

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION**

U.S. COMMODITY FUTURES TRADING COMMISSION,)	
)	
Plaintiff,)	
)	CASE NO. _____
v.)	
)	
SEAN NATHAN HEALY,)	
)	
Defendant,)	
)	
and)	
)	
SHALESE RANIA HEALY and SAND DOLLAR INVESTING PARTNERS, LLC,)	
)	
Relief Defendants.)	
)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S *EX PARTE*
EMERGENCY MOTION FOR A STAUTORY RESTRAINING ORDER,
EXPEDITED DISCOVERY, PRELIMINARY INJUNCTION,
AND OTHER EQUITABLE RELIEF**

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I. INTRODUCTION

Plaintiff U.S. Commodity Futures Trading Commission (CFTC) respectfully submits this Memorandum in Support of Plaintiff's *Ex Parte* Emergency Motion for a Statutory Restraining Order, Preliminary Injunction, Expedited Discovery, and Other Equitable Relief against defendant Sean Nathan Healy (Sean Healy or Defendant) and against relief defendants Shalese Healy and Sand Dollar Investing Partners, LLC (Sand Dollar), (collectively, Relief Defendants), pursuant to Section 6c of the Commodity Exchange Act (Act), 7 U.S.C. § 13a-1 (2006).

Since at least May 2008, Sean Healy has engaged in a fraudulent scheme to solicit funds from Alfred L. Madeira (Madeira), as well as from friends, acquaintances, and business associates of Madeira and Madeira's attorney, Thomas Ahrens (Ahrens) (collectively, the Madeira Investors) to invest in, *inter alia*, commodity futures contracts (futures) and commodity options contracts (options). Upon information and belief, approximately 44 investors, most of whom reside in this District have invested collectively at least \$14 million in Defendant's fraudulent scheme.

Starting sometime in or around April 2008, Sean Healy contacted Madeira, an acquaintance since approximately 2000. Sean Healy represented to Madeira that he was a successful day trader of futures, options, and securities. Based upon these

representations, Madeira decided to invest his funds with Sean Healy for the purpose of trading futures and options, as well as securities.

Throughout the next several months, Sean Healy falsely represented to Madeira that his trading activities were reaping substantial profits for the both of them. Based upon these false claims of success, Madeira encouraged others, the Madeira Investors, to entrust their funds with Sean Healy.

Contrary to Sean Healy's claims that he profitably traded Madeira's and the Madeira Investors' funds, in reality Sean Healy misappropriated these funds for his and his wife's own use.¹ During the time that Sean Healy was receiving money from Madeira, he and his wife, Shalese Healy, purchased numerous exotic vehicles, jewelry, a lease on a luxury suite at Bank Atlantic Arena (where the Miami Heat play basketball), a \$2.4 million home, and approximately \$2 million in home furnishings and home improvements, including a \$500,000 home movie theater. Sean Healy concealed the nature of his fraud by repeatedly assuring Madeira that his futures and options trading was earning excellent returns and that distributions of these tremendous trading profits would be made in February 2009.

In February 2009, however, Sean Healy told Madeira that his futures and options trading account, which allegedly had a \$79.3 million balance, was

¹ Sean Healy directed that all funds received from Madeira and the Madeira Investors be deposited into a bank account in the name of his wife, Shalese Healy, who had sole signatory authority over the account.

temporarily restricted because certain transactions “were still open.” By March 2009, Sean Healy told Madeira that “regulatory issues” had reduced the value of the account and that only distributions of principal would be available.

Madeira filed *Madeira v. Healy* in the U.S. District Court for the Southern District of Florida on March 16, 2009 (Case No. 09-6-4-3-CIV-MARTINEZ/BROWN) and contacted the United States Attorney’s Office for the Middle District of Pennsylvania (USAO). Sean Healy furnished falsified documents to the USAO in response to inquiries, including purported bank records and brokerage account records from a representative named “Mike Hein” at a firm called “PCF” and for an account he claims to maintain at Interactive Brokers (Interactive), a futures commission merchant (FCM) registered with the CFTC. PCF is not a registered futures trading firm or broker-dealer. The purported address on the documents produced to the USAO—“398 Lafayette Street, New York, NY”—is either misspelled or nonexistent. Likewise, there is no record of any registered representative by the name of “Mike Hein” or “Michael Hein” at any firm registered with the CFTC or the U.S. Securities and Exchange Commission (SEC).

Further, the detail contained in the Interactive records Sean Healy produced to the USAO were combined from activity in two accounts that appear to have no relationship or connection with Sean Healy or any entities with which he is associated.

