY POOL OPERATOR

[5] Section 4o(1) of the Act makes it unlawful for a "commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly – (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant."

Section 4m(1) of the Act provides that it is unlawful for any CPO, unless registered under the Act, to make use of the mails or any means or instrumentality of interstate commerce in connection with its CPO business. Defendant Palmer accepted funds from pool participants through the United States mail, and made misrepresentations through the Internet, for the purpose of investing in the Futures Pool. Thus, Palmer violated Section 4m(1) of the Act because he used the mail and other means of interstate commerce in connection with the Futures Pool, while failing to register with the Commission as a CPO.

IV. THE COMMISSION IS ENTITED TO RELIEF

Plaintiff Commodity Futures Trading Commission ("Commission") seeks summary judgment as to liability, entry of an order of permanent injunction, disgorgement and civil monetary penalties and other equitable relief to prevent Palmer from further violations of the Act.

A. THE COURT SHOULD ENJOIN PALMER FROM FUTURE VIOLATIONS

1. Permanent Injunction

Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), authorizes and directs the Commission to enforce the Act and Regulations. In an action for permanent injunctive relief, the Commission is not required to make a specific showing of irreparable injury or inadequacy of other remedies, which private litigants must make. CFTC v. Muller, 570 F.2d 1296, 1300 (5th Cir. 1978); United States v. Quadro Corp., 928 F. Supp. 688, 697 (E.D. Tex. 1996) (citations omitted), aff'd, U.S. v. Quadro Corp., 127 F.3d 34 (5th Cir, 1997); CFTC v. British Am. Commodity Options Corp., 560 F.2d 135, 141-42 (2d Cir. 1977), cert. denied 438 U.S. 905 (1978). Rather, the

Commission makes the requisite showing for issuance of injunctive relief when it presents a *prima facie* case that the defendant has engaged, or is engaging, in illegal conduct, and that there is a likelihood of future violations. CFTC v. American Bd. of Trade, Inc., 803 F.2d 1242, 1250-51 (2d Cir. 1986); CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir. 1979), cert. denied, 442 U.S. 921 (1979).

In a Commission enforcement case, it was held that the district court's finding that there was the likelihood of future violations supported its entry of a permanent injunction, CFTC v. Sidoti, 178 F.3d 1132 (11th Cir. 1999). In Sidoti, the 11th Circuit stated: "In light of the likelihood of future violations, the district court did not abuse its discretion in enjoining further violations of the Act." See SEC v. Carriba Air, Inc., 681 F.2d 1381, 1322 (11th Cir.1982); SEC v. Blatt, 583 F.2d 1325, 1334 (5th Cir. 1978); Sidoti at 1137. Whether such a likelihood of future violations exists depends on the "totality of the circumstances." SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975); CFTC v. Morgan, Harris & Scott, Ltd., 484 F. Supp. 669, 676 (S.D.N.Y. 1979). Foremost among these circumstances is the past illegal conduct of the defendant, from which courts may infer a likelihood of future violations. CFTC. v. British Am. Commodity Options Corp., 560 F.2d at 142; SEC v. Management Dynamics, Ltd., 515 F.2d at 807; SEC v. Carriba Air, Inc., 681 F.2d 1318, 1322 (11th Cir. 1982).

The scope of the injunctive relief can be tailored to meet the circumstances of the violations shown. For example, courts have entered permanent injunctions against future violations of the Act upon the Commission's showing of a violation and likelihood of future violations. See, e.g., CFTC v. U.S. Metals Depository Co., 468 F. Supp. 1149 (S.D.N.Y. 1979). Other courts have issued broader injunctions prohibiting trading activity. CFTC v. Noble Wealth Data Information Services, Inc., 90 F. Supp. 2d 676, 692 (D. Md. 2000) ("[t]he pervasiveness

and seriousness of [the defendant's] violation justify the issuance of a permanent injunction prohibiting him from violating the Act and from engaging in any commodity-related activity, including soliciting customers and funds"); see also, CFTC v. Rosenberg, 85 F. Supp. 2d 424, 454-55 (D. N.J. 2000) (permanently enjoining defendant from trading commodities on behalf of others). Under these standards, permanent injunctive relief is clearly warranted against Defendant Palmer.

Accordingly, this Court should enter a permanent injunction restraining Defendant Palmer from violating Sections 4b(a)(2) and 4o(1) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 6(b)(a)(2) and 6o(1) (2006), and Section 4b(a)(1) of the Act as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act ("CRA")), § 13102, 122 Stat. 1651 (effective June 18, 2008), to be codified at 7 U.S.C. § 6(b)(a)(1), by fraudulently operating a commodity pool, misappropriating pool participant funds, and running a Ponzi scheme. Such an injunction is necessary and appropriate, and warranted by the conduct by which Palmer violated the Act and Regulations. As described more fully above, Palmer's fraudulent conduct was pervasive and serious, taking place over a period of approximately nine years. Absent a permanent injunction, there is a high likelihood of future violations.

B. PALMER SHOULD DISGORGE HIS GAINS AND PAY PREJUDGMENT INTEREST

Equitable remedies, including disgorgement of ill-gotten gains, are remedies for violations of the Act. See CFTC v. American Metals Exch. Corp., 991 F.2d 71, 76 (3d Cir. 1993) ("A number of courts have held that district courts have the power to order disgorgement as a remedy for violations of the Commodity Exchange Act for the purpose of depriving the

wrongdoer of his ill-gotten gains and deterring violations of the law.") The Commission requests that this Court order Palmer to disgorge a total of $20,619,981.98, which is the amount that Palmer received in ill-gotten gains during the course of his fraudulent commodity trading advisory activities. See Ex. 15, ¶16.

C. THE COURT SHOULD IMPOSE A CIVIL PENALTY AGAINST PALMER

Under Section 6c(d)(1) of the Act, 7 U.S.C. 13a-1(d)(1) (2002), "the Commission may seek and the Court shall have jurisdiction to impose, ... on any person found in the action to have committed any violation, a civil penalty in the amount of . . . triple the monetary gain to the person for each violation" or $110,000 for each violation of the Act on or before October 22, 2000, $120,000 for each violation of the Act from October 23, 2000, through October 22, 2004, $130,000 for each violation of the Act from October 23, 2004, through October 22, 2008, and $140,000 for each violation of the Act on or after October 23, 2008. 7 U.S.C. §13a(c) (d) (1) and 17 C.F.R. 143.8.

The Commission has set forth several factors to consider in assessing a civil monetary penalty. These factors include: the relationship of the violation at issue to the regulatory purposes of the Act and whether or not the violations involved core provisions of the Act; whether or not scienter was involved; the consequences flowing from the violative conduct; financial benefits to a defendant; and harm to customers or the market. *In re Grossfeld*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,467-8 (CFTC Dec. 10, 1996), *aff'd*, 137 F.3d 1300 (11th Cir. 1998). Civil monetary penalties should "reflect the abstract or general seriousness of each violation and should be sufficiently high to deter future violations," which means that Civil monetary penalties should make it financially detrimental to a defendant

to fail to comply with the Act and Regulations so that the defendant would rather comply than risk violations. *Id.* As the Commission has stated:

> [Civil monetary] 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 the 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.

In re GNP Commodities, ¶ 25,360 at 39,222. *See also Reddy v. CFTC*, 191 F.3d 109, 123 (2nd Cir. 1999) (Civil monetary penalties serve to further the Act's remedial policies and to deter others from committing similar violations).

Here, Palmer knowingly engaged in fraud, which is a core violation of the Act. *Grossfeld*, ¶ 26,921 at 44,467 & n. 28, citation omitted. Palmer's deception of customers resulted in the fraudulent solicitation and misappropriation of pool participant funds, and Palmer's ill-gotten gains – the benefit of the fraud to Palmer – totaled $20,619,981.98.

Although the Commission may request the imposition of a civil monetary penalty for each act constituting a violation of the Act or Regulations or for triple the monetary gain to Palmer, the Commission is requesting imposition of a civil monetary of $20,619,981.98-- the monetary gain to Palmer

V. CONCLUSION

Based on the foregoing and the record of this case, it is requested that the Court grant Plaintiff's motion and enter a summary judgment against Palmer including a order for permanent injunction restraining Palmer from violating Sections 4b(a)(2) and 4o(1) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 6(b)(a)(2) and 6o(1) (2006), and Section 4b(a)(1) of the

Act as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act ("CRA")), § 13102, 122 Stat. 1651 (effective June 18, 2008), to be codified at 7 U.S.C. § 6(b)(a)(1), by fraudulently operating a commodity pool, misappropriating pool participant funds, and running a Ponzi scheme, a requirement that Palmer disgorge $20,619,981.98, and a Civil Monetary Penalty of $20,619,981.98.

Respectfully submitted,

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Dated: June 17, 2010