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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

U.S. COMMODITY FUTURES TRADING COMMISSION Plaintiff, v. U.S. VENTURES LC, a Utah limited liability company, WINSOME INVESTMENT TRUST, an unincorporated Texas entity, ROBERT J. ANDRES and ROBERT L. HOLLOWAY, Defendants.	PLAINTIFF'S BRIEF IN SUPPORT OF ITS *EX PARTE* MOTION FOR STATUTORY RESTRAINING ORDER, EXPEDITED DISCOVERY, ACCOUNTING, ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION AND OTHER EQUITABLE RELIEF Case: 2:11cv00099 Jenkins Assigned To : ~~Campbell, Tena~~ Assign. Date : 1/24/2011 Description: US Commodity Futures Trading Commission v. US Ventures et al

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I. INTRODUCTION

Pursuant to Section 6c of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* (2006), as amended (the "CEA"), 7 U.S.C. §13a-1 (2006), and based on the egregious fraud and other unlawful acts detailed herein, Plaintiff U.S. Commodity Futures Trading Commission (the "Commission") respectfully submits this Brief in Support of its *Ex Parte* Motion for Statutory Restraining Order, Expedited Discovery, Accounting, Order to Show Cause re: Preliminary Injunction and Other Equitable Relief ("Motion"), and exhibits attached hereto, against defendants US Ventures LC ("USV"), Winsome Investment Trust ("Winsome"), Robert J. Andres ("Andres") and Robert L. Holloway ("Holloway") (collectively, "Defendants").[1]

Commencing in May 2005 and continuing through at least November 2008 (the "relevant period"), Winsome and Andres, acting directly and/or through their agents, employees or officers, fraudulently solicited and accepted at least $50.2 million from at least 243 individuals via an unnamed Winsome commodity pool, operated by Winsome and Andres, to trade commodity futures contracts ("commodity futures") through an unnamed USV commodity pool, operated by USV and Holloway. Only a portion of the Winsome funds were used for trading by USV and Holloway with overall trading losses of $10.7 million during the relevant period. Defendants used the remainder of the funds to make purported profit payments to participants in a manner akin to a Ponzi scheme. Andres and Holloway misappropriated participant funds to pay for personal expenses and to fund unrelated business interests. Defendants concealed their fraudulent activities by issuing false statements to participants.

[1]Section 6c(a) of the CEA, 7 U.S.C. § 13a-1(a), provides, in pertinent part: "[N]o restraining order (other than a restraining order which prohibits any person from destroying, altering, or disposing of, or refusing to permit authorized representatives of the Commission to inspect, when and as requested, any books and records or other documents or which prohibits any person from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property and other than an order appointing a temporary receiver to administer such restraining order to perform such other duties as the court may consider appropriate) or injunction for violation of the provisions of this Act shall be issued ex parte by said Court."

Defendants have not returned most of the participants' funds despite demands by the Winsome participants. To date, Winsome and Andres have not disclosed that most of the Winsome participant funds were never used for trading but instead, were used to make payments to participants in a manner akin to a Ponzi scheme or were misappropriated for personal use. Recently, however, Andres personally contacted participants asking them to verify their investments, purportedly as part of a process to return funds to participants. In a blatant effort to intimidate, Andres demanded that in order to obtain repayment, participants must acknowledge whether they have taken or assisted others in taking legal action against Winsome. The source of the funds purportedly available to make payments to existing participants is unknown.

Unless restrained and enjoined by this Court, Defendants are likely to continue to engage in the acts and practices alleged in this motion, as more fully described below, and similar acts and practices. To prevent the further dissipation of participant funds or the potential destruction of Defendants' records, the Commission requests an *ex parte* statutory restraining order ("SRO"): (1) freezing Defendants' assets; (2) appointing a temporary receiver; (3) permitting the Commission and a receiver to inspect and copy Defendants' books, records, documents and correspondence (wherever they may be located); and (4) preventing Defendants from directly or indirectly destroying, mutilating, concealing, altering or disposing of any books, records, documents or correspondence. For the same reasons, the Commission also requests that the Court enter an order granting expedited discovery and requiring Defendants to provide the Commission and the receiver, with a full accounting of their funds, documents and assets. The Commission further requests that the Court enter an order compelling Defendants to appear before the Court and show cause why a preliminary injunction should not be entered against

them to enjoin further violations of the CEA and the Commission Regulations ("Regulation(s)") promulgated thereunder, 17 C.F.R. §1 *et seq.* (2010).

II. STATEMENT OF FACTS

A. The Parties

Plaintiff U.S. Commodity Futures Trading Commission is an independent federal regulatory agency that is charged by Congress with responsibility for administering and enforcing the provisions of the CEA and the Regulations promulgated thereunder.

Defendant US Ventures LC is a Utah limited liability company with its principal place of business at 3899 East Parkview Drive, Salt Lake City, Utah 84124. (Exhibit 1, Declaration of Michelle S. Bougas ("Bougas") ¶21). USV is engaged in the business of operating an unnamed commodity futures pool. (Bougas ¶¶44-79; Exhibit 2, Declaration of Bryan R. Bailey ("Bailey") ¶6). USV operated a "fund of funds," accepting and investing funds solicited by other commodity pools (e.g., Winsome). (Bougas ¶¶44-79; Bailey ¶11). USV has never been registered with the Commission in any capacity.[2] (Bougas ¶25).

Defendant Winsome Investment Trust is an unincorporated Texas entity with its principal place of business at 5644 Westheimer Road #452, Houston, Texas 77056. (Bougas ¶22). Winsome is engaged in the business of soliciting individuals to participate in an unnamed commodity futures pool. (Bailey ¶12; Exhibit 3, Declaration of Jerry Comeaux ("Comeaux") ¶¶3-11; Exhibit 4, Declaration of Patricia J. Huff ("Huff") ¶¶3-22; Exhibit 5, Declaration of Hari S. Sekhon ("Sekhon") ¶¶3-21; Exhibit 6, David Stelly ("D. Stelly") ¶¶3-17; Exhibit 7,

[2] The U.S. Securities and Exchange Commission ("SEC") named USV and Holloway, among others, as relief defendants in an April 2007 action filed in this court, *SEC v. Novus Techs., LLC,* No. 2:07CV00235 (D. Utah filed Apr. 11, 2007). In May 2010, the Court entered a consent order against USV and Holloway, holding them jointly and severally liable for payment of approximately $1.3 million but waiving actual payment. In the consent judgment, USV and Holloway neither admitted nor denied the allegations of the SEC complaint, except as to jurisdiction.

Declaration of Stephen B. Stelly ("S. Stelly") ¶¶3-12; Exhibit 8, Declaration of David Ward ("Ward") ¶¶3-10). Winsome maintains a presence on the world-wide web at www.winsometrust.com. (Bougas ¶22). Winsome has never been registered with the Commission in any capacity. (Bougas ¶26).

