UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

U.S. COMMODITY FUTURES TRADING COMMISSION,	)	
	)	Case No. 10-cv-2417
Plaintiff,	)	
	)	Judge Edmond E. Chang
v.	)	
	)	
CARMINE GAROFALO,	)	
	)	
Defendant.	)	

FINAL JUDGMENT AND ORDER OF PERMANENT INJUNCTION, RESTITUTION AND CIVIL MONETARY PENALTIES AGAINST DEFENDANT CARMINE GAROFALO BY DEFAULT

Plaintiff U.S. Commodity Futures Trading Commission filed this action in this Court on April 19, 2010, alleging that Defendant Carmine Garofalo violated Section 4c(b) of the Commodity Exchange Act (hereinafter, "the Act"), as amended, 7 U.S.C. § 6c(b) (2008), and Commission Regulation 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c) (2009), by cheating or defrauding another person in connection with a commodity option transaction. (Docket #1). The Commission also alleged that Garofalo violated Section 4c(a) of the Act, 7 U.S.C. §6c(a) (2006), by entering into a transaction that is a fictitious sale involving the purchase or sale of an option on a commodity for future delivery, and that Garofalo further violated Regulation 1.38(a), 17 C.F.R. §1.38(a) (2009), by entering into noncompetitive transactions to buy and sell commodity options. *Id.* The Complaint seeks an order of permanent injunction, disgorgement of ill-gotten gains, restitution, civil monetary penalties and other ancillary relief.

On April 18, 2011, this Court issued an order granting Plaintiff's Motion to Show Cause for Failure to Comply With Discovery Orders and For Sanctions and entered a default judgment against Garofalo both as a sanction for his failure to comply with discovery orders pursuant to Fed. R. Civ. Pro. 37 and pursuant to Rule 55(a) because Garofalo had failed to Answer the Complaint in a timely manner. (Docket #114).

The Commission has moved the Court for a Final Judgment and Order of Permanent Injunction, Restitution, and Civil Monetary Penalties By Default pursuant to Fed. R. Civ. Pro. 55(b), Section 6c(a) of the Act, 7 U.S.C. §13a-1, and Regulation 143.8(a)(1)(iv), 17 C.F.R. §143.8(a)(1)(iv) (2009). Based upon Plaintiff's Memorandum of Points and Authorities, as well as the declarations and other exhibits attached hereto, the record in this case, and the Court being otherwise advised in the premises, it is hereby

ORDERED that Plaintiff's motion is GRANTED and Final Judgment of Permanent Injunction, Restitution, and Civil Monetary Penalties is entered against Defendant Carmine Garofalo. The Court hereby enters the following findings of fact and conclusions of law finding the Defendant liable as to all violations alleged in the Complaint. Accordingly, the Court now issues the following Order of Permanent Injunction ("Order") against Defendant on issues of liability and injunctive relief, disgorgement, restitution, and civil monetary penalties.

I. The Parties

Plaintiff Commodity Futures Trading Commission is a federal independent regulatory agency charged with the administration and enforcement of the Act, as amended, 7 U.S.C. §§ 1 et seq., and the Regulations thereunder, 17 C.F.R. §§ 1.1 et seq.

Defendant Carmine Garofalo is an Italian citizen who purports to resides in Tunisia. He is not registered in any capacity with the Commission or National Futures Association.

II. Findings of Fact and Conclusions of Law

The Court, being fully advised in the premises, finds that there is good cause for the entry of this Order and that there is no just reason for delay. The Court therefore, further directs the entry of the following Findings of Fact and Conclusions of Law, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2008), as set forth herein.

A. Jurisdiction and Venue

1. The Court has jurisdiction over the transactions at issue in this case pursuant to Section 6c of the Act, as amended, 7 U.S.C. § 13a-1 (2008), and Section 2(c)(2) of the Act, as amended, at 7 U.S.C. § 2(c)(2). Section 6c(a) of the Act authorizes the Commission to seek injunctive relief against any person whenever it shall appear 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.

2. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, in that Defendant transacted business in this district, and the acts and practices in violation of the Act have occurred within this district.

B. Findings of Fact

Having entered an order of default against Defendant Garofalo on April 18, 2011 for his failure to answer the complaint and as a sanction for discovery violations, the Court adopts the following well-pled allegations in the Complaint as true.