Sean Healy's conduct violates Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. § 6b(a)(2)(i)-(iii) (2006), for conduct that occurred prior to June 18, 2008, and Section 4b(a)(1)(A)-(C) of the Act, as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act ("CRA")), § 13102, 122 Stat. 1651 (effective June 18, 2008), to be codified at 7 U.S.C. §§ 6b(a)(1)(A)-(C), for conduct that occurred on or after June 18, 2008; Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006); and CFTC Regulation (Regulation) 33.10(a)-(c), 17 C.F.R. § 33.10(a)-(c) by, among other things, misappropriating investor funds, making false statements to Madeira and either directly or indirectly to the Madeira investors regarding, among other things, trading activity and profits supposedly generated from that trading, and issuing false written statements to Madeira. Because Relief Defendants received Madeira's and the Madeira Investors' money to which they were not entitled and to which they do not have a legitimate claim, they must disgorge these ill-gotten gains.

Accordingly, the CFTC brings this action to enjoin such unlawful acts and practices and to compel compliance with the provisions of the Act; the Act, as amended by the CRA; and the Regulations. The CFTC seeks an *ex parte* statutory restraining order (SRO): (1) freezing Defendant's and Relief Defendants' assets; (2) appointing a receiver; (3) preventing Defendant and Relief Defendants from directly or indirectly destroying, mutilating, concealing, altering, or disposing of any

books, records, documents, or correspondence; (4) requiring Defendant and Relief Defendants to provide the CFTC and the receiver with a full accounting of their funds, documents, and assets; (4) permitting the CFTC and the receiver to inspect and copy books, records, documents, and correspondence (wherever they may be located) of Defendant and Relief Defendants; (5) ordering Defendant to appear before the Court and show cause why a preliminary injunction should not be entered against him to enjoin further violations of the Act; the Act, as amended by the CRA; and Regulations.

Unless restrained and enjoined by the Court, Defendant likely will continue to engage in the acts and practices alleged in the Complaint and similar acts and practices, as more fully described below.

II. THE PARTIES

A. Plaintiff

Plaintiff **Commodity Futures Trading Commission** is an independent federal regulatory agency that is charged with the administration and enforcement of the Act, 7 U.S.C. §§ 1 *et seq.* (2006), as amended by the CRA, §§ 13101-13204, and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2009). The CFTC maintains its principal office at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

B. Defendant

Defendant **Sean Nathan Healy** resides in Weston, Florida. He is a self-described day trader of futures, options, and securities. He has never been registered with the CFTC in any capacity.

C. Relief Defendants

Relief Defendant **Shalese Healy** resides in Weston, Florida. Her husband is Sean Healy. Defendant and Shalese Healy maintain all or nearly all their assets in Shalese Healy's name. Sean Healy directed that all funds received from Madeira and the Madeira Investors be deposited into a bank account in the name of Shalese Healy, who had sole signatory authority over the account. She is also the sole owner of a \$2.4 million home in Weston Florida that was purchased with misappropriated investor funds. Between October 2008 and January 2009, numerous luxury vehicles have been titled in her name. She has never been registered with the CFTC in any capacity.

Relief Defendant **Sand Dollar Investing Partners, LLC**, is a Nevada limited liability company formed on or about July 21, 2008 as a result of a joint venture agreement between Sean Healy and Madeira, Sand Dollar's sole members. At the time of its formation, Sand Dollar's registered address was Madeira's home address in Chambersburg, Pennsylvania. Defendant used the Sand Dollar entity to title several of the vehicles he purchased with investor funds and caused Sand Dollar to

lease warehouse space in which to store the luxury vehicles he purchased using investor funds. Sand Dollar has never been registered with the CFTC in any capacity.

III. STATEMENT OF FACTS²

Sean Healy and Madeira have been acquainted since approximately 2000. Exhibit A at ¶ 5. In or around April 2008, Sean Healy contacted Madeira with the purpose of soliciting Madeira to invest his funds with Sean Healy. *Id.* Specifically, Sean Healy represented to Madeira that he was a successful day trader of futures, options, and securities. *Id.* at ¶¶ 7-8.

From approximately June to August 2008, based on Sean Healy's representations to Madeira of Sean Healy's purported trading success, Madeira, at Sean Healy's instructions, forwarded approximately \$1.2 million to Shalese Healy's Bank of America account. *Id.* at ¶¶ 13-17. Madeira transmitted these funds with the understanding that Sean Healy would purchase, among other things, certain oil and gold futures and/or options contracts on behalf of Madeira and, perhaps, other individuals. *Id.*

On or about June 18, 2008, Sean Healy faxed to Madeira a handwritten letter representing that Sean Healy had executed, among other things, certain gold and oil

² The Statement of Facts is based on Alfred L. Madeira's Verified Complaint for Damages and Injunctive Relief, *Madeira v. Healy*, 09-60403-Civ-Martinez/Brown (S.D.Fla. 2009) (Madeira Compl.), attached as Exhibit A; Deposition Transcript of Alfred L. Madeira in *Madeira v. Healy*, 09-60403-Civ-Martinez/Brown (S.D.Fla. 2009) (Madeira Dep.), attached as Exhibit B; June 1, 2009 Facsimile (6/1/08 Fax), attached as Exhibit C; Wednesday, August 6, 2008 7:26 p.m. Email (7:26 p.m. Email), attached as Exhibit D; Wednesday, August 6, 2008 7:24 p.m. Email (7:24 p.m. Email), attached as Exhibit E; the Declaration of Michael Loconte (Loconte Decl.), attached as Exhibit F; Stipulated Status Quo Order, attached as Exhibit G; and Order Finding Defendants in Civil Contempt (Contempt Order), attached as Exhibit H.

futures and/or options trades on Madeira's behalf. *Id.* at ¶ 10; *Id.* at Madeira Compl. Ex. 2. On or about June 30, 2008, Sean Healy faxed to Madeira a handwritten letter representing that the oil futures and/or options contracts that Sean Healy had executed on behalf of himself and Madeira had been extremely successful, resulting in a profit of over \$1.1 million for each of them. *Id.* at ¶ 15; *Id.* at Madeira Compl. Ex. 5. On or about July 1, 2008, Sean Healy faxed to Madeira a handwritten letter representing that certain additional oil futures and/or options trades Sean Healy had executed on behalf of himself and Madeira also had been extremely successful, resulting in approximately \$1.2 million in "gross value" for each of them. *Id.* at ¶ 16; Exhibit C.

In addition to the handwritten letters, Sean Healy called Madeira numerous times conveying that he had achieved certain trading successes. Exhibit B, p. 49:14-50:17. For example, Sean Healy said, on one particular occasion, "[a]t times, this is almost too easy...there's times and this is one of the few times in your life that you're going to see oil go up like this, therefore, you have to take advantage of the opportunity because this only happens like [sic] a once in a lifetime." *Id.*, p. 50:6-17.

At some point after Madeira initially invested his funds with Sean Healy, they discussed the possibility of additional investments by Madeira and investments from third parties. Exhibit A. at ¶ 29. With the prospect of receiving additional funds, particularly funds from third parties, for additional futures and options trades, Sean Healy suggested to Madeira the formation of Sand Dollar, which would be used

to conduct the actual trading. *Id.* Upon information and belief, Sand Dollar did no futures or options trading. Exhibit F at ¶ 12.

In early August, 2008, Madeira met Sean Healy in person in Hollywood, Florida. Exhibit A at ¶ 18. During these meetings, Sean Healy represented to Madeira that Sean Healy's trading account, placed with a broker Sean Healy referred to only as "Andy" (Andy Account), totaled more than \$79 million as of August 6, 2008. *Id.* at ¶¶ 18, 26; Exhibit D. Madeira was supposedly entitled to fifty percent of this amount. Exhibit A at ¶ 18. According to Sean Healy, however, the Andy Account had a 90-day trading restriction imposed upon it by regulators because of a technically improper trade conducted by Sean Healy; therefore, Sean Healy told Madeira that the distribution on any gains in the Andy Account would occur on or about February 1, 2009. *Id.* at ¶¶ 33, 35; Exhibit E.

Shortly after Sean Healy told Madeira of the purported extraordinary profits they had earned, Sean Healy told Madeira that he had a connection with a commodities trader, identified as "Matt," who could turn \$1.5 million into \$16 million by trading gold futures and/or options. Exhibit A at ¶ 21. Enticed by this prospect and Sean Healy's supposed extraordinary trading success, Madeira and Ahrens raised an additional \$13.2 million from the Madeira Investors, giving that money to Sean Healy to use to trade futures and options. *Id.* at ¶ 24. Madeira

Investors' funds were supposedly held in an account traded by Matt (Matt Account). *Id.* at ¶¶ 20-22.

In or about December 2008, Sean Healy told Madeira that the Andy Account was transferred to Matt's firm supposedly to ease custodial arrangements. *Id.* at ¶ 27. After the purported transfer, Matt's firm supposedly held the Andy Account, the Matt Account, and a third account that invested in financial products other than futures and options. The supposed aggregate value of these three accounts was \$160 million. *Id.* At no time did Sean Healy provide any account statements or identifying information regarding the accounts traded by Matt to Madeira or the Madeira Investors. *Id.* at ¶ 28.

As the February 1, 2009 supposed distribution deadline passed, Madeira arranged a meeting with Sean Healy to discuss the failure to distribute the owed funds. *Id.* at ¶ 36. On or about February 11, 2009, Sean Healy assured Madeira that the accounts would be "cleared," and the accounts would be available for distribution on March 2, 2009. *Id.*

On or about March 2, 2009, Sean Healy informed Madeira that there would be no distribution that day, that certain transactions in one of the three accounts purportedly held by Matt were "still open," and that regulators required that certain additional steps be taken with respect to the accounts, which he claimed would be completed several days thereafter. *Id.* at ¶ 38. Sean Healy told Madeira that the

estimated value of the Matt Account would be affected by open issues regarding trades within that account, but approximately \$30-40 million would be available for distribution on or about March 5, 2009. *Id.* at ¶ 40. Sean Healy claimed that the issues in the Matt Account had no effect on either the Andy Account or the third account. *Id.*

On or about March 5, 2009, despite the prior representations of extraordinary gains, Sean Healy informed Madeira that Madeira should not expect distributions of any purported gain in any of the accounts, and any reimbursement of principal would come from Matt's firm. *Id.* at ¶¶ 41-43.

To date, only a small fraction of the investors' principal provided to Sean Healy (and no purported gains) have been returned to Madeira and the Madeira Investors. *Id.* at ¶ 44. The futures and options trading did not occur as represented by Sean Healy (and likely did not occur at all) and the oral and written representations made by Sean Healy to Madeira regarding trading activity and purported success were false. Exhibit F at ¶¶ 13-14.

During the time that Sean Healy was receiving money from Madeira into Shalese Healy's Bank of America account (BoA), Sean and Shalese Healy purchased \$1.4 million worth of jewelry, gold bullion, a lease on a luxury suite at BankAtlantic Arena (where the Miami Heat play basketball), purchased a \$2.4 million home, and approximately \$2 million in home furnishings and home improvements, inclusive of

\$1.2 million in design and general contracting services, a \$500,000 home movie theater, \$144,000 on a swimming pool and \$100,000 on landscaping. *Id.* at ¶ 16.

Furthermore, between October 2008 and January 2009, the following motor vehicles were titled in Shalese Healy's name:

- a. Porsche 911 TURBO
VIN # WP0AB29983S686390
- b. Lamborghini GALLARDO SPYDER
VIN # ZHWGU22T48LA06992
- c. Ferrari F355 GTS
VIN # ZFFPR42A9S0101284
- d. Lamborghini GALLARDO SPYDER
VIN # ZHWGU22T08LA07153
- e. Lamborghini GALLARDO SPYDER
VIN # ZHWGU22T58LA06581
- f. Porsche CARRERA GT
VIN # WP0CA29875L001294
- g. Maserati QUATTROPORTE M139
VIN # ZAMFE39A470029810
- h. Bentley CONTINENTAL GTC
VIN # SCBDR33W57C050378
- i. Ferrari 430 F430 SPIDER
VIN # ZFFEW59A570154292
- j. Lamborghini Murcielago
VIN # ZHWBU26S46LA01879
- k. Ferrari 360 SPIDER/SPIDER F1
VIN # ZFFYT53A940134895

Id.

The BoA records show that over \$1.9 million of the funds the Healys received from investors were sent in the form of checks and wire transfers to what appear to be car dealers:

- a. On February 3, 2009, \$365,000.00 to International Motorcar;
- b. On November 25, 2008, \$360,824.00 to Ultimate Auto Sports;
- c. On December 5, 2008, \$185,962.53 to AMB AUTOS LLC;
- d. On December 4, 2008, \$30,750.00 to Schumacher Buick Oldsmobile;
- e. On October 21, 2008, \$22,260.00 to Speed Fanatix.

Id. at ¶ 20.

Between October 2008 and December 2008, payments totaling \$941,832 were sent to Excel Auto as follows:

- a. October 15, 2008 - \$154,321.88;
- b. October 30, 2008 - \$96,046.88;
- c. November 6, 2008 - \$230,775.00;
- d. November 7, 2008 - \$103,996.98;
- e. December 15, 2008 - \$274,556.00;
- f. December 19, 2008 - \$23,635.80;
- g. December 23, 2008 - \$53,646.88;
- h. December 31, 2008 - \$4,853.00.

Id.

On August 15, 2008, \$70,000.00 was wired from the BoA account to Aladdin Coachbuilders, Inc., apparently a limousine dealership, and on August 26, 2008, a Black Lincoln Limousine, VIN # 111FM88W97Y632915, was titled in the name of Relief Defendant Sand Dollar. *Id.* at ¶ 21. On October 7, 2008, Defendant wired \$51,593 in funds to Blue Star Jets for private aircraft flights between Fort Lauderdale, Florida and the Bahamas. *Id.* at ¶ 17.

Sean Healy also used the Sand Dollar entity to title several additional vehicles he purchased with investor funds and caused Sand Dollar to lease warehouse space in which to store the luxury vehicles he purchased using investor funds. *Id.* at ¶¶ 22, 24.

Madeira filed *Madeira v. Healy* in the U.S District Court for the Southern District of Florida and contacted the USAO to investigate Sean Healy's actions. *Id.* at ¶ 25. Sean Healy furnished falsified documents to the USAO in response to inquiries and in response to discovery requests in *Madeira v. Healy*, including fictitious bank records and brokerage account records from a representative named "Mike Hein" at a firm called "PCF" and for an account he claims to maintain at Interactive Brokers (Interactive), a futures commission merchant (FCM) registered with the CFTC. *Id.*

PCF is not a registered futures trading firm or broker-dealer. The purported address on the documents produced to the USAO and in the civil lawsuit—"398 Lafayette Street, New York, NY"—is either misspelled or nonexistent. *Id.* at ¶ 26.

Likewise, there is no record of any registered representative by the name of “Mike Hein” or “Michael Hein” at any firm registered with the CFTC or the U.S. Securities and Exchange Commission (SEC). *Id.*

Further, the Interactive records Sean Healy produced to the USAO and in his civil lawsuit were combined from two accounts that appear to have no relationship or connection with entities associated with Sean Healy. *Id.* at ¶ 27.

On April 27, 2009, shortly after Madeira filed his lawsuit, the court in *Madeira v. Healy* issued a stipulated “status quo order” directing Defendant and Shalese Healy to preserve at least \$600,000 remaining in the Northern Trust bank account held in her name. Exhibit G. The court further ordered the Healys not to sell or encumber their assets. *Id.* Defendant and his wife have not abided by the court’s instructions, however. On July 1, 2009, the court in *Madeira v. Healy* found Defendant and Shalese Healy in contempt for selling two vehicles subject to the status quo order. Exhibit H. Furthermore, Sean and Shalese Healy also have taken out a \$900,000 line of credit against the house they purchased with investor funds. Exhibit F at ¶ 23.

IV. JURISDICTION

Pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1, whenever it appears that an individual has violated a provision of the Act or any Regulation, the CFTC is authorized to file a civil action. In this matter, Sean Healy appears to have violated

both the Act as well as the Regulations by offering to enter into on-exchange futures and options contracts on behalf of others, and then defrauding those customers.

V. ARGUMENT

A. Defendant's Violations of the Act and Regulations Justify the Issuance of an *Ex Parte* SRO.

Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a), empowers U.S. district courts to grant restraining orders to freeze assets, appoint a receiver, and prohibit any person from destroying records or denying CFTC officials access thereto.³ Mindful that notice “may result in the destruction of books and records and the dissipation of customer funds,” Congress authorized courts to issue such relief *ex parte* in order “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. No. 97-565, at 53-54, 93 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3902-03, 3942. A “district court has inherent power as a court of equity to order such

³ Section 6c(a) of the Act, 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 CFTC to inspect, when 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.

temporary, ancillary relief in order to preserve the status quo so that an ultimate decision for the [CFTC] could be effective.” *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978); *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 679 (S.D.N.Y. 1979) (such relief will “ensure that the court maintains jurisdiction over [the defendants’] assets, in order to allow the court the opportunity to determine later whether disgorgement of illegally acquired profits is appropriate”). Under the statute, such restraining orders may be issued—on an *ex parte* basis—whenever it appears that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of the Act. *See CFTC v. Clothier*, 788 F. Supp. 490, 490-93 (D. Kan. 1992). Because CFTC actions for injunctive relief derive from statute, the requirements of Federal Rule of Civil Procedure 65 do not govern a request for a restraining order under Section 6c(a), 7 U.S.C. § 13a-1(a). *See id.* at 492-93.

An asset freeze is especially appropriate where, as here, Defendant has misappropriated customer funds. In such a case, funds must be frozen immediately if they are to be preserved at all. *Muller*, 570 F.2d at 1301; *see also CFTC v. American Metals Exch. Corp.*, 991 F.2d 71, 79 (3d Cir. 1993), *aff’g in part* 693 F. Supp. 168 (D. N.J. 1988) (finding that “a[n asset] freeze is designed to preserve the status quo by preventing the dissipation and diversion of assets”); *Morgan, Harris & Scott, Ltd.*, 484 F. Supp. at 678 (holding that a temporary asset freeze “is often necessary to ensure that the assets will be available to compensate public customers”); *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 also maintains the court's jurisdiction over the assets when presented with "[a] prima facie case of illegality." *Muller*, 570 F.2d at 1300; *see also American Metals Exch. Corp.*, 991 F.2d at 79 (finding that "a[n asset] freeze is designed to preserve the status quo by preventing the dissipation and diversion of assets").

An order prohibiting the destruction of records and granting the CFTC and the receiver access to inspect and copy records will allow the CFTC and the receiver to identify Defendant's assets and determine the identity of any possible additional victims of his fraudulent acts. Given the ease of destroying documents, Defendant's records (and those of the Relief Defendants, which are certainly within his control) must be preserved early in the litigation to increase the likelihood of a meaningful opportunity to locate and recover customer funds and to determine the scope of the wrongs perpetrated by Defendant's fraudulent schemes. *See Clothier*, 788 F. Supp. at 493. Such relief will preserve the status quo while an investigation is conducted to clarify the sources of various funds. *See Muller*, 570 F.2d at 1300; *Morgan, Harris & Scott, Ltd.*, 484 F. Supp. at 678. This relief is particularly necessary in this case because Defendant has produced fictitious documents to the USAO and to the parties in *Madeira v. Healy*. Further, because Defendant has never registered with the

CFTC, he is under no regulatory obligation to maintain records that may be material to determining the full extent of his violative conduct.

B. Preliminary Injunctive Relief Is Necessary and Appropriate.

Pursuant to Section 6c(a) of the Act, the CFTC also seeks a preliminary injunction against Defendant prohibiting, among other things, any future violations of the Act; the Act, as amended by the CRA; or Regulations under which he has been charged.

Section 6c(b) of the Act provides in pertinent part that “[u]pon a proper showing, a . . . temporary injunction . . . shall be granted without bond.”

“It has long been recognized that the grant of injunctive relief . . . should be granted . . . upon a showing by the moving party: (1) of the reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. Moreover, while the burden rests upon the moving party to make these two requisite showings, the Court should also take into account, when relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.” *United States v. Richlyn Lab., Inc.* 827 F.Supp. 1145, 1150 (E.D. Pa. 1992) (citations omitted). Unlike private actions for equitable relief, however, a CFTC action for injunctive relief is a creature of statute. “In actions for a statutory injunction, the agency need not prove irreparable injury or the inadequacy of other remedies as required in private

injunctive suits. A prima facie case of illegality is sufficient.” *Muller*, 570 F.2d at 1300; *see also American Metals Exch. Corp.*, 991 F.2d at 74 n.3 (citations omitted) (“The standard for an injunction under the Act differs from that in the normal civil context in that proof of irreparable harm is not required.”).

The CFTC has submitted clear evidence of statutory violations in this case including, among other things, that Defendant stole money intended for investment in futures and options and made numerous fraudulent representations and omissions. As a result, the CFTC has made a prima facie case of illegality and need not prove irreparable injury or the inadequacy of other remedies.

C. The Evidence Justifies Entry of a Preliminary Injunction.

The record filed in support of the CFTC’s motion—most importantly the evidence that Defendant misappropriated customer funds, made materially false representations and omissions regarding the profits investors would and did achieve by trading futures and options, and provided false reports and statements—clearly shows that Defendant violated Sections 4b(a)(2)(i)-(iii) and 4c(b) of the Act; Section 4b(a)(1)(A)-(C) of the Act, as amended by the CRA; and Regulation 33.10(a)-(c).

1. Violation of Section 4b(a)(2)(i)-(iii) of the Act and 4b(a)(1)(A)-(C) of the Act, as Amended by the CRA.

Section 4b(a)(2)(i)-(iii) of the Act makes it unlawful

for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, 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, Section 4b(a)(1)(A)-(C) of the Act, as amended by the CRA, makes it unlawful

for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person – (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...

Defendant—through his misappropriation, issuance of false account statements, and misrepresentations and omissions of material fact—violated

Section 4b(a)(2)(i)-(iii) of the Act and Section 4b(a)(1)(A)-(C) of the Act, as amended by the CRA.

a. Fraud by Misappropriation

Defendant violated Section 4b(a)(2)(i) and (iii) of the Act and Section 4b(a)(1)(A) and (C) of the Act, as amended by the CRA, by misappropriating millions of dollars of customer money and using it to purchase real property in Florida, jewelry, and at least thirteen luxury vehicles, including a Rolls Royce, a Bentley, and several Ferraris.

Misappropriation of customer funds constitutes “willful and blatant” fraud in violation of Section 4b(a)(2)(i) and (iii) of the Act and Section 4b(a)(1)(A) and (C) of the Act, as amended by the CRA. *CFTC v. Noble Wealth Data Info. Servs., Inc.*, 90 F. Supp. 2d 676, 687 (D. Md. 2000) (defendants violated Section 4b(a)(2)(i) and (iii) (the predecessor to 4b(a)(2)(A) and (C)) by diverting investor funds for operating expenses and personal use), *aff’d sub nom. CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002); *see also CFTC v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985) (holding that defendant violated Section 4b when he 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); *CFTC v. Weinberg*, 287 F. Supp. 2d. 1100, 1106 (C.D. Cal. 2003) (misappropriating investor funds violated Section 4b(a)(2)(i) and (iii) 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) (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) (“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 ex rel Kelley v. 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 Act).

b. Fraud by Misrepresentations and Omissions

To establish that Defendant violated Section 4b(a)(2)(i) and (iii) of the Act and Section 4b(a)(1)(A) and (C) of the Act, as amended by the CRA, through misrepresentations and omissions, the CFTC must prove that (1) a misrepresentation or omission was made; (2) with scienter; and (3) that the misrepresentation or omission was material. *CFTC v. R.J. Fitzgerald & Co.*, 310 F. 3d 1321, 1328-29 (11th Cir. 2002).

i. Defendant Made Misrepresentations and Failed to Disclose Information to Customers.