Defendant Robert J. Andres resides in Houston, Texas. (Bougas ¶23). He is engaged in the business of soliciting individuals to trade commodity futures via a commodity pool. (Bailey ¶12; Comeaux ¶¶3-11; Huff ¶¶3-22; Sekhon ¶¶3-15; D. Stelly ¶¶3-17; S. Stelly ¶¶3-12; Ward ¶¶3-10). Andres is the apparent sole manager, attorney and trustee of Winsome. (Bougas ¶23; Bailey ¶12, Comeaux ¶¶3, 9; Huff ¶¶8, 23; Sekhon ¶8, Ward ¶8). Andres has never been registered with the Commission in any capacity. (Bougas ¶27).

Defendant Robert L. Holloway resides in San Diego, California. (Bougas ¶24). He is engaged in the business of operating an unnamed commodity futures pool. (Bougas ¶¶44-79; Bailey ¶6). Holloway is the CEO, corporate secretary, manager, managing partner, member, program manager, resident agent, 50% shareholder and trading agent of USV. (Bougas ¶24). He has not held a seat on any commodity exchange. (Bougas ¶24). Holloway was registered with the Commission as a Commodity Trading Advisor ("CTA") from November 29, 2007 through April 4, 2009. (Bougas ¶28). In June 2010, Holloway applied for registration with the Commission as a CTA. (Bougas ¶28). Holloway withdrew his CTA application in December 2010.[3] (Bougas ¶28).

B. Winsome and Andres Fraudulently Solicited Pool Participants

Commencing in at least May 2005 and continuing at least through November 2008, Winsome and Andres, acting directly and/or through their agents, employees or officers,

[3] As set forth above, the SEC named Holloway as a relief defendant in an enforcement action.

solicited and accepted funds from individuals to participate in an unnamed Winsome commodity futures pool that they managed. (Bougas ¶¶32-36; Bailey ¶12; Comeaux ¶¶3-9; Huff ¶¶3-25; Sekhon ¶¶3-15; D. Stelly ¶¶3-11; S. Stelly ¶¶3-7; Ward ¶¶3-6). Winsome, through its agents, employees or officers, including but not limited to Andres, thereafter deposited a portion of those pooled funds in an unnamed USV commodity futures pool managed by USV and Holloway. (Bougas ¶¶30, 44-46, 62-69; Bailey ¶12)

1. Winsome and Andres Claimed That Losses Were "Historically Non-Existent"

Winsome and Andres and/or their agents, employees or officers, solicited prospective participants through meetings, telephone and electronic communications, a website, marketing materials and third party marketers. (Comeaux ¶¶4-8; Huff ¶¶3-22; Sekhon ¶¶3-14; D. Stelly ¶¶3-10; S. Stelly ¶¶3-6; Ward ¶¶3-4). Winsome and Andres, acting directly or through others, including but not limited to third party marketers, handed or e-mailed prospective participants a collection of documents that provided an overview of Winsome's trading program ("prospectus"). (Comeaux ¶¶3-7; Huff ¶¶3-22; Sekhon ¶¶4-14; D. Stelly ¶¶3-9; S. Stelly ¶¶3-5). The prospectus claims that profits between 2% and 10% per day can historically be expected. (Huff ¶9; Sekhon ¶5; S. Stelly ¶3). The prospectus also asserts that daily program losses are limited to 2.5% and a participant's principal risk exposure is no more than 8-13% at any given time. (Comeaux ¶5; Huff ¶9; Sekhon ¶5; D. Stelly ¶5; S. Stelly ¶3). It further states that "'Loss' days have been historically non-existent" and the program has only experienced one day of losses (of .7088%) since its inception. (Comeaux ¶5; D. Stelly ¶¶5-7). The prospectus includes purported copies of existing participants' account statements reflecting consistently profitable daily returns with no losses. (Comeaux ¶7; Huff ¶¶7, 11-17; Sekhon ¶7; D. Stelly ¶¶4, 8; Ward

¶3). Winsome and Andres provided participants in the "Guaranteed" program, with a prospectus that guaranteed participants that they would receive 10% profits per month. (Comeaux ¶4).

The prospectus states that pool funds would be traded "at the Chicago Mercantile Exchange for E-mini S&P and, potentially, at the Chicago Board of Trade for electronic 30-year bond and 10-year note futures." (Comeaux ¶6; Huff ¶9; Sekhon ¶5; S. Stelly ¶3). According to the prospectus, participation is highly regulated and adheres to strict compliance with Chicago Mercantile Exchange ("CME") and SEC regulations. (Comeaux ¶5). Ironically, the prospectus also informs prospective participants that Defendants' activities are not regulated. (Comeaux ¶5; D. Stelly ¶5).

The prospectus does not identify Holloway as the fund's program manager, but it describes him as an experienced member of the securities industry and as having held a seat on the CME. (Comeaux ¶5; D. Stelly ¶5). The prospectus also contains Andres' resume wherein he claims to be an attorney, a Certified Public Accountant and a holder of insurance and securities licenses. (Huff ¶8; Sekhon ¶8)

In their solicitations, Winsome and Andres, acting directly or through others, did not provide participants with disclosure documents. (Comeaux ¶8; Huff ¶19; D. Stelly ¶10; S. Stelly ¶6; Ward ¶4). In addition, Winsome, Andres and their agents, employees and officers never obtained signed and dated acknowledgements from participants stating that they had received required Disclosure Documents. (Comeaux ¶8; Huff ¶19; D. Stelly ¶10; S. Stelly ¶6; Ward ¶4).

After seeing the prospectus and receiving affirmations of the prospectus' claims from Winsome and Andres or their agents, employees or officers, many prospective participants committed to investing in the unnamed Winsome commodity pool. (Comeaux ¶9; Huff ¶¶3-7, 10, 21; Sekhon ¶¶3-14; D. Stelly ¶¶6-7, 11; S. Stelly ¶¶3-5, 7; Ward ¶¶3, 5). Some participants

decided to invest with Winsome and Andres after learning of the purported profits earned by friends and relatives from Winsome and Andres' purportedly successful trading activities. (Comeaux ¶3; S. Stelly ¶9). Most participants understood that their money was being pooled to trade commodity futures contracts. (Comeaux ¶¶5-6; Sekhon ¶15; D. Stelly ¶5; S. Stelly ¶3; Ward ¶5).

2. Winsome and Andres Guaranteed the Return of Participants' Principal

Winsome and Andres, acting directly or through their agents, employees and officers, instructed participants to wire funds for investment to Winsome bank accounts and to sign an agreement. (Comeaux ¶¶4, 9; Huff ¶¶22-25; Sekhon ¶13; D. Stelly ¶11; S. Stelly ¶¶5, 7; Ward ¶¶5-6). The standard agreement provided for the distribution of net proceeds to the participant, Winsome, the individual or entity who solicited the participant and occasionally, a purported charity. (Huff ¶23; Sekhon ¶14; Ward ¶5). The standard agreement also guaranteed the return of a participant's principal investment at the conclusion of the investment's duration, or upon fifteen days notice following the thirteenth week of the investment's duration. (Huff ¶¶22, 23; Sekhon ¶14; Ward ¶5). Participants in Winsome's "Guaranteed" program were provided with agreements that guaranteed monthly profits of 10% per month. (Comeaux ¶¶4, 9).

C. Defendants Misappropriated Participant Funds

At least 243 participants wired at least $50.2 million to Winsome bank accounts controlled by Andres. (Bougas ¶34; Bailey ¶12; Comeaux ¶9; Huff ¶25; Sekhon ¶13; D. Stelly ¶11; S. Stelly ¶7; Ward ¶6). Andres forwarded approximately $24.8 million of participant funds from Winsome bank accounts to USV bank accounts controlled by Holloway. (Bougas ¶¶44-46; Bailey ¶12). Holloway, his wife, his one-time USV partner, Arnel Cruz, and one of his USV employees, Bryan Bailey, were signatories on the USV banking accounts. (Bougas ¶¶30-31).

Holloway maintained control over all but one of the bank accounts and over other signatories' use of the accounts. (Bougas ¶30; Bailey ¶17).

Winsome and Andres used participant funds to make payments to other pool participants in a manner akin to a Ponzi scheme, to provide money to Andres' wife and to invest in various unrelated and undisclosed businesses, including but not limited to using $4.2 million of participant funds to purchase an aerospace consulting business. (Bougas ¶¶40-41; Bailey ¶¶41, 43). Winsome and Andres stopped forwarding funds to USV's bank accounts after April 2007. (Bougas ¶44). Regardless, Winsome and Andres continued to accept deposits from participants into the Winsome bank accounts up to at least November 2008. (Bougas ¶32).

USV and Holloway through their agents, employees or officers, pooled Winsome funds with at least $4.5 million that they received from other participants in the unnamed USV commodity pool. (Bougas ¶¶49-53, 57; Bailey ¶19). From the USV bank accounts, Holloway deposited approximately $26.4 million into commodity futures trading accounts held in USV's name -- withdrawing approximately $15.7 million over the relevant period. (Bougas ¶¶57, 66-74). Holloway used participant funds to pay for houses, cars, home furnishings, jewelry, lawn service, maid service and credit card bills in the name of Holloway's wife. (Bougas ¶¶58-60; Bailey ¶¶27-34, 36). Holloway also used participant funds to finance his wife's eBay business, Alcoy Enterprise, LLC. (Bailey ¶30).

D. USV and Holloway Sustained Significant Overall Trading Losses

Despite Winsome and Andres' claims of past trading success, Holloway sustained consistent losses prior to the relevant period. (Bougas ¶¶75-80; Bailey ¶¶37, 40). From February 2005 through April 2005, USV and Holloway deposited approximately $272,500 in USV commodity trading accounts and sustained net trading losses of approximately $211,949. (Bougas ¶67).

Contrary to the consistent profits reported in participant account statements, USV and Holloway sustained significant trading losses during the relevant period totaling approximately $10.7 million. (Bougas ¶¶75-80; Bailey ¶40). The remainder of the money in the trading accounts (approximately $15.7 million) was withdrawn by USV and Holloway throughout the relevant period. (Bougas ¶¶70-74).

E. Defendants Used False Statements to Conceal Their Misappropriation and Trading Losses

To shield their losses and misappropriation from discovery and prolong their successful fraudulent solicitation of funds from prospective and existing participants, Winsome, through Andres, and USV, through Holloway, developed and implemented an elaborate plan whereby Winsome and Andres paid $38.2 million of participant funds to participants as purported "profits" from USV and Holloway' trading in a manner akin to a Ponzi scheme. (Bougas ¶¶37-39; Bailey ¶¶41-44).

Andres and Holloway attempted to conceal the fraud by directing USV employees to falsify participant account records and by providing or causing to be provided, through others, e-mailed account statements to participants reflecting purported profitable returns for the unnamed USV pool. (Bougas ¶¶81-84; Bailey ¶¶41-43, 46, 49; Huff ¶¶26-27; Sekhon ¶16; D. Stelly ¶12; S. Stelly ¶8; Ward ¶7). The posted returns falsely represented that Holloway profitably traded pool funds – sustaining virtually no losses during the relevant period. (Bougas ¶¶81-84; Bailey ¶¶49-50; Huff ¶¶26-27; Sekhon ¶16; D. Stelly ¶12; S. Stelly ¶8).

In addition, on several occasions, Holloway directed USV employees to use his "guesstimated" trading results for participant account statements. (Bailey ¶48)

As a result of Defendants' false account statements, certain participants made additional investments in the unnamed USV pool through Winsome and persuaded others to invest with

them. (D. Stelly ¶13; S. Stelly ¶9; Ward ¶7). For example, after making an initial investment of $100,000 in September 2006 and receiving account statements showing consistent profitable returns, one participant invested an additional $350,000 with Winsome and Andres. (Ward ¶7).

Winsome and Andres failed to reflect fees in account statements and failed to provide certain participants with monthly account statements. (Bougas ¶82; Comeaux ¶10; Huff ¶26).

F. Holloway Controlled USV and Was Its Agent

During the relevant period, Holloway was a controlling person of USV. Holloway acted as the CEO, corporate secretary, manager, managing partner, member, program manager, resident agent, 50% shareholder and trading agent of USV. (Bougas ¶24; Bailey ¶5). He held himself out as the CEO of USV at all relevant times including but not limited to when he opened and maintained commodity futures trading accounts with FCMs on behalf of USV. (Bougas ¶63; Bailey ¶5).

As the CEO, corporate secretary, manager, managing partner, member, program manager, resident agent and trading agent of USV, Holloway exercised control over its day-to-day business operations. (Bailey ¶10). He managed the trading of participant funds in the unnamed USV commodity pool, and he was responsible for the content of the account statements distributed to participants. (Bougas ¶63; Bailey ¶¶46, 48). Holloway also monitored USV employees' substantive communications with participants. (Bailey ¶10).

G. Andres Controlled Winsome and Was Its Agent

Andres acted as the apparent sole manager, attorney and trustee of Winsome. (Bougas ¶23; Bailey ¶12; Comeaux ¶¶3, 9; Huff ¶¶8, 23; Sekhon ¶8; Ward ¶8). He held himself out as the attorney and trustee of Winsome at all relevant times including but not limited to when he

solicited and accepted funds for investment with Winsome. (Bailey ¶12; Comeaux ¶¶3, 9; Huff ¶¶8, 23; Ward ¶8).

As the apparent sole manager and trustee of Winsome, Andres exercised control over its day-to-day business operations. He entered into agreements on behalf of Winsome, directed the wire transfer of customer money into Winsome's bank accounts, directed others' solicitation of prospective participants and was responsible for the content of the account statements distributed to participants. (Bougas ¶29; Bailey ¶¶12, 41, 43; Comeaux ¶¶4, 9; Huff ¶¶23-27; Sekhon ¶13; D. Stelly ¶¶11-12; S. Stelly ¶¶5, 7-8; Ward ¶¶4-5).

H. Defendants' Fraud Is Ongoing

Between April 2007 and October 2007, Winsome, through its agents, employees or officers, including but not limited to Andres, notified certain participants via e-mail that the SEC had frozen USV's assets. (Huff ¶29; Sekhon ¶18; D. Stelly ¶15; S. Stelly ¶11; Ward ¶9). Winsome and Andres informed certain participants that Andres was securing loans to return funds to participants. (Huff ¶30; D. Stelly ¶15; S. Stelly ¶11; Ward ¶9). Winsome and Andres did not disclose at that time or since that USV and Holloway's trading resulted in significant losses or that most of the participants' funds were never traded but instead, were misappropriated. Despite Winsome and Andres' continued promises to return funds to participants, most participants have not received any money from Defendants. (Comeaux ¶¶10-11; Huff ¶30).

Recently, however, Andres contacted certain participants asking them to verify their investments purportedly as part of a process to return funds to participants. (Sekhon ¶21; D. Stelly ¶17). In a blatant effort to intimidate, Andres demanded that in order to obtain repayment, participants must acknowledge whether they have taken, or assisted others in taking, legal action

against Winsome. (Sekhon ¶21; D. Stelly ¶17). If any participants indicate they have, Andres indicated that the return of their funds would "handled by an Attorney." (Sekhon ¶21; D. Stelly ¶17). The source of the funds available to make payment to existing participants is unknown and raises an immediate concern that at least Winsome and Andres are either still soliciting funds from others, or have funds available to repay investors.

Holloway's recent application for registration as a CTA also raises a concern that he may still be soliciting funds from others for investment in commodity futures. (Bougas ¶28).

III. ARGUMENT

The Court should issue the *Ex Parte* Statutory Restraining Order and Preliminary Injunction because Defendants fraudulently solicited pool participants, misappropriated funds and issued false statements in the furtherance of their fraud in violation of the CEA and Regulations. Due to the nature of this fraud, the Commission seeks an order that, among other things, freezes assets under the control of the Defendants, prohibits the removal or destruction of documents and evidence, appoints a receiver, requires an accounting and allows for expedited discovery. Plaintiff also seeks a preliminary injunction prohibiting, among other things, any future violations of the CEA and Regulations because the evidence gathered thus far establishes a reasonable likelihood that Defendants' violations of the CEA and Regulations will continue unless enjoined.

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

[4] On June 18, 2008, Congress enacted Section 4b(a)(1)(A)-(C), 7 U.S.C. §§ 6b(a)(2)(A)-(C), with 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, which modified and re-designated what was Section 4b(a)(2)(i)-(iii) of the CEA, 7 U.S.C. §§ 6b(a)(2). Section 4b(a)(2)(i)-(iii) of the CEA, 7 U.S.C. §§ 6b(a)(2), applies to violations occurring before June 18, 2008 and Section 4b(a)(1)(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.

Sections 4b(a)(2)(i)-(iii) of the CEA make it unlawful:

> for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (A) hedging any transaction in interstate commerce in such commodity or the products 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—(i) to cheat or defraud or attempt to cheat or defraud such other person; (ii) willfully to make or cause to be made to such other person any false report or statement thereof, . . .[or]; (iii) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person.

Similarly, Sections 4b(a)(1)(A)-(C) of the CEA as amended by the CRA make it unlawful:

> for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity 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; (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.

Defendants, through their misrepresentations and omissions of material fact, misappropriation and issuance of false account statements, violated Sections 4b(a)(2)(i)-(iii) of the CEA and Sections 4b(a)(1)(A)-(C) of the CEA as amended by the CRA.

1. Fraudulent Solicitation by Misrepresentations and Omissions

Under Sections 4b(a)(2)(i) and (iii) of the CEA and Sections 4b(a)(1)(A) and (C) of the CEA as amended by the CRA (for the period June 18, 2008 to the present), liability for

solicitation fraud is established upon proof that: 1) a person or entity made a misrepresentation, misleading statement or a deceptive omission; 2) this person or entity acted with scienter; and 3) the misrepresentation was material. *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002) (internal citations omitted); *CFTC v. Noble Wealth Data Info. Servs.*, 90 F. Supp. 2d 676, 687 (D. Md. 2000), *aff'd in relevant part and vacated in part on other grounds sub nom. CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002); *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC Mar. 1, 1990).

a. Winsome and Andres Made Misrepresentations and Omissions

Winsome and Andres, acting directly and/or through their agents, officers and employees, made misrepresentations and omissions in their solicitations of participants to participate in a commodity pool. Winsome, Andres and/or their representatives, misrepresented to participants that Winsome had a successful track record trading commodity futures, generating daily returns of 2-10%, and guaranteed the return of their participants' principal. Despite Winsome and Andres' claims of successful trading, USV and Holloway's commodity futures trading resulted in significant losses prior to and during the relevant period. Winsome and Andres also did not use most of the pool participants' funds for trading or investment but instead misappropriated the funds for Andres' personal use or to make payments back to participants in a manner akin to a Ponzi scheme. *See R.J. Fitzgerald*, 310 F.3d at 1330-31 (misleading and deceptive to speak of high profits without disclosing that overwhelming majority of customers loses money); *CFTC v. United Investors Group, Inc.*, 440 F. Supp. 2d 1345, 1357 (S.D. Fla. 2006) (misleading to make unrealistic statements regarding profit potential while omitting that all past customers lost money); *CFTC v. Wilshire Inv. Mgmt. Corp.*, 407 F. Supp. 2d 1304, 1310 (S.D. Fla. 2005)

(omitting that 87-88% of customers lose money, in conjunction with exaggerated statements of profit potential, make solicitations fraudulent as a matter of law); *Noble Wealth*, 90 F. Supp. 2d at 685 (false characterizations of historic profit and loss considered fraudulent misrepresentations); *CFTC v. Commonwealth Fin. Group*, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994) (misrepresentations concerning trading record and experience of a firm or broker are fraudulent because past success and experience are material factors to reasonable customers).

b. Winsome's Agents, Including Andres, Acted With Scienter

Winsome's agents, including Andres, acted with scienter in their misleading solicitations of prospective participants. Establishing scienter for the purpose of proving fraud requires proof that Winsome's agents, including but not limited to Andres, made false representations intentionally or with reckless disregard for their truth or falsity. *Noble Wealth,* 90 F. Supp. 2d at 686 (citing *CFTC v. Noble Metals Int'l*, 67 F.3d 766, 774 (9th Cir. 1995); *Crothers v. CFTC*, 33 F.3d 405, 411 (4th Cir. 1994); *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677-79 (11th Cir. 1988); *Drexel Burhham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988)); *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,313 (CFTC July 19, 1999), *aff'd in relevant part and rev'd sub nom, Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000); *Hammond*, ¶ 24,617 at 36,657. Scienter requires "'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*, 310 F.3d at 1328 (quoting *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001)). Plaintiff need not prove that defendants possessed an evil motive or intent to injure a customer, or that they subjectively wanted to cheat or defraud their customers. *Cange v. Stotler & Co.*, 826

F.2d 581, 589 (7th Cir. 1987); *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985) ("Proof of an evil motive is unnecessary.").

Andres controlled participants' funds and the information provided to participants, including but not limited to information appearing in the prospectus and participant account statements. Andres directed USV employees to falsify participant account statements while operating a Ponzi scheme. Andres knew that he was using participants' funds for his personal use and to make purported "profit" payments to participants. Accordingly, Andres knew that, or recklessly disregarded whether, his statements regarding Winsome's successful track record, projected profits and limited risk were false. Therefore, Andres directly, and as an agent of Winsome, acted with scienter.

c. Winsome and Andres' Misrepresentations and Omissions Were Material

The misrepresentations and omissions to prospective and existing participants made by Winsome through its agents, including but not limited to Andres, were material. A statement or omitted fact is material if a reasonable participant would consider the matter important in making an investment decision. *R.J. Fitzgerald*, 310 F.3d at 1328-1329 (citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (2432)); *Saxe v. E.F. Hutton & Co.*, 789 F.2d 105, 109 (2d Cir. 1986); *Noble Wealth*, 90 F. Supp. 2d at 686 (citing *Sudol v. Shearson Loeb Rhoades, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 at 31,119 (CFTC Sept. 30, 1985)); *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 447 (D.N.J. 2000) (misrepresenting an account balance, profit potential or material risk). Any fact that enables customers to assess independently the risk inherent in their investment and the likelihood of profit is a material fact. *In re Commodities Int'l Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943 at 44,563-44,564 (CFTC Jan. 14, 1997) (misrepresentations and omissions to customers

were material and fraudulent because customers could not properly evaluate their circumstances with regard to risk of loss and opportunity for profit).

False representations regarding profit potential and risk are considered material. *Noble Wealth,* 90 F. Supp. 2d at 686. "'When the language of a solicitation obscures the important distinction between the possibility of substantial profit and the probability that it will be earned, it is likely to be materially misleading to customers.'" *Id.* (quoting *In re JCC Corp.,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,576 n.23 (CFTC May 12, 1994)); *see also In re Citadel Trading Co.,* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23082 (CFTC May 23, 1986). Misrepresentations regarding profit and risk "go to the heart of a customer's investment decision and are therefore material as a matter of law." *Noble Wealth,* 90 F.Supp.2d at 686 (citing *Commonwealth Fin. Group*, 874 F. Supp at 1353 (guarantees of profitability are prohibited by Section 4b); *Hall v. Paine Webber Jackson & Curtis, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,317 at 32,890 (CFTC Oct. 8, 1986); *Keller v. First Nat'l Monetary Corp.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,402 at 29,823 (CFTC Oct. 22, 1984)).

Misrepresentations regarding trading records are considered fraudulent because past success and experience are material factors which a reasonable participant would consider when deciding to invest. *Commonwealth Fin. Group*, 874 F.Supp at 1353-54 (citing *Reed v. Sage Group*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,942 at 34,299 (CFTC Oct. 14, 1987); *In re Ferragamo*, [1986-1987] Comm. Fut. L. Rep. ¶ 23,795 at 34,103 (ALJ Aug. 14, 1987), *aff'd* [1987-1989 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,982 (CFTC Jan. 14, 1991); *In re Nelson, Ghun & Assocs.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,395 (CFTC Feb. 22, 1982); *LeBallister v. Lincolnwood Commodities, Inc.*, [2437-1980

Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,538 at 22,224 (CFTC Dec. 21, 2437)). Failing to inform participants of significant past losses while projecting large profits amounts to fraud. *Commonwealth Fin. Group*, 874 F. Supp. at 1354 (citing *Olson v. Ulmer*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,987 at 37,627 (CFTC Jan. 13, 1991); *In re Ferragamo*, ¶ 23, 795 at 34,103)).

Andres' and other Winsome agents' misstatements and omissions regarding profits, risk of loss and their successful trading were material because a reasonable participant would have relied on these statements in determining whether to invest in the commodities markets and particularly, with Winsome and Andres. *R.J. Fitzgerald*, 310 F.3d at 1332 ("a reasonable investor *surely* would want to know - before committing money to a broker – that 95% or more of [defendant's] investors lost money" (emphasis in original)).

Andres' and other Winsome agents' knowing, material misrepresentations and omissions regarding profits and risk in their solicitations of prospective participants represent clear violations of Sections 4b(a)(2)(i) and (iii) of the CEA with respect to acts occurring before June 18, 2008, and 4b(a)(1)(A) and (C) of the CEA as amended by the CRA with respect to acts occurring on or after June 18, 2008.

2. Andres and Holloway Misappropriated Participants' Funds

The misappropriation of participant funds also violates Sections 4b of the CEA. Misappropriation of participants' funds constitutes "willful and blatant" fraudulent activity that violates the anti-fraud provisions of the CEA. *Noble Wealth*, 90 F. Supp. 2d at 687; *CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002) ("misappropriation of funds constitutes 'willful and blatant' fraudulent activity violative of Section 4b(a) of the Act"), *cert. denied*, 537 U.S. 950 (2002); *CFTC v. King*, No. 3:06-CV-1583-M, 2007 WL 1321762, at *2 (N.D. Tex. May 7, 2007) ("King's violation of section 4b(a)(2)(i), (iii) of the CEA is further proven by his admitted

misappropriation of customer funds for personal and professional use."); *CFTC v. McLaurin*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,768 at 44,180 (N.D. Ill. 1996) (by depositing customer funds in accounts in which the customers had no ownership interest and making unauthorized disbursements for his own use, defendant violated Section 4b of the CEA); *CFTC v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985) (CPO disbursement of investor funds to other investors, herself and her family violated Section 4b of the CEA); *CFTC v. Morse*, 762 F.2d 60, 62 (8th Cir. 1985) (defendant's use of customer funds for personal use violated Section 4b of the CEA).

Defendants, through the acts of Andres, Holloway and others, accepted participant funds into Winsome and USV bank accounts and not into accounts held in the name of the pools. From those accounts, Defendants misappropriated participants' funds to make purported "profit" payments to other participants in a manner akin to a Ponzi scheme. In addition, Andres and Holloway misappropriated participants' funds for personal use. Defendants' misappropriation of participants' funds violated Sections 4b(a)(2)(i) and (iii) of the CEA with respect to acts occurring before June 18, 2008, and 4b(a)(1)(A) and (C) of the CEA as amended by the CRA with respect to acts occurring on or after June 18, 2008.

3. Fraud by Issuing False Account Statements

Section 4b(a)(2)(ii) of the CEA and Section 4b(a)(1)(B) of the CEA as amended by the CRA prohibit any person from willfully making or causing to be made any false report or false statement in connection with any order to make, or the making of a commodity futures contract made or to be made for or on behalf of such person. Issuing or causing to be issued false statements to participants concerning the profitability of commodity futures trading conducted on their behalf violates Section 4b(a)(2)(ii). *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 CEA.); *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 448 (D.N.J. 2000); *Skorupskas*, 605 F. Supp. at 932-33 (defendant violated Section 4b(a) of the CEA by issuing false monthly statements to customers); *CFTC v. Sorkin*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,855, at 27,585 (S.D.N.Y. Aug. 25, 1983) (distribution of false account statements that falsely report trading activity or equity is a violation of Section 4b of the CEA).

USV, Winsome, Andres and Holloway, directly and/or through their agents, employees or officers, issued, or caused to be issued, false statements to participants by posting profitable returns for the pool in participants' account statements while, in reality, Holloway's trading resulted in significant losses. Accordingly, Defendants violated Section 4b(a)(2)(ii) of the CEA with respect to acts occurring before June 18, 2008, and 4b(a)(1)(B) of the CEA, as amended by the CRA, with respect to acts occurring on or after June 18, 2008.

B. USV and Winsome Committed Fraud as Commodity Pool Operators, and Andres and Holloway Committed Fraud as Associated Persons in Violation of Section 4o(1)

Section 4o(1) of the CEA broadly prohibits fraudulent transactions by Commodity Pool Operators ("CPO(s)")[5] and Associated Persons ("AP(s)")[6] thereof. Sections 4o(1)(A) and (B) apply to all CPOs or APs, whether registered, required to be registered or exempted from registration. *Skorupskas*, 605 F. Supp. at 932. Section 4o(1)(A) of the CEA makes it unlawful for a CPO or an AP of a CPO to employ any device, scheme or artifice to defraud any participant or prospective participant. Section 4o(1)(B) of the CEA makes it unlawful for a CPO, or an AP

[5] The CEA defines CPO as any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market. 7 U.S.C. §1a(5) (2006).

[6] The CEA defines AP as any person associated with a commodity pool operator as a partner, employee, consultant, or agent in any capacity that involves the solicitation of funds, securities or property for a participation in a commodity pool. 7 U.S.C. §6k(2) (2006).

of a CPO, to engage in any transaction, practice or course of business that operates as a fraud or deceit upon any participant or prospective participant.

Significantly, unlike Section 4b and 4o(1)(A) of the CEA, 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,* 847 F.2d at 678-79). The same fraudulent conduct that violates Section 4b of the CEA as set forth above, also violates Section 4o(1) of the CEA. *Skorupskas*, 605 F. Supp. at 932-33.

As set forth below, USV and Winsome acted as CPOs and Holloway and Andres acted as their respective APs. As set forth above, Defendants, through the acts of Andres and Holloway, committed acts of fraudulent solicitation, false statements and/or misappropriation of participant funds in violation of Section 4b(a)(2)(i)-(iii) with respect to acts occurring before June 18, 2008, and 4b(a)(1)(A)-(C) of the CEA as amended by the CRA with respect to acts occurring on or after June 18, 2008. By those same acts, Defendants violated Sections 4o(1)(A) and (B). *Slusser*, ¶ 27,701 at 48,313 ("Where the record establishes that the respondents engaged in fraudulent conduct in violation of section 4b the Division has, as the ALJ observed, surpassed its burden of proof with respect to section 4o"); *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,218 (CFTC Aug. 11, 1992) (the same conduct that violates section 4b can be used to establish a violation of section 4o(1)(A) and (B)), *aff'd in part and modified sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993) (affirming liability, modifying sanctions).

C. USV and Winsome Violated Section 4m(1) of the CEA by Failing to Register as CPOs and Andres and Holloway Violated Section 4k(2) of the CEA by Failing to Register as APs

USV and Winsome each acted as a CPO of a respective pool and Holloway and Andres as APs of USV and Winsome, respectively, without registering with the Commission, in

violation of Sections 4m(1) and 4k(2) of the CEA, 7 U.S.C. §§ 6m(1) and 4k(2), respectively.

Section 4m(1) of the CEA provides that it is unlawful for any CPO, unless registered under the CEA, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as a CPO. Section 4k(2) of the CEA requires any AP of a CPO to be registered as such with the Commission.

Using instrumentalities of interstate commerce, Defendants solicited and received funds from participants for the purpose of investing in pools to trade commodity futures. Thus, USV and Winsome were acting as CPOs without being registered as required by Section 4m(1) of the CEA and Holloway and Andres were acting as APs of USV and Winsome, respectively, without being registered as required by Section 4k(2) of the CEA.

D. USV's and Winsome's Failures to Comply with Regulation 4.20

Regulation 4.20(a)(1), 17 C.F.R. § 4.20(a)(1), requires a CPO to "operate its pool as an entity cognizable as a separate legal entity from that of the pool operator." Regulation 4.20(b), 17 C.F.R. §§ 4.20(b), further provides that the CPO receive funds from existing or prospective participants in the pool's name.

Defendants received participants' funds in USV's and Winsome's names but not in the names of the USV and Winsome pools. Indeed, Defendants do not appear to have maintained bank accounts in the names of the pools. By such actions, USV and Winsome failed to operate the pools as separate legal entities and failed to properly deposit participants' funds in violation of Regulation 4.20(a)(1) and (b).

E. Winsome's Failure to Comply with Regulation 4.21

Pursuant to Regulation 4.21(a)(1), 17 C.F.R. § 4.21(a), a CPO is required to provide a disclosure document to prospective participants prepared in accordance with Regulations 4.24

and 4.25, 17 C.F.R. §§ 4.24 and 4:25 (2010), by no later than the time it delivers to the prospective participant a subscription agreement. In addition, prior to accepting or receiving funds, Regulation 4.21(b), 17 C.F.R. § 4.21(b), requires a CPO to receive from participants an acknowledgment signed and dated by the participants that they received the disclosure document. Winsome, acting through its agents, employees or officers, solicited and accepted funds from participants without providing the required disclosure documents and failed to receive signed and dated acknowledgments from the participants stating that they received the disclosure document in violation of Regulations 4.21(a)(1) and (b).

F. Winsome's Failure to Comply with Regulation 4.22

Regulation 4.22, 17 C.F.R. § 4.22, requires that a CPO provide participants with a monthly Account Statement which must contain specific information including but not limited to the total amount of commissions, fees and expenses. Winsome and Andres failed to provide that information in Account Statements and failed to provide Account Statements to certain participants. Accordingly, Winsome violated Regulation 4.22.

G. Holloway Is Liable for USV's Violations, Pursuant to Section 13(b) of the CEA

Holloway is liable for the violations of the CEA and Regulations by USV, pursuant to Section 13(b) of the CEA, 17 U.S.C. § 13c(b). Section 13(b) provides that any person who, directly or indirectly, controls any person who has violated the CEA, or regulations promulgated thereunder, may be held liable for such violations to the same extent as the controlled person. To establish liability as a controlling person pursuant to Section 13(b), plaintiff must show that the person possesses the requisite degree of control and either: (1) knowingly induced, directly or indirectly, the acts constituting the violation; or (2) failed to act in good faith. *In re Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,251 at 34,766

(CFTC March 11, 1992).

To establish the "knowing inducement" element of the controlling person violation, plaintiff must show that "the controlling person had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue." *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103 at 34,767 (CFTC Jan. 12, 1998). "'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 CEA directly on such individuals as well as on the corporation itself.'" *R.J. Fitzgerald,* 310 F.3d at 1334 (quoting *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1567 (11th Cir. 1995)).

Holloway is liable under Section 13(b) of the CEA as he possessed both control and or knowing inducement of the acts constituting the violation. *See R.J. Fitzgerald,* 310 F.3d at 1334. It is the power to control that matters, not whether the power is exercised by actually participating in or benefiting from the illegal acts. *In re First National Trading Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,142 41,787 (July 20, 1994).

Being an officer, founder, sole principal, sole stockholder or the authorized signatory on the company's bank accounts constitute roles and capacities that indicate the power to control a company. *Spiegel,* ¶ 24,103 at 34,768; *see also Apache Trading* ¶ 25,251 at 38,795 (finding that an individual controls a corporation where he "directs the economic aspects of the firm"). A person also has the requisite degree of control when he or she is in "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person whether through the ownership of voting securities, by contract, or otherwise." *Spiegel,* ¶ 24,103 at 34,765 n.4.

Holloway was the CEO of USV during the relevant time period. The available evidence

indicates that he was the principal and AP of USV responsible for USV's day-to-day operations. Holloway directed the flow of participant funds into bank accounts held by USV, and he controlled the trading of all of USV's commodity futures accounts. He was also responsible for providing the information appearing in participants' account statements. Therefore, it is evident that Holloway was in control of USV during the relevant period.

The second prong of the test focuses on whether Holloway knowingly induced the misconduct, or failed to act in good faith. Knowing inducement requires a showing that "the controlling person had actual or constructive knowledge of the core activities that make up the violation at issue and allowed them to continue." *R.J. Fitzgerald,* 310 F.3d at 1334 (citing *JCC,* 63 F.3d at 1568); *see also Spiegel,* ¶ 24,103 at 34,767.

As evidenced the facts set forth above, Andres and Holloway are the architects of this fraud. Holloway controlled participant funds held in the USV bank account, managed USV's trading of participants' funds and produced information for participants' account statements. Holloway used his control over USV's day-to-day operations to misappropriate participant funds and create false statements used to solicit and retain participants in the unnamed USV pool.

Holloway had actual knowledge of core activities and indeed is the person who committed the fraudulent acts on behalf of USV. Accordingly, Holloway knowingly induced USV's violations as set forth above and is liable for those violations pursuant to Section 13(b) of the CEA.

H. USV is Liable for Holloway's Violations

Section 2(a)(1)(B) of the CEA, 7 U.S.C. § 2(a)(1)(B), and Regulation 1.2, 17 C.F.R. § 1.2, provide that the "act, omission, or failure of any official, agent, or other person acting for any ... corporation ... within the scope of his employment or office, shall be deemed the act,

omission, or failure of such... corporation ..., as well as such official, agent, or other person." In order to determine whether an agency relationship exists, an overall assessment of the totality of the facts and circumstances must be made in each case. *Embieta v. Heusvold Commodities, Inc.*, Comm. Fut. L. Rep. (CCH) ¶22,594 at 30,552 ("[I]t is the conduct of the parties that must ultimately establish whether they were principal and agent.").

In the present case, the agent-principal relationship is clear. Holloway is the CEO, co-owner, manager and trading agent of USV. Holloway acted on behalf of USV, by, among other things, opening and maintaining the USV bank and trading accounts, directing funds in the name of USV and providing the information appearing in participants' account statements. Accordingly, USV is liable for Holloway's violations of the CEA and Regulations.

I. Andres Is Liable for Winsome's Violations

Andres is liable for the violations of the CEA and Regulations by Winsome, pursuant to Section 13(b) of the CEA, 17 U.S.C. § 13c(b). Andres is the attorney, trustee and apparent sole manager of Winsome. He appears to be the sole principal and AP of Winsome responsible for Winsome's day-to-day operations. Andres solicited participants on behalf of Winsome, directed the flow of participant funds into bank accounts held by Winsome, forwarded a portion of those funds to USV and provided account statements to participants. Andres exploited his control over Winsome by, among other things, fraudulently soliciting participants, misappropriating participant funds and providing false statements to prospective and existing participants. As the controlling person of Winsome, Andres knowingly induced the violative acts of fraud, misappropriation and regulatory failures set forth above. Andres is therefore liable for Winsome's violations of the CEA and Regulations, as alleged.

J. Winsome is Liable for Andres' Violations

Because Andres committed his violative acts, *e.g,* his misrepresentations, material omissions and misappropriations, while acting as officer and principal of Winsome, Winsome is liable for Andres' violations pursuant to Section 2(a)(1)(B) of the CEA, 7 U.S.C. § 2(a)(1)(B), and Regulation 1.2, 17 C.F.R. § 1.2.

IV. STANDARDS FOR RELIEF

A. An *Ex Parte* Statutory Restraining Order Is in the Public Interest and May Be Granted Pursuant to Section 6(c) of the CEA

The Court should issue an *Ex Parte* Statutory Restraining Order because it is in the public interest to prevent disposal of funds, destruction of records and continued violations of the CEA.

Section 6c(a) of the CEA *explicitly* authorizes the Court to issue an *ex parte* restraining order freezing assets, appointing a temporary receiver and prohibiting any person from destroying Defendants' records or denying Commission officials access to Defendants' records.[7] *See* 7 U.S.C. § 13a-1. Congress authorized district courts to issue restraining orders in Commission enforcement cases in order to "to prevent possible removal or destruction of potential evidence or other impediments to legitimate law enforcement activities and to prohibit movement or disposal of funds, assets and other property which may be subject to lawful claims of customers." H.R. Rep. 6 No. 97-565, Part I, 97th Cong., 2d Sess. 53-54, 93 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3902-03, 3942. The Court has "broad discretion" to grant such statutory relief, including an asset freeze, when presented with a "prima facie case of illegality." *CFTC v. Co Petro Marketing Group, Inc.*, 680 F.2d 573, 583 (9th Cir. 1982) (the Court may also grant relief ancillary to

[7] District courts have applied Section 6c in the Commission's enforcement cases to issue *ex parte* SROs. *See, e.g., CFTC v. Hawker*, 2003 WL 22048369, **1-2 (D. Utah Mar. 13, 2003); *CFTC v. Schenk*, No. 2:98-CV-00216-BSJ (D. Utah Mar. 27, 1998).

injunctive relief); *SEC v. First Fin. Group*, 645 F.2d 429, 438 (5th Cir. 1981).[8]

In light of the evidence of substantial misappropriation of participant funds, an asset freeze is especially appropriate here to preserve funds for disgorgement and restitution. *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 678 (S.D.N.Y. 1979); *CFTC v. Trending Cycles for Commodities, Inc.*, (1980-1982 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 21,013 at 23,970 (S.D. Fla. 1980). Moreover, a freeze maintains the court's jurisdiction over the assets when disgorgement or restitution is ordered. *CFTC v. American Metal Exch. Corp.*, 693 F. Supp. 168, 196 (D.N.J. 1988).

An order prohibiting the destruction of records and granting the Commission access to inspect and copy records will allow the Commission to identify assets and victims. *See Co Petro*, 680 F.2d at 583; *Clothier,* 799 F. Supp. at 493. Such relief will "preserve the status quo while an investigation is conducted to clarify the sources of various funds." *Morgan,* 484 F. Supp. at 678.

The appointment of a receiver is appropriate where, as in this case, it is necessary to protect the public interest. *Morgan*, 484 F. Supp. at 677; *CFTC v. 4NExchange*, No. 2:02-CIV-432K (D. Utah June 4, 2002) (the Court granted the CFTC's motion to appoint a receiver to marshal and preserve assets); *Cf. SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972) (courts repeatedly have upheld the appointment of receivers to effectuate the purposes of the federal securities laws). A receiver investigates the Defendants' activities, ascertains the Defendants' financial status and the identity of investors and prevents diversion or waste of the Defendants' assets to the detriment of customers. *Morgan*, 484 F. Supp. at 677; *CFTC v.*

[8] Because Plaintiff's injunctive actions derive from statute, Federal Rule of Civil Procedure 65 does not govern a request for a restraining order under Section 6c(a). *CFTC v. Clothier,* 799 F.Supp. 490, 492-93 (D. Kan. 1992).

