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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.	Case No. 2:11CV00099 BSJ MOTION AND SUPPORTING MEMORANDUM FOR ENTRY OF DEFAULT JUDGMENT, PERMANENT INJUNCTION, CIVIL MONETARY PENALTIES, AND ANCILLARY EQUITABLE RELIEF AGAINST DEFENDANTS U.S. VENTURES LC, WINSOME INVESTMENT TRUST, ROBERT J. ANDRES, AND ROBERT L. HOLLOWAY

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PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT, PERMANENT INJUNCTION, CIVIL MONETARY PENALTIES, AND ANCILLARY EQUITABLE RELIEF AGAINST DEFENDANTS U.S. VENTURES LC, WINSOME INVESTMENT TRUST, ROBERT J. ANDRES, AND ROBERT L. HOLLOWAY

Pursuant to Federal Rule of Civil Procedure 55(b)(2), Plaintiff Commodity Futures Trading Commission ("Commission" or "CFTC") now hereby respectfully moves the Court to enter a final judgment by default, order for permanent injunction, civil monetary penalties, and ancillary equitable relief against Defendants U.S. Ventures LC ("USV), Winsome Investment Trust ("Winsome"), Robert J. Andres ("Andres"), and Robert L. Holloway ("Holloway") (collectively, "Defendants") for their failure to plead or otherwise defend this action. As shown below in Plaintiff's supporting memorandum, Plaintiff is entitled to final judgment by default as a matter of law against Defendants.

MEMORANDUM OF FACTS AND LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT, PERMANENT INJUNCTION, CIVIL MONETARY PENALTIES, AND ANCILLARY EQUITABLE RELIEF AGAINST DEFENDANTS U.S. VENTURES LC, WINSOME INVESTMENT TRUST, ROBERT J. ANDRES, AND ROBERT L. HOLLOWAY

I. INTRODUCTION

On January 24, 2011, the U.S. Commodity Futures Trading Commission ("Commission") filed its Complaint in the above-captioned action against U.S. Venture, LC ("USV"), Winsome Investment Trust ("Winsome"), Robert J. Andres ("Andres"), and Robert L. Holloway ("Holloway") (collectively, "Defendants") seeking injunctive and other equitable relief for violations of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 1 *et seq.* (2012), and the Commission Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2013) (Dkt. #1). The Complaint alleges that from at least May 2005, and continuing at least through November 2008, Defendants engaged in a fraudulent scheme wherein they solicited and accepted more than $50.2

million from at least 243 members of the general public (collectively the "pool participants") for the purported purpose of pooling the funds to trade commodity futures on behalf of the pool participants. Specifically, the Complaint alleges that Defendants violated Sections 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii) (2006), with respect to acts occurring before June 18, 2008, Sections 4b(a)(1)(A)-(C) of the Act, 7 U.S.C. § 6b(a)(1)(A)-(C) (2012), for conduct occurring on or after June 18, 2008, and Sections, 4k(2), 4m(1), and 4o(1) of the Act, 7 U.S.C. §§ 6k(2), 6m(1), and 6o(1) (2012), and Commission Regulations 4.20(a)(1) and (b), 4.21, and 4.22, 17 C.F.R. §§ 4.20(a)(1) and (b), 4.21, and 4.22 (2013), and seeks, *inter alia*, injunctive relief, restitution, and civil monetary penalties.

Defendants USV and Holloway were served with the Complaint and the Summons on January 28, 2011 (Dkt. #'s 24 & 25). The Commission filed its Proof of Service for USV and Holloway with the Clerk of the Court's Office on February 9, 2011 (Dkt. #'s 24 & 25). Pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(a)(1)(A)(i), USV's and Holloway's Answers were due on or before February 18, 2011. USV and Holloway failed to respond to the Commission's Complaint within 21 days of service. On February 23, 2011, the Commission, pursuant to Fed. R. Civ. P. 55(a), filed its Request for Clerk's Entry of Default against USV and Holloway (Dkt. #29). The Clerk of the Court entered defaults against USV and Holloway on February 28, 2011 (Dkt. #31).

Holloway filed a motion to set aside his default in this matter on February 28, 2012, 365 days after the Court granted the Commission's Motion for Entry of Default (Dkt. #110). Holloway's grounds to set aside the default are that he "was never served with the Complaint in this matter and he did not understand the legal ramifications of that default until recently." Holloway characterized those grounds as "excusable neglect, inadvertence or surprise." On May

18, 2012, the Court denied Holloway's Motion to Set Aside Default Judgment (Dkt. #156). The Court found that Holloway failed to demonstrate good cause to set aside the Clerk of Court's Entry of Default, Holloway's default was the result of his culpable conduct, and Holloway failed to provide a valid excuse for not responding to the Commission's Complaint.

Defendants Winsome and Andres were served with the Complaint and the Summons on January 29, 2011 (Dkt. #'s 22 & 23). The Commission filed its Proof of Service with the Clerk of the Court's Office on February 8, 2011 (Dkt. #'s 22 & 23). Pursuant to Fed. R. Civ. P. 12(a)(1)(A)(i), Winsome's and Andres' Answers were due on or before February 19, 2011. On February 28, 2011, Winsome and Andres filed a Motion seeking an extension of time until March 7, 2011 to file its Answer to the Complaint (Dkt. #'s 35 & 36). On March 1, 2011, the Commission filed a Response to Winsome's and Andres's Motion stating that it would not oppose an extension of time until March 1, 2011 (Dkt. #'s 38 & 39). Defendants Winsome and Andres failed to respond to the Commission's Complaint by March 1, 2011, or at any time thereafter. On March 28, 2011, the Commission, pursuant to Fed. R. Civ. P. 55(a), filed its Request for Clerk's Entry of Default against Winsome and Andres (Dkt. #49). The Clerk of the Court entered default against Winsome and Andres on April 19, 2011 (Dkt. #52).

II. PARTIES

Plaintiff **U.S. Commodity Futures Trading Commission** is an independent federal regulatory agency that is charged by Congress with the administration and enforcement of the Act, 7 U.S.C. §§ 1 *et seq*., and Commission Regulations ("Regulations") promulgated thereunder, 17 C.F.R. §§1.1 *et seq*. (2012). The Commission maintains its principal office at Three Lafayette Centre, 1155 21st Street NW, Washington, D.C. 20581.