Defendant misrepresented to the Madeira Investors that customers' funds would be invested in futures and options. Defendant repeatedly assured Madeira that Defendant's futures and options trading was earning excellent returns and that distributions of these tremendous trading profits would be made in February 2009. In February 2009, however, Defendant told Madeira that his futures and options trading account, which allegedly had a \$79.3 million balance, was temporarily restricted because certain transactions "were still open." By March 2009, Defendant told Madeira that "regulatory issues" had reduced the value of the account and that only distributions of principal would be available.⁴ All of these statements are false. Further, because Defendant claimed that he traded Madeira's funds and traded them successfully, he was under a duty to disclose the material facts that he was neither successful nor actually trading futures and options. The failure to disclose such information deceived Madeira and the Madeira Investors. As discussed below, these misrepresentations and omissions were material.

ii. Defendant Acted with Scienter.

The scienter element is established when an individual's acts are performed "with knowledge of their nature and character." *Wasnick v. Refco, Inc.*, 911 F.2d. 345, 348 (9th Cir. 1990) (citation omitted). The CFTC must demonstrate only that a defendant's actions were "intentional as opposed to accidental." *Lawrence v. CFTC*,

⁴ To date, only one distribution of \$200,000 was made to one of the Madeira investors.

759 F.2d 767, 773 (9th Cir. 1985). Scierer requires proof that a defendant committed the alleged wrongful acts “intentionally or with reckless disregard for his duties under the Act.” *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988) (finding that recklessness is sufficient to satisfy scierer requirement); *Do v. Lind-Waldock & Co.* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,516 at 43,321 (CFTC Sept. 27, 1995) (determining that a reckless act is one where there is so little care that it is “difficult to believe the [actor] was not aware of what he was doing”); *CFTC v. Noble Metals Int’l, Inc.*, 67 F.3d 766, 774 (9th Cir. 1995).

Defendant made misrepresentations or omitted material information with the requisite scierer. Defendant knew that he was making misrepresentations and failing to disclose critical information to customers because he stole their money and never traded futures or options on their behalf. Defendant, thus, acted with the requisite scierer.

iii. Defendant’s Misrepresentations and Omissions were Material.

A statement or omission is material if “it is substantially likely that a reasonable investor would consider the matter important in making an investment decision.” *R.J. Fitzgerald*, 310 F.3d at 1328 (internal quotation omitted); *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 447 (D.N.J. 2000); *see also Commonwealth Fin. Group*, 874 F. Supp. at 1353-54. Any fact that enables pool participants 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 44,563-64 (CFTC Jan. 14, 1997); *see also Saxe v. E.F. Hutton & Co., Inc.*, 789 F.2d 105, 110 (2nd Cir. 1986) (“‘material misrepresentations about the nature of the organization handling [an] account, the people [dealt] with, and the type of trading [the] funds were used for’ would be sufficient to state a cause of action pursuant to the CEA.”) (citing *Psimenos v. E.F. Hutton & Co. Inc.*, 789 F.2d 105 (2nd Cir. 1986)); *CFTC v. Commonwealth Financial Group, Inc.*, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994) (misrepresentations regarding the trading record of a firm or broker are fraudulent because past success and experience are material factors to reasonable investors); *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1160 (S.D.N.Y. 1979) (misrepresentations regarding profitability of investment); *CFTC v. Crown Colony Commodity Options, Ltd.*, 434 F. Supp. 911, 919 (S.D.N.Y. 1977) (misrepresentations concerning profit potential); *CFTC v. J.S. Love & Associates Options, Ltd.*, 422 F. Supp 652, 655 (S.D.N.Y. 1976) (misrepresentations concerning profit potential); *Rosenberg*, 85 F. Supp. 2d at 448.