Chilcott Portfolio Mgmt., Inc., 713 F.2d 1477 (10th Cir. 1983); *American Metal Exch. Corp.*, 693 F. Supp. 168, 196 (D.N.J. 1988).

In this matter, the appointment of a receiver is necessary to ensure that all assets are identified and located, all Winsome and USV clients are identified and the scope and full nature of Defendants' wrongdoing is ascertained. A receiver is necessary to protect the public interest by marshalling, monitoring and protecting any remaining assets in the possession and control of the Defendants.

In light of the evidence supporting the fraud allegations, the participants' unanswered demands for their money and the ongoing nature of the fraud, an order that, among other things, freezes assets, prohibits the destruction of documents, grants the Commission access to documents and appoints a receiver, is appropriate here.

B. Expedited Discovery and an Accounting Are Appropriate to Enable the Commission to Fulfill Its Statutory Duties

The Commission also moves this Court for an order granting expedited discovery and requiring an accounting for the purpose of ascertaining Defendants' assets and the identity of Defendants' customers. Expedited discovery, in advance of that provided by Fed. R. Civ. P. 26 is necessary to enable the Commission to fulfill its statutory duties. Specifically, discovery of Defendants' complete assets and customers will enable the Commission to protect customers from further loss and damage by ensuring that the Defendants are complying fully with the Court's restraining order.

An immediate accounting and expedited discovery is necessary and appropriate to locate and secure Defendants' and the participants' funds, and further investigate the expanse of Defendants' fraud before the further misappropriation of funds. *See, e.g., CFTC v. Abad*, 2008 WL 5661885, **3-4 (C.D. Cal. 2008) (court ordered an accounting where good cause to believe

defendant may have violated section 4b of the CEA); *CFTC v. Bane*, 2008 WL 4377126 *2 (C.D. Cal. 2008) (expedited discovery ordered where good cause to believe defendant may have violated Section 4b of the CEA). In similar cases, courts have granted plaintiff's request for expedited discovery. *See, e.g., 4NExchange*, 2:02-CIV-432K (D. Utah June 4, 2002); *see also CFTC v. DBS, Inc.*, No. C-031379 – VRW (N.D. Ca. April 3, 2003); *CFTC v. First Bristol Group, Inc.*, 2002 WL 31357411 (S.D. Fla. Aug. 20, 2002); *CFTC v. Luger*, 2002 WL 1789768 (S.D. Fla. June 3, 2002); *CFTC v. Chilcott*, 2002 WL 1455345 (M.D. Fla. March 7, 2002).

C. Order to Show Cause Why Preliminary Injunction Should Not Be Issued Is Necessary

Plaintiff also seeks an order to show cause as to why a preliminary injunction should not be issued prohibiting, among other things, any future violations of the CEA or Regulations. In that regard, Section 6c of the CEA provides federal courts with broad discretion to fashion appropriate relief, afford redress to aggrieved parties, and deter violations of the CEA. *Co Petro*, 680 F.2d at 583 (Section 6c of the CEA provides the court with authority to issue a broad variety of orders). In fact, Section 6c(a) provides that "(u)pon a proper showing, a . . . temporary injunction . . . shall be granted without bond."

Unlike private actions, which are rooted in the equity jurisdiction of the federal court, Commission suits for injunctive relief are statutorily created. The injunctive relief contemplated in Section 6c of the CEA is remedial in nature, and is designed to prevent injury to the public and to deter future illegal conduct. "When the 'public interest is involved . . . the district court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989); *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174-75 (9th Cir. 1987).

Therefore, restrictive concepts ordinarily associated with private litigation, such as proof

of irreparable injury or inadequacy of other remedies, are inapplicable. *See Odessa,* 833 F.2d at 176; *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979); *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978) (holding that there is no requirement for a showing of irreparable harm where an injunction is authorized by a federal statute); *Co Petro*, 502 F. Supp. at 818. Indeed, upon a showing that the CEA has been violated, irreparable injury may be presumed. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) *cert. denied sub nom., Windrush Partners, Ltd. v. Metro Fair Housing Svcs.*, 469 U.S. 882 (1984) (finding presumption of irreparable injury in statutory enforcement action). As irreparable harm is presumed, the Court need only find some chance of probable success on the merits. *See FTC v. World Wide Factors*, 882 F.2d 344, 247 (9th Cir. 1989); *Gresham*, 730 F.2d at 1423. And, that will be satisfied by a prima facie showing of illegality. *See Muller*, 570 F.2d at 1300.

Accordingly, the CFTC is entitled to injunctive relief upon a showing that a violation has occurred and is likely to continue unless enjoined. *Odessa*, 833 F.2d at 174; *Sahni*, 868 F.2d at 1097; *Co Petro*, 680 F.2d at 583 n.16 (court correctly issued permanent injunction where there was a reasonable likelihood of future violations); *FTC v. Sage Seminars, Inc.*, 1995 WL 798938, at *8 (N.D. Cal. Nov. 2, 1995); *see also Kemp v. Peterson*, 940 F.2d 110, 113 (4th Cir. 1991). "'(T)he commission of past illegal conduct is highly suggestive of the likelihood of future violations.'" *CFTC v. Crown Colony Comm. Options, Ltd.*, 434 F. Supp. 911, 919 (S.D.N.Y. 1977) (*quoting SEC v. Mngmt. Dynamics*, 515 F.2d 801, 807 (2d Cir. 1975). Even a purported cessation of illegal activity should not prevent the granting of a preliminary injunction. *Crown Colony*, 434 F. Supp. at 919-20 ("past actions speak louder than . . . present words.").

Injunctive relief is appropriate in this case because Defendants repeatedly and with *scienter* engaged in core violations of the CEA and Regulations for over three years. The

ancillary relief sought in this case is of the type typically sought in an injunctive action and is well within the court's equitable jurisdiction. Therefore, the Commission requests that the Court enter an order compelling Defendants to appear before the Court and show cause why a preliminary injunction should not be entered against them to enjoin further violations of the CEA and Regulations.

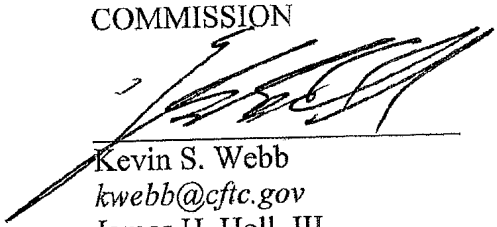
V. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court grant the Commission's Motion and issue a SRO: (1) freezing Defendants' assets; (2) appointing a temporary receiver; (3) permitting the Commission and the receiver to inspect and copy Defendants' books, records, documents and correspondence (wherever they may be located); and (4) preventing Defendants from directly or indirectly destroying, mutilating, concealing, altering or disposing of any books, records, documents or correspondence. The Commission also requests that the Court enter an order granting expedited discovery and requiring Defendants to provide the Commission and the receiver, with a full accounting of their funds, documents and assets. The Commission further requests that the Court enter an order compelling Defendants to appear before the Court and show cause why a preliminary injunction should not be entered against them to enjoin further violations of the CEA and Regulations.

Dated: January 24, 2011

Respectfully submitted,

ATTORNEYS FOR THE PLAINTIFF
U.S. COMMODITY FUTURES TRADING COMMISSION



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