Defendant **US Ventures LC** is a Utah limited liability company. During the relevant

period, USV had its principal place of business at 3899 East Parkview Drive, Salt Lake City, Utah 84124 (Bougas ¶21 at Dkt. #17-1).[1] USV was engaged in the business of operating an unnamed commodity futures pool (Bougas ¶¶44-79 at Dkt. #17-1; Bailey ¶6 at Dkt. #18-2). USV operated a "fund of funds," accepting and investing funds solicited by other commodity pools (e.g., Winsome) (Bougas ¶¶44-79 at Dkt. #17-1; Bailey ¶11 at Dkt. #18-2). USV has never been registered with the Commission in any capacity (Bougas ¶25 at Dkt. #17-1).

Defendant **Winsome Investment Trust** is an unincorporated Texas entity. During the relevant period, Winsome had its principal place of business at 5644 Westheimer Road #452, Houston, Texas 77056 (Bougas ¶22 at Dkt. #17-1). Winsome was engaged in the business of soliciting individuals to participate in an unnamed commodity futures pool (Bailey ¶12 at Dkt. #18-2; Comeaux ¶¶3-11 at Dkt. #18-3; Huff ¶¶3-22 at Dkt. #18-4; Sekhon ¶¶3-21 at Dkt. #18-5; D. Stelly ¶¶3-17 at Dkt. #18-6; S. Stelly ¶¶3-12 at Dkt. #18-7; Ward ¶¶3-10 at Dkt. #18-8). Winsome maintained a presence on the world-wide web at www.winsometrust.com (Bougas ¶22 at Dkt. #17-1). Winsome has never been registered with the Commission in any capacity (Bougas ¶26 at Dkt. #17-1).

Defendant **Robert J. Andres** resides in Houston, Texas (Bougas ¶23 at Dkt. #17-1). He was engaged in the business of soliciting individuals to trade commodity futures via a commodity pool (Bailey ¶12 at Dkt. #18-2; Comeaux ¶¶3-11 at Dkt. # 18-3; Huff ¶¶3-22 at Dkt. #18-4; Sekhon ¶¶3-15 at Dkt. #18-5; D. Stelly ¶¶3-17 at Dkt. #18-6; S. Stelly ¶¶3-12 at Dkt. #18-7; Ward ¶¶3-10 at Dkt. #18-8). Andres was the apparent sole manager, attorney, and trustee of

[1] Exhibits that were previously filed in the electronic case filing ("ECF") system in support of the CFTC's Motion for Statutory Restraining Order, Expedited Discovery, Accounting, Order to Show Cause Re: Preliminary Injunction and Other Equitable Relief (Dkt. #11) have not been filed again as Exhibits to this Motion and Memorandum. Instead, the following previously filed Exhibits are incorporated herein by citation to the Court's ECF for this matter and include the Declarations of Michelle S. Bougas ("Bougas") (Dkt. #17-1), Bryan R. Bailey ("Bailey") (Dkt. #18-2), Jerry Comeaux ("Comeaux") (Dkt. #18-3), Patricia J. Huff ("Huff") (Dkt. #18-4), Hari S. Sekhon ("Sekhon") (Dkt. #18-5), David Stelly ("D. Stelly") (Dkt. #18-6), Stephen B. Stelly ("S. Stelly") (Dkt. #18-7), and David Ward ("Ward") (Dkt. #18-8). References to declaration paragraphs appear, for example, as Bougas ¶1 at Dkt. 17-1.

Winsome (Bougas ¶23 at Dkt. #17-1; Bailey ¶12 at Dkt. #18-2; Comeaux ¶¶3, 9 at Dkt. #18-3; Huff ¶¶8, 23 at Dkt. #18-4; Sekhon ¶8 at Dkt. #18-5, Ward ¶8 at Dkt. #18-8). Andres has never been registered with the Commission in any capacity (Bougas ¶27 at Dkt. #17-1). On December 8, 2011, the U.S. District Court for the District of Utah unsealed an indictment, filed on December 7, 2011, charging Andres with five counts of wire fraud in connection with the operation of Winsome. On August 21, 2013, Andres pleaded guilty to one count of wire fraud. He is awaiting sentencing.

Defendant **Robert L. Holloway** resides in San Diego, California (Bougas ¶24 at Dkt. #17-1). He was engaged in the business of operating an unnamed commodity futures pool (Bougas ¶¶44-79 at Dkt. #17-1; Bailey ¶6 at Dkt. #18-2). Holloway was the CEO, corporate secretary, manager, managing partner, member, program manager, resident agent, 50% shareholder, and trading agent of USV (Bougas ¶24 at Dkt. #17-1). He has not held a seat on any commodity exchange (Bougas ¶24 at Dkt. #17-1). Holloway was registered with the Commission as a Commodity Trading Advisor ("CTA") from November 29, 2007 through April 4, 2009 (Bougas ¶28 at Dkt. #17-1). In June 2010, Holloway applied for registration with the Commission as a CTA (Bougas ¶28 at Dkt. #17-1). Holloway withdrew his CTA application in December 2010 (Bougas ¶28 at Dkt. #17-1). On December 8, 2011, the U.S. District Court for the District of Utah unsealed an indictment, filed on December 7, 2011, charging Holloway with four counts of wire fraud and one count of making and subscribing a false income tax return in connection with the operation of USV. A trial date has been set for July 8, 2014.

III. FACTS

A. Factual Allegations of the Complaint Should be Taken as True

The Commission incorporates by reference the well-pleaded facts in the Commission's

Complaint filed against Defendants on January 24, 2011. As previously stated, the Defendants failed to file any responsive pleadings. Therefore, the facts alleged in the Complaint, which have never been contested by Defendants in any pleading, should be taken as true for purposes of Plaintiff's Motion for Entry of Default Judgment. *See* Fed. R. Civ. P. 8(b).

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, solicited and accepted funds from individuals to participate in an unnamed Winsome commodity futures pool that they managed (Bougas ¶¶32-36 at Dkt. #17-1; Bailey ¶12 at Dkt. #18-2; Comeaux ¶¶3-9 at Dkt. #18-3; Huff ¶¶3-25 at Dkt. #18-4; Sekhon ¶¶3-15 at Dkt. # 18-5; D. Stelly ¶¶3-11 at Dkt. #18-6; S. Stelly ¶¶3-7 at Dkt. #18-7; Ward ¶¶3-6 at Dkt. #18-8). 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 at Dkt. #17-1; Bailey ¶12 at Dkt. #18-2).

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 at Dkt. #18-3; Huff ¶¶3-22 at Dkt. #18-4; Sekhon ¶¶3-14 at Dkt. #18-5; D. Stelly ¶¶3-10 at Dkt. #18-6; S. Stelly ¶¶3-6 at Dkt. #18-7; Ward ¶¶3-4 at Dkt. #18-8). 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 at Dkt. #18-3; Huff ¶¶3-22 at Dkt. #18-4; Sekhon ¶¶4-14 at Dkt. #18-5; D. Stelly ¶¶3-9 at

Dkt. #18-6; S. Stelly ¶¶3-5 at Dkt. #18-7). The prospectus claims that profits between 2% and 10% per day can historically be expected (Huff ¶9 at Dkt. #18-4; Sekhon ¶5 at Dkt. #18-5; S. Stelly ¶3 at Dkt. #18-7). 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 at Dkt. #18-3; Huff ¶9 at Dkt. #18-4; Sekhon ¶5 at Dkt. #18-5; D. Stelly ¶5 at Dkt. #18-6; S. Stelly ¶3 at Dkt. #18-7). 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 at Dkt. #18-3; D. Stelly ¶¶5-7 at Dkt. #18-6). The prospectus includes purported copies of existing participants' account statements reflecting consistently profitable daily returns with no losses (Comeaux ¶7 at Dkt. #18-3; Huff ¶¶7 at Dkt. #18-4, 11-17; Sekhon ¶7 at Dkt. #18-5; D. Stelly ¶¶4, 8 at Dkt. #18-6; Ward ¶3 at Dkt. #18-8). 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 at Dkt. #18-3).

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 at Dkt. #18-3; Huff ¶9 at Dkt. #18-4; Sekhon ¶5 at Dkt. #18-4; S. Stelly ¶3 at Dkt. #18-7). According to the prospectus, participation is highly regulated and adheres to strict compliance with Chicago Mercantile Exchange ("CME") and SEC regulations (Comeaux ¶5 at Dkt. #18-3). Ironically, the prospectus also informs prospective participants that Defendants' activities are not regulated (Comeaux ¶5 at Dkt. #18-3; D. Stelly ¶5 at Dkt. #18-6).

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 at Dkt. #18-3; D. Stelly ¶5 at Dkt. #18-6). The prospectus also contains Andres's résumé wherein he claims to be an attorney, a Certified Public Accountant, and a holder of insurance and securities licenses (Huff ¶8 at Dkt. #18-4; Sekhon ¶8 at Dkt. #18-5).

In their solicitations, Winsome and Andres, acting directly or through others, did not provide participants with disclosure documents (Comeaux ¶8 at Dkt. #18-3; Huff ¶19 at Dkt. #18-4; D. Stelly ¶10 at Dkt. #18-6; S. Stelly ¶6 at Dkt. #18-7; Ward ¶4 at Dkt. #18-8). 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 at Dkt. #18-3; Huff ¶19 at Dkt. #18-4; D. Stelly ¶10 at Dkt. #18-6; S. Stelly ¶6 at Dkt. #18-7; Ward ¶4 at Dkt. #18-8).

After seeing the prospectus and receiving affirmations of the prospectus's 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 at Dkt. #18-3; Huff ¶¶3-7, 10, 21 at Dkt. #18-4; Sekhon ¶¶3-14 at Dkt. #18-5; D. Stelly ¶¶6-7, 11 at Dkt. #18-6; S. Stelly ¶¶3-5, 7 at Dkt. #18-7; Ward ¶¶3, 5 at Dkt. #18-8). Some participants decided to invest with Winsome and Andres after learning of the purported profits earned by friends and relatives from Winsome and Andres's purportedly successful trading activities (Comeaux ¶3 at Dkt. #18-3; S. Stelly ¶9 at Dkt. #18-7). Most participants understood that their money was being pooled to trade commodity futures contracts (Comeaux ¶¶5-6 at Dkt. #18-3; Sekhon ¶15 at Dkt. #18-5; D. Stelly ¶5 at Dkt. #18-6; S. Stelly ¶3 at Dkt. #18-7; Ward ¶5 at Dkt. #18-8).

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 at Dkt. #18-3; Huff ¶¶22-25 at Dkt. #18-4; Sekhon ¶13 at Dkt. #18-5; D. Stelly ¶11 at Dkt. #18-6; S. Stelly ¶¶5, 7 at Dkt. #18-7; Ward ¶¶5-6 at Dkt. #18-8). 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 at Dkt. #18-4; Sekhon ¶14 at Dkt. #18-5; Ward ¶5 at Dkt. #18-8). 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 at Dkt. #18-4; Sekhon ¶14 at Dkt. #18-5; Ward ¶5 at Dkt. #18-8). Participants in Winsome's "Guaranteed" program were provided with agreements that guaranteed monthly profits of 10% per month (Comeaux ¶¶4, 9 at Dkt. #18-3).

C. Defendants Misappropriated Participant Funds

At least 243 participants wired at least $50.2 million to Winsome bank accounts controlled by Andres (Bougas ¶34 at Dkt. #17-1; Bailey ¶12 at Dkt. 18-2; Comeaux ¶9 at Dkt. #18-3; Huff ¶25 at Dkt. #18-4; Sekhon ¶13 at Dkt. #18-5; D. Stelly ¶11 at Dkt. #18-6; S. Stelly ¶7 at Dkt. #18-7; Ward ¶6 at Dkt. #18-8). Andres forwarded approximately $24.8 million of participant funds from Winsome bank accounts to USV bank accounts controlled by Holloway (Bougas ¶¶44-46 at Dkt. #17-1; Bailey ¶12 at Dkt. #18-2). 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 at Dkt. #17-1). Holloway maintained control over all but one of the bank accounts and over other signatories' use of the accounts (Bougas ¶30 at Dkt. #17-1; Bailey ¶17 at Dkt. #18-2).

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 at Dkt. #17-1; Bailey ¶¶41, 43 at Dkt. #18-2). Winsome and Andres stopped forwarding funds to USV's bank accounts after April 2007 (Bougas ¶44 at Dkt. #17-1). Regardless, Winsome and Andres continued to accept deposits from participants into the Winsome bank accounts up to at least November 2008 (Bougas ¶32 at Dkt. # 17-1).

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 at Dkt. #17-1; Bailey ¶19 at Dkt. #18-2). From the USV bank accounts, Holloway deposited approximately $26.4 million into commodity futures trading accounts held in USV's name and withdrew approximately $15.7 million over the relevant period (Bougas ¶¶57, 66-74 at Dkt. #17-1). 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 at Dkt. #17-1; Bailey ¶¶27-34, 36 at Dkt. #18-2). Holloway also used participant funds to finance his wife's eBay business, Alcoy Enterprise, LLC (Bailey ¶30 at Dkt. #18-2).

D. USV and Holloway Sustained Significant Overall Trading Losses

Despite Winsome's and Andres's claims of past trading success, Holloway sustained consistent losses prior to the relevant period (Bougas ¶¶75-80 at Dkt. #17-1; Bailey ¶¶37, 40 at Dkt. #18-2). 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 at Dkt. #17-1).

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 at Dkt.#17-1; Bailey ¶40 at Dkt. #18-2). 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 at Dkt. #17-1).

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

To shield their losses and misappropriation from discovery and to 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" in a manner akin to a Ponzi scheme (Bougas ¶¶37-39 at Dkt. #17-1; Bailey ¶¶41-44 at Dkt. #18-2).

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 at Dkt. #17-1; Bailey ¶¶41-43, 46, 49 at Dkt. #18-2; Huff ¶¶26-27 at Dkt. #18-4; Sekhon ¶16 at Dkt. #18-5; D. Stelly ¶12 at Dkt. #18-6; S. Stelly ¶8 at Dkt. #18-7; Ward ¶7 at Dkt. #18-8). The posted returns falsely represented that Holloway profitably traded pool funds – sustaining virtually no losses during the relevant period (Bougas ¶¶81-84 at Dkt. #17-1; Bailey ¶¶49-50 at Dkt. #18-2; Huff ¶¶26-27 at Dkt. #18-4; Sekhon ¶16 at Dkt. #18-5; D. Stelly ¶12 at Dkt. #18-6; S. Stelly ¶8 at Dkt. #18-7).

In addition, on several occasions, Holloway directed USV employees to use his "guesstimated" trading results for participant account statements (Bailey ¶48 at Dkt. #18-2).

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 at Dkt. #18-6; S. Stelly ¶9 at Dkt. #18-7; Ward ¶7 at Dkt. #18-8). 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 at Dkt. #18-8).

Winsome and Andres failed to reflect fees in the false account statements and failed to provide certain participants with monthly account statements (Bougas ¶82 at Dkt. #17-1; Comeaux ¶10 at Dkt. #18-3; Huff ¶26 at Dkt. #18-4).

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 at Dkt. #17-1; Bailey ¶5 at Dkt. #18-2). 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 at Dkt. #17-1; Bailey ¶5 at Dkt. #18-2).

As the CEO, corporate secretary, manager, managing partner, member, program manager, resident agent, and trading agent of USV, Holloway exercised control over USV's day-to-day business operations (Bailey ¶10 at Dkt. #18-2). 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 at Dkt. #17-1; Bailey ¶¶46, 48 at Dkt. #18-2). Holloway also monitored USV employees' substantive communications with participants (Bailey ¶10 at Dkt. #18-2).

G. Andres Controlled Winsome and was its Agent

Andres acted as the apparent sole manager, attorney, and trustee of Winsome (Bougas ¶23 at Dkt. #17-1; Bailey ¶12 at Dkt. #18-2; Comeaux ¶¶3, 9 at Dkt. #18-3; Huff ¶¶8, 23 at Dkt. #18-4; Sekhon ¶8 at Dkt. #18-5; Ward ¶8 at Dkt. #18-8). 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 at Dkt. #18-2; Comeaux ¶¶3, 9 at Dkt. #18-3; Huff ¶¶8, 23 at Dkt. #18-4; Ward ¶8 at Dkt. #18-8).

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 at Dkt. #17-1; Bailey ¶¶12, 41, 43 at Dkt. #18-2; Comeaux ¶¶4, 9 at Dkt. #18-3; Huff ¶¶23-27 at Dkt. #18-4; Sekhon ¶13 at Dkt. #18-5; D. Stelly ¶¶11-12 at Dkt. #18-6; S. Stelly ¶¶5, 7-8 at Dkt. #18-7; Ward ¶¶4-5 at Dkt. #18-8).

IV. ARGUMENT

A. Defendants' Failure to Properly Answer Warrants Entry of Default Judgment

Rule 55 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") provides a two-step process for obtaining a default judgment. *Williams v. Smithson*, 57 F.3d 1081 (Table), 1995 WL 365988, at *1 (10th Cir. June 20, 1995). Under Fed. R. Civ. P. 55(a), when a party against whom a default judgment is sought has failed to plead or otherwise assert a defense, and that fact has been documented, the clerk shall enter the party's default. Having obtained the entry of default, the plaintiff must next seek a judgment by default under Fed. R. Civ. P. 55(b).

Pursuant to Fed. R. Civ. P. 55(b)(2), the plaintiff must apply to the court for entry of judgment in all cases where the plaintiff's claim is other than for a sum certain or a sum that can be made certain by computation. Entry of default judgment is left to the sound discretion of the trial court. *Nikwei v. Ross School of Aviation, Inc.*, 822 F.2d 939, 941 (10th Cir. 1987); *Grandbouche v. Clancy*, 825 F.2d 1463, 1468 (10th Cir. 1987); *see also SEC v. Lawbaugh*, 359 F. Supp. 2d 418, 421 (D. Md. 2005) (granting default judgment for permanent injunction, disgorgement and civil monetary penalty where defendant failed to answer complaint alleging securities fraud and misappropriation). Upon default, the well-pled allegations in the complaint are to be taken as true for purposes of establishing liability. *Lawbaugh*, 359 F. Supp. 2d at 422; *see also Holland v. New Country Mining*, No. 01:06-0626, 2006 U.S. Dist. LEXIS 88372, at *6 (S.D.W. Va. Dec. 6, 2006) (where defendant has not pled or otherwise defended himself in an action, all averments in the complaint are deemed admitted); *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780 (4th Cir. 2001) (defaulting defendant admits plaintiff's well-pled allegations of fact).

Courts may award damages under Fed. R. Civ. P. 55(b)(2) if the record adequately reflects the basis for the award *via* a hearing or a demonstration by detailed affidavits establishing the necessary facts. *DeMarsh v. Tornado Innovations, L.P.*, Case No. 08–2588–JWL, 2009 WL 3720180, at *2 (D. Kan. Nov. 4, 2009) (citing *Olcott v. Delaware Flood Co.*, 327 F.3d 1115, 1125 (10th Cir. 2003); *see also Advanced Optics Electronics, Inc. v. Robins*, 769 F. Supp. 2d 1285, 1303 (D. N.M. Dec. 16, 2010) ("It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly.") (citations omitted). "[A] court may enter a default judgment

without a hearing only if the amount claimed is a liquidated sum or one capable of mathematical calculation." *Hunt v. Inter-Globe Energy, Inc.*, 770 F.2d 145, 148 (10th Cir. 1985) (citing *Venable v. Haislip*, 721 F.2d 297, 300 (10th Cir. 1983) (citations omitted). The decision whether a hearing is necessary regarding the matter of damages is left to the discretion of the district court. *SEC v. Lines*, No. 07 Civ. 11387(DLC)(DF), 2011 WL 3611350, at *4 (S.D.N.Y. June 7, 2011).

Andres and Winsome have not responded to the Commission's Complaint. Although Holloway and USV attempted to set aside the Clerk's Entry of Default, the Court denied the motion. Therefore, the Commission respectfully submits that the entry of final judgment against the Defendants is warranted as a matter of law.

B. Jurisdiction

The Court has jurisdiction over the conduct and transactions at issue in this case pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), and Section 2(c)(2) of the Act, 7 U.S.C. § 2(c)(2) (2012). Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (2012), authorizes the Commission to seek injunctive relief against any person whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order thereunder.

Venue properly lies with the Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2012), in that the Defendants transacted business in the District of Utah, and the acts and practices in violation of the Act occurred within this District, among other places.

C. The Commodity Exchange Act

The Commission respectfully requests that in analyzing the Commission's Motion for Entry of Default Judgment the Court consider that a crucial purpose of the Act is "protecting the

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

1. Defendants Committed Fraud in Connection with Futures in Violation of Sections 4b(a)(2)(i)-(iii) and 4b(a)(l)(A)-(C) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii) (2006) and 7 U.S.C. § 6b(a)(1)(A)-(C) (2012)

Sections 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii) (2006), 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 Act, 7 U.S.C. § 6b(a)(1)(A)-(C) (2012), 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; [or] (C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for or, in the case of

paragraph (2), with the other person.

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 Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii) (2006), and Sections 4b(a)(1)(A)-(C) of the Act, 7 U.S.C. § 6b(a)(1)(A)-(C) (2012).

a. Andres and Holloway Misappropriated Participants' Funds

The misappropriation of participant funds also violates Sections 4b of the Act. Misappropriation of participants' funds constitutes "willful and blatant" fraudulent activity that violates the anti-fraud provisions of the Act. *Noble Wealth*, 90 F. Supp. 2d at 687; *CFTC v. Baragosh,* 278 F.3d 319 (4th Cir. 2002), *cert denied*, 537 U.S. 950 (2002) ("misappropriation of funds constitutes 'willful and blatant' fraudulent activity violative of Sections 4b(a) of the Act"); *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,315 (CFTC July 19, 1999), *aff'd in relevant part sub nom., Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000) [hereinafter Slusser] (respondents violated Section 4b by surreptitiously retaining money in their own bank accounts that should have been traded on behalf of participants); *CFTC v. King,* No. 3:06-CV-1583-M, 2007 WL 1321762, at *2 (N.D. Tex. May 7, 2007) ("[Defendant's] violation of section 4b(a)(2)(i), (iii) of the Act is further proven by his admitted misappropriation of customer funds for personal and professional use."); *CFTC v. Weinberg*, 287 F. Supp. 2d 1100, 1106 (C.D. Cal. 2003) (misappropriating investors' funds violated Section 4b(a)(2)(i) and (iii) of the Act); *CFTC ex rel Kelley 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 Act); *see also CFTC v. Skorupskas*, 605 F. Supp.

923, 932 (E.D. Mich. 1985) (holding that defendant violated Section 4b when she misappropriated pool participant funds by soliciting funds for trading and then trading only a small percentage of those funds, while disbursing the rest of the funds to investors, herself, and her family).

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 Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii) (2006), with respect to acts occurring before June 18, 2008, and 4b(a)(1)(A) and (C) of the Act, 7 U.S.C. §§ 6b(a)(1)(A) and (C) (2012), with respect to acts occurring on or after June 18, 2008.

b. Solicitation Fraud

To establish that Defendants violated Section 4b of the Act, the Commission must prove that (1) a misrepresentation, misleading statement, or deceptive omission was made; (2) with scienter; and (3) that the misrepresentation, misleading statement, or deceptive omission was material. *CFTC v. King*, No. 3:06-CV-1583-M, 2007 WL 1321762, at *2 (N.D. Tex. May 7, 2007) (citing *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002)).

i. 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's and Andres's 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 and investment, but instead misappropriated the funds for Andres's 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 lose 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 lost money, in conjunction with exaggerated statements of profit potential, make solicitations fraudulent as a matter of law); *CFTC v. Noble Wealth Data Info. Servs., Inc.*, 90 F. Supp. 2d 676, 685 (D. Md. 2000), *aff'd in relevant part sub nom CFTC v. Baragosh,* 278 F.3d 319 (4th Cir. 2002), *cert denied,* 537 U.S. 950 (2002) (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).

ii. 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). 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)); *Wasnick v. Refco, Inc.*, 911 F.2d. 345, 348 (9th Cir. 1990) (holding that scienter is established when an individual's acts are performed "with knowledge of their nature and character") (citation omitted); *Lawrence v. CFTC*, 759 F. 2d 767, 773 (9th Cir. 1985) (providing that Commission must demonstrate only that a defendant's actions were "intentional as opposed to accidental"). "Recklessness is [also] sufficient to satisfy Section 4b's scienter requirement." *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748 (D.C.Cir. 1988).

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.

iii. Winsome's 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 is material if "there is a substantial likelihood that a reasonable investor would consider the information important in making a decision to invest." *R&W Technical Serv. Ltd. v. CFTC*, 205 F.3d 165, 169 (5th Cir. 2000); *see R.J. Fitzgerald & Co.*, 310 F.3d at 1328 (citing *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128 (1972)) ("A representation or omission is material if a reasonable investor would consider it important in deciding whether to make an investment") (internal quotation marks omitted). 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, 1997 CFTC LEXIS 8, at *25 (CFTC Jan. 14, 1997) (holding 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 decisions 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).

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)). 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, 1992)).

Andres's 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. *See 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's 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 Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii) (2006), with respect to acts occurring before June 18, 2008, and 4b(a)(1)(A) and (C) of the Act, 7 U.S.C. §§ 6b(a)(1)(A) and (C) (2012), with respect to acts occurring on or after June 18, 2008.

c. Fraud by Issuing False Written Statements to Pool Participants

Section 4b(a)(2)(ii) of the Act, 7 U.S.C. § 6b(a)(2)(ii) (2006), and Section 4b(a)(1)(B) of the Act, 7 U.S.C. § 6b(a)(1)(B) (2012), 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) of the Act, 7 U.S.C. § 6b(a)(2)(ii) (2006). *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 Act).

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 Act, 7 U.S.C. § 6b(a)(2)(ii) (2006), with respect to acts occurring before June 18, 2008, and 4b(a)(1)(B) of the Act, 7 U.S.C. § 6b(a)(1)(B) (2012), with respect to acts occurring on or after June 18, 2008.

2. USV and Winsome Committed Fraud as Commodity Pool Operators, and Andres and Holloway Committed Fraud as Associated Persons in Violation of Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (2012)

Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (2012), broadly prohibits fraudulent transactions by Commodity Pool Operators ("CPO(s)")[2] and Associated Persons ("AP(s)")[3] thereof. Sections 4o(1)(A) and (B) of the Act, 7 U.S.C. §§ 6o(1)(A) and (B) (2012), apply to all CPOs and APs, whether registered, required to be registered, or exempted from registration. Skorupskas, 605 F. Supp. at 932. Section 4o(1)(A) of the Act, 7 U.S.C. § 6o(1)(A) (2012), 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 Act, 7 U.S.C. § 6o(1)(B) (2012), makes it unlawful for a CPO, or an AP 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 Sections 4b and 4o(1)(A) of the Act, 7 U.S.C. §§ 6b and 4o(1)(A) (2012), Section 4o(1)(B) of the Act, 7 U.S.C. § 6o(1)(B) (2012), has no scienter requirement. *In re Kolter*, [199401996 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 Act, 7 U.S.C. § 6b (2012), as set forth above, also violates Section 4o(1) of the Act, 7 U.S.C. § 4o(1) (2012). *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,

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[2] The CEA defines a 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 any commodity for future delivery on or subject to the rules of any contract market. 7 U.S.C. § 1a(5) (2006).

[3] The CEA defines an 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).

committed acts of fraudulent solicitation, false statements, and/or misappropriation of participant funds in violation of Sections 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii) (2006), with respect to acts occurring before June 18, 2008, and Sections 4b(a)(1)(A)-(C) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)-(C) (2012), with respect to acts occurring on or after June 18, 2008. By those same acts, Defendants violated Sections 4o(1)(A) and (B) of the Act, 7 U.S.C. §§ 6o(1)(A) and (B) (2012). *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).

3. USV and Winsome Violated Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2012), by Failing to Register as CPOs and Andres and Holloway Violated Section 4k(2) of the Act, 7 U.S.C. § 6k(2) (2012), by Failing to Register as APs

USV and Winsome each acted as a CPO of a respective pool, and Holloway and Andres acted as APs of USV and Winsome, respectively, without registering with the Commission, in violation of Sections 4m(1) and 4k(2) of the Act, 7 U.S.C. §§ 6m(1) and 4k(2) (2012), respectively.

Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2012), provides that it is unlawful for any CPO, unless registered under the Act, to make use of the mails of any means or instrumentality of interstate commerce in connection with his business of as a CPO. Section 4k(2) of the Act, 7 U.S.C. § 6k(2) (2012), 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. Neither USV nor Winsome claimed exemption from registration, nor did USV or Winsome qualify for the exemptions identified in Commission Regulation 4.13, 17 C.F.R. § 4.13 (2013). Thus, USV and Winsome were acting as CPOs without being registered as required by Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2012), and Holloway and Andres were acting as APs of USV and Winsome, respectively, without being registered as required by Section 4k(2) of the Act, 7 U.S.C. § 6k(2) (2012).

4. USV's and Winsome's Failures to Comply with Commission Regulation 4.20, 17 C.F.R. § 4.20 (2013)

Commission Regulation 4.20(a)(1), 17 C.F.R. § 4.20(a)(1) (2013), requires a CPO to "operate its pool as an entity cognizable as a separate legal entity from that of the pool operator." Commission Regulation 4.20(b), 17 C.F.R. § 4.20(b) (2013), 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 Commission Regulations 4.20(a)(1) and 4.20(b), 17 C.F.R. §§ 4.20(a)(1) and 4.20(b) (2013).

5. Winsome's Failure to Comply with Commission Regulation 4.21, 17 C.F.R. § 4.21 (2013)

Pursuant to Commission Regulation 4.21(a)(1), 17 C.F.R. § 4.21(a) (2013), a CPO is required to provide a disclosure document to prospective participants prepared in accordance with Commission Regulations 4.24 and 4.25, 17 C.F.R. §§ 4.24 and 4.25 (2013), by no later than

the time it delivers to the prospective participant a subscription agreement. In addition, prior to accepting or receiving funds, Commission Regulation 4.21(b), 17 C.F.R. § 4.21(b) (2013), requires a CPO to receive from participants an acknowledgement 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 Commission Regulations 4.21(a)(1) and (b), 17 C.F.R. §§ 4.21(a)(1) and (b) (2013).

6. Winsome's Failure to Comply with Commission Regulation 4.22, 17 C.F.R. § 4.22 (2013)

Commission Regulation 4.22, 17 C.F.R. § 4.22 (2013), 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 monthly Account Statements to certain participants. Accordingly, Winsome violated Commission Regulation 4.22, 17 C.F.R. § 4.22 (2013).

7. Holloway is Liable for USV's Violations, Pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2012)

Holloway is liable for the violations of the Act and Regulations by USV, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2012). Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2012), provides that any person who, directly or indirectly, controls any person who has violated the Act, 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) of the Act, 7 U.S.C. § 13c(b) (2012), 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 Act 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 Act, 7 U.S.C. §13c(b) (2012), as he both possessed control over and knowingly induced, or failed to act in good faith with respect to, 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 at 41,787 (CFTC 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. *Spiegal*, ¶ 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." *Spiegal*, ¶ 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 Spiegal*, ¶ 24,103 at 34, 767.

Along with Andres, Holloway was one of 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 created false statements used to solicit and retain participants in the unnamed USV pool.

Holloway did not act in good faith and/or knowingly induced the acts and omissions that constitute violations of the Act insofar as he engaged in, and had actual knowledge of, the conduct upon which the violations of the Act are based. Because Holloway had the requisite control of USV, Holloway knowingly induced USV's violations as set forth above and is liable for those violations pursuant to Section 13(b) of the Act, 7 U.S.C. §13c(b) (2012).

8. USV is Liable for Holloway's Violations

Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Commission Regulation 1.2, 17 C.F.R. § 1.2 (2013), 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 Act and Commission Regulations.

9. Andres is Liable for Winsome's Violations

Andres is liable for the violations of the Act and Regulations by Winsome, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2012). 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 Act and Commission Regulations.

10. Winsome is Liable for Andres's 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 Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Commission Regulation 1.2, 17 C.F.R. § 1.2 (2013).

V. REMEDIES

Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), states in relevant part:

> (a) Whenever it shall appear to the Commission that any registered entity or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this Act or any rule, regulation or order, thereunder . . . the Commission may bring an action in the proper district court of the United States . . . to enjoin such act or practice, or to enforce compliance with this Act, or any rule, regulation or order thereunder . . .
>
> (d) . . . the Commission may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation . . . a civil penalty in the amount of not more than the greater of $100,000[4] or triple the monetary gain to the person for each violation . . . .

Here, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), the Commission seeks a permanent injunction, civil monetary penalties ("CMP"), and other equitable relief against Defendants.

[4] For the time period at issue in the case at bar, the maximum civil monetary penalty ("CMP") that may be ordered is $140,000 for each violation of the Act committed on or after October 23, 2008, and $130,000 for each violation committed before October 23, 2008, or triple the monetary gain to the Defendant, whichever is higher. *See* Commission Regulation 143.8(a)(1)(iii)-(iv), 17 C.F.R. § 143.8(a)(1)(iii)-(iv) (2013).

A. The Court Should Enter a Permanent Injunction Against Defendants

The Commission must establish two things to obtain permanent injunctive relief in an action under Section 6c of the Act, 7 U.S.C. § 13a-1 (2012): (1) that a violation of the Act has occurred; and (2) that there is a reasonable likelihood of future violations. *See CFTC v. IBS, Inc.*, 113 F. Supp. 2d 830, 848 (W.D.N.C. 2000) (quoting *CFTC v. Hunt,* 591 F.2d 1211, 1220 (7th Cir. 1979), *cert. denied* 442 U.S. 921 (1979) (finding that "[o]nce a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations" under Section 6c of the Act). To be sure, while past misconduct does not require the conclusion that there is a likelihood of future misconduct, it is "highly suggestive of the likelihood of future violations." *Hunt*, 591 F.2d at 1220; *see also CFTC v. Am. Metals Exch. Corp.*, 693 F. Supp. 168, 191 (D.N.J. 1988) ("The likelihood of future violations may be inferred from past infractions based upon consideration of the totality of the circumstances to determine if the past infraction was an isolated occurrence as opposed to an indication of a systematic and continuous pattern of wrongdoing.") (citations omitted); *Cf. SEC v. Zale Corp.*, 650 F.2d 718, 720 (5th Cir. 1981) ("[T]he [Securities and Exchange] Commission is entitled to prevail when the inferences flowing from the defendant's prior illegal conduct, viewed in light of the present circumstances, betoken a 'reasonable likelihood' of future transgressions"), *cert. denied sub nom.,* 454 U.S. 1124 (1981) (citations omitted); *Hunt*, 591 F.2d, at 1219-20 (reversing the district court's denial of injunctive relief, and stating that a court of appeals should not hesitate "to reverse an order denying [injunctive] relief when it is evident that the trial court's discretion has not been exercised to effectuate the manifest objectives of the specific legislation involved.") (internal quotation marks and citations omitted).

Here, the Commission has made a showing that Defendants engaged in acts and practices that violated Sections 4b(a)(2)(A)-(C) of the Act, 7 U.S.C. §§ 6b(a)(2)(A)-(C) (2012). Based on the egregiousness of the conduct in this matter, it is clear that, unless restrained and enjoined by this Court, there is a reasonable likelihood that the Defendants will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of the Act. As a result, the Commission respectfully requests that the Court enter an injunction against Defendants permanently restraining, enjoining, and prohibiting them from directly or indirectly:

1. Engaging in conduct that violates Sections 4b(a)(1)(A)-(C), 4o(1)(A) and (B), 4m(1), and 4k(2) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)-(C), 6o(1)(A) and (B), 6m(1), and 6k(2) (2012), and Commission Regulations 4.20(a)(1) and (b), 4.21(a)(1) and (b), and 4.22, 17 C.F.R. §§ 4.20(a)(1) and (b), 4.21(a)(1) and (b), and 4.22 (2013);

2. Engaging in any activity involving:

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

b. entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 1.3 (hh), 17 C.F.R. § 1.3 (hh))("commodity options"), security futures products, and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i)) ("forex contracts") for their own personal account or for any account in which they have a direct or indirect interest;

c. having any commodity futures, options on commodity futures, commodity options, security futures products, and/or forex contracts traded on their behalf;

d. controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, security futures and/or forex contracts;

e. Soliciting, receiving or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, security futures products and/or forex contracts;

f. applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or

exemption from registration with the Commission except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9); and/or

g. Acting as a principal (as that term is defined in Commission Regulation 3.1(a), 17 C.F.R. § 3.1(a)), agent or any other officer or employee of any person (as that term is defined in Section 1a of the Act, 7 U.S.C. § 1a) registered, exempted from registration or required to be registered with the Commission except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9).

B. Defendants Should be Ordered to Pay Restitution

1. The Court Has Authority to Order Restitution

In a civil enforcement action brought pursuant to Section 6c of the Act, 7 U.S.C. §13a-1 (2012), the district court may also order ancillary equitable relief that it deems appropriate, including restitution and disgorgement. *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 193 (4th Cir. 2002) ("It is well settled that equitable remedies such as disgorgement are available to remedy violations of the [Act]"); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 760-61 (6th Cir. 1999) ("[r]estitution and disgorgement are part of the court's traditional equitable authority").

This authority is founded on the well-established legal principle articulated by the Supreme Court in *Porter v. Warner Holding Co.*:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader power and more flexible character than when a private controversy is at stake. Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case."

Porter, 328 U.S. 395, 398 (1946) (citations omitted).

2. Restitution Should be Measured in the Amount of Participants' Losses

The object of restitution is to restore the status quo and return the parties to the positions they occupied before the transactions at issue occurred. *Porter*, 328 U.S. at 402 (equitable restitution consists of "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant"); *United States v. Long,* 537 F.2d 1151, 1153 (4th Cir. 1975) (restitution consists of restoring the injured party "to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money") (quoting Restatement of Restitution, § 1, cmt. a (1937)); *see also SEC v. AMX Int'l, Inc.,* 7 F.3d 71, 74–75 (5th Cir.1993) ("[r]estitution . . . has the goal of making the aggrieved party whole"); *First Penn Corp. v. FDIC,* 793 F.2d 270, 272 (10th Cir.1986) ("[t]he object of restitution is to return the parties to the position that existed before the transaction occurred").

"Restitution is measured by the amount invested by customers less any refunds made by the [D]efendants." *Noble Wealth,* 90 F. Supp. 2d at 693; *see also CFTC v. Marquis Fin. Mgmt. Systems, Inc.*, 2005 WL 3752232, at *6 (E.D. Mich. 2005) (ordering restitution in the amount of net customer deposits); *CFTC v. Rosenberg,* 85 F. Supp. 2d 424, 455 (D. N.J. 2000) (ordering restitution in amount of customer deposits).

Here, during the time period from at least May 2005, and continuing at least through November 2008, Defendants fraudulently solicited at least $50.2 million from at least 243 pool participants, and returned $38.2 million as purported profits or return of principal to pool participants. Accordingly, the Court should order the Defendants, jointly and severally, to pay restitution in the amount of $12 million, the total amount of losses incurred by pool participants.

C. Defendants Should be Ordered to Pay Civil Monetary Penalties

As outlined above, the Court has jurisdiction to impose a Civil Monetary Penalty ("CMP") of "*the greater of* [$130,000 for each violation occurring prior to October 23, 2008 and $140,000 for each violation occurring on or after October 23, 2008], or triple the monetary gain to the [Defendant] for each violation." 7 U.S.C. §13a-1 (2006) (emphasis added). The Commission may, as it did here, allege multiple violations in a single count. *CFTC v. Levy*, 541 F.3d 1102, 1110-11 (11th Cir. 2008). Thus, the Court must first determine the number of violations in order to calculate the maximum civil monetary penalty that may be imposed.

The Court is free to fashion a civil monetary penalty appropriate to the gravity of the offense and sufficient to act as a deterrent. *Miller v. CFTC,* 197 F.3d 1227, 1236 (9th Cir. 1999). "In determining how extensive the fine for violations of the Act ought to be, courts and the Commission have focused upon the nature of the violations." *Capitalstreet Financial, LLC*, 2012 WL 79758 at *15 (quoting *Noble Wealth*, 90 F. Supp. 2d at 694). Conduct that violates the core provisions of the Act, such as customer fraud, should be considered extremely serious. *JCC, Inc.*, 63 F.3d at 1571. In *JCC, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit upheld the district court order imposing a civil monetary penalty, finding that "[c]onduct that violates the core provisions of the Act's regulatory system – such as manipulating prices or defrauding customers *should be considered very serious* even if there are mitigating facts and circumstances." *Id.* at 1571 (internal quotation marks and citation omitted) (emphasis added). In the case at hand, there are no mitigating facts or circumstances. Instead, Defendants were blatant and malicious in their fraudulent conduct.

In light of the egregiousness of Defendants' conduct, Plaintiff proposes a civil monetary penalty of $32,370,000, plus post-judgment interest thereon, be imposed jointly and severally on

Defendants. Plaintiff asks that the Court consider each of the 243 participants defrauded by Defendants' violations of the anti-fraud provisions of Section 4b(a) of the Act, 7 U.S.C. § 6b(a) (2012), as alleged in Counts One through Three of its Complaint, as a separate and distinct violation for purposes of imposing a civil monetary penalty. This yields $31,590,000.[5] Because Defendants' violations of Section 4o(1) of the Act, 7 U.S.C. §6o(1) (2012), as alleged in Count Four of the Complaint, are based on the same acts that violated Section 4b(a) of the Act, Plaintiff asks that the Court consider this as a single violation for purposes of imposing a civil monetary penalty. This yields an additional $130,000. Plaintiff further asks that the Court consider each of Defendants' violations of Sections 4m and 4k of the Act, 7 U.S.C. §§ 6m and 6k (2012), and Commission Regulations 4.20, 4.21, and 4.22, 17 C.F.R. §§ 4.20, 4.21, and 4.22 (2013), as alleged in Counts Five through Eight of the Complaint, as single violations for purposes of imposing a civil monetary penalty. This yields an additional $650,000. Taken together, the civil monetary penalty would thus total $32,370,000. The extreme gravity, long duration, and breadth of Defendants' blatant fraud surely justify this amount.

VI. CONCLUSION

This Court should enter a default judgment and permanent injunction against Defendants, together with the ancillary relief sought herein by the Commission, including an award of restitution and civil monetary penalties, in accordance with the attached proposed order. This relief is both within the power of this Court and appropriate under the present circumstances. As alleged in the Complaint, Defendants have engaged in egregious conduct that clearly violated the Act. By granting the injunctive and ancillary relief requested by the Commission, this Court can prevent Defendants from further violating the Act and protect the public.

[5] In light of the fact that the overwhelming majority of Defendants' violations of the Act occurred prior to October 23, 2008, and the difficulty in parsing out those may have which occurred after October 23, 2008 from those which occurred prior thereto, the Commission is seeking civil monetary penalties of only $130,000 for each violation.

Respectfully submitted,

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Dated: 4/21/2014

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on all parties or counsel of record identified below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing:

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