As demonstrated above, Defendant violated Section 4b(a)(2)(i) and (iii) of the Act and Section 4b(a)(1)(A) and (C) of the Act, as amended by the CRA, by misappropriating customer funds and making various misrepresentations and omitting

material information. Such misrepresentations and omissions are material in that a reasonable customer would want to know, among other things, that 1) Defendant stole customer money; 2) Defendant did not actually trade futures and options with customer funds and 3) profitability statements made by Defendant were false.

c. Fraud by Issuing False Account Statements to Customers

Defendant violated Section 4b(a)(2)(ii) of the Act and Section 4b(a)(1)(B) of the Act, as amended by the CRA, by providing Madeira handwritten statements purporting to show successfully traded futures and options when, in fact, no such trading ever took place.

Delivering, or causing the delivery of, false written statements to customers constitutes a violation of Section 4b(a)(2)(ii) of the Act. *See, e.g., Skorupskas*, 605 F. Supp. at 932-33 (finding that defendant violated Section 4b(a) of the Act by issuing false monthly statements to customers); *CFTC v. Sorokin*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,855 at 27,585 (S.D.N.Y. August 25, 1983) (determining that distribution of false account statements which falsely report trading activity or equity is a violation of Sections 4o and 4b of the Act); *Weinberg*, 287 F.Supp. at 1107 (false and misleading statements as to the amount and location of investors' money violated Section 4b(a) of the Act.); *Noble Wealth*, 90 F.Supp. 2d. at 685-87 (defendants violated Section 4b(a) of the Act through the delivery of false account statements).

2. Violation of Section 4c(b) of the Act and Regulation 33.10(a)-(c)

Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006), provides that:

“No person shall . . . enter into or confirm the execution of any transaction involving any . . . option . . . contrary to any . . . regulation of the Commission.”

Regulation 33.10-(a)-(c), 17 C.F.R. §§ 33.10 (a)-(c) (2008), provides that:

It shall be unlawful for any person directly or indirectly—(a) to cheat or defraud or attempt to cheat or defraud any other person; (b) to make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof; (c) to deceive or attempt to deceive any other person by any means whatsoever; in or in connection with . . . any commodity option transaction.

Under these provisions, liability for solicitation fraud involving options is established when a person or entity 1) makes a misrepresentation, misleading statement, or a deceptive omission; 2) acts with scienter; and 3) the misrepresentation is material. *R.J. Fitzgerald*, 310 F.3d at 1328; *CFTC v. Rosenberg*, 85 F.Supp.2d 424, 446-47 (D.N.J. 2000).

The same misrepresentations, omissions, and false statements that violate Section 4b(a)(2)(i)-(iii) of the Act and Section 4b(a)(1)(A)-(C) of the Act, as amended by the CRA, as set forth above, also violate Section 4c(b) of the Act and Regulation 33.10(a)-(c). *See, e.g., Rosenberg*, 85 F. Supp. 2d. at 445 (analyzing Section 4(b)(a) and Section 4c(b) claims together).

3. Relief Defendants Are Not Entitled to Ill-Gotten Gains.

Relief Defendants received customer funds from Defendant. A district court may freeze the assets of relief defendants. *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d 187, 193 (4th Cir. 2002) (“[W]hen a plaintiff seeks equitable relief..., a district court possesses ‘inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief.’”) (quoting *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995); *SEC v. Heden*, 51 F. Supp.2d 296, 299 (S.D.N.Y. 1999).

A nominal or relief defendant is a person or entity that has received ill-gotten funds, and does not have a legitimate claim to those funds. *SEC v. Cavanagh*, 155 F.3d 129, 136 (2nd Cir. 1998). A relief or nominal defendant is joined to aid in full relief without asserting separate subject matter jurisdiction over the person or entity. *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d at 191; *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (providing that a nominal defendant is joined as a means of facilitating collection, no subject matter jurisdiction needs to be asserted as the relief defendant has no ownership interest, but merely possession of the funds that are at the center of the controversy.); *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (holding that, in order to effect full relief in recovering assets that are the fruit of the underlying fraud, SEC could name a non-party depository as a relief defendant.)

Relief Defendants have either received customer funds misappropriated by Defendant or titled property in their names that was acquired using misappropriated customer funds. Accordingly, they are not entitled to the customer funds they received.

IV. CONCLUSION

For the foregoing reasons, the CFTC respectfully requests that the Court issue the CFTC's proposed *ex parte* SRO (1) freezing Defendant's and Relief Defendants' assets; (2) appointing a receiver; (3) preventing Defendant and Relief Defendants from directly or indirectly destroying, mutilating, concealing, altering, or disposing of any books, records, documents, or correspondence; (4) requiring Defendant and Relief Defendants to provide the CFTC and the receiver with a full accounting of their funds, documents, and assets; (4) permitting the CFTC and the receiver to inspect and copy Defendant's and Relief Defendants' books, records, documents, and correspondence (wherever they may be located); and (5) ordering Defendant to appear before the Court and show cause why a preliminary injunction should not be entered against him to enjoin further violations of the Act.

Respectfully submitted by,

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