3. Garofalo has a personal account for trading on the Chicago Mercantile Exchange (CME), Acct. No. *****102, held at Futures Commission Merchant ("FCM") Interactive Brokers LLC (the "Personal Account"). Garofalo trades the Personal Account on CME's Globex electronic trading platform ("Globex").

4. Garofalo opened the Interactive Brokers LLC account electronically on February 9, 2010, and funded the account with a single transfer of 10,000€ on February 23, 2010.

5. Aleph Societe d'Investissement a Capitale Variable (Aleph SICAV) is a Luxembourg based investment firm that operates four separate funds for investment.

6. Aleph SICAV has an account for trading on the CME, Acct. No. *****237, held at IW Bank S.p.A. (IW Bank) and executed through FCM UBS Limited (the "Aleph SICAV Account"). Aleph SICAV trades the Aleph SICAV Account on Globex via a third-party platform provided by InvestNet Italia S.p.A.

7. The E-mini S&P 500 option contract traded on the CME is a contract for the right to buy or sell one E-mini S&P 500 futures contract at the strike price specified in the contract during the month specified in the contract. An E-mini S&P 500 futures contract is equivalent to $50.00 times the notional value of the S&P 500 index.

8. The Euro/U.S. Dollar European Style Premium option contract traded on the CME is a contract for the right to buy or sell one 125,000 € futures contract at the strike price specified in the contract during the month specified in the contract.

9. CME is a designated contract market under Section 5(b) of the Act and Regulations 38.3(a)(1)(ii) and (iii).

10. Globex is an electronic trading platform used to trade, i.e., buy or sell, futures and options contracts listed on the CME. Globex runs almost continuously and, therefore, it is not restricted by geography or time zones.

11. During the period from 7:18 p.m. CST on March 4, 2010, to 12:26 a.m. CST on March 5, 2010, (the "Relevant Period" or the "March 5, 2010 trading day"), Garofalo fraudulently obtained unauthorized access to the Aleph SICAV Account.

12. During the Relevant Period, Garofalo simultaneously entered trades in his Personal Account and the Aleph SICAV Account in E-mini S&P 500 options and Euro/U.S. Dollar European Style Premium options that were executed on CME's Globex platform. During this time, Garofalo repeatedly, illegally, and self-servingly, traded options contracts between his Personal Account and the Aleph SICAV Account.

13. Garofalo intentionally executed parallel orders to buy and sell during after-hours trading on the March 5, 2010 trading day – a period of low volume options trading – with the purpose of having the opposite orders find and match each other on Globex. During a 5-hour period on the March 5, 2010 trading day, Garofalo fraudulently executed 168 trades in the Aleph SICAV Account and was successful in

matching 119 of the Aleph SICAV orders with orders placed in his own Personal Account.

14. These transactions, in which Garofalo's Personal Account bought from and sold to the Aleph SICAV Account at profitable prices, effected the transfer of money from Aleph SICAV to Garofalo.

15. Garofalo engaged in two patterns of inter-account trading activity, as follows:

(a) Garofalo would buy commodity options contracts for his Personal Account at lower prices from the Aleph SICAV Account and then sell them back, i.e., offset the previously established position, to the Aleph SICAV Account at higher prices, and

(b) Garofalo would sell commodity options contracts from his Personal Account at higher prices to the Aleph SICAV Account and subsequently buy them back, i.e., offset the previously established position, from the Aleph SICAV Account at lower prices.

16. For example, during the Relevant Period, at 10:52:56 p.m. CST, Garofalo entered a buy order in his Personal Account and at 10:53:00 p.m. CST – four seconds later – entered a sell order in the Aleph SICAV Account, designed to trade against his Personal Account, resulting in the execution of the following April 2010 Euro/U.S. Dollar European Style Premium options with a $13.25 strike price on the CME: 50 at 0.0055. At 10:59 p.m., Garofalo offset those positions by entering a sell order in his Personal Account for 50 April 2010 Euro/U.S. Dollar European Style Premium options

at a $13.25 strike price at a cost of $0.0085 per contract and a buy order for the exact same number of contracts only seconds later in the Aleph SICAV Account. This particular series of transactions resulted in a gain to Garofalo's Personal Account of $18,750.

17. Minutes later at 11:02 p.m., Garofalo repeated the same series of transactions and entered a buy order in his Personal Account designed to trade against the Aleph SICAV Account (50 April 2010 Euro/U.S. Dollar European Style Premium options with a $13.25 strike price at a cost of $0.0066 per contract), followed by a sell order in his Personal Account designed to trade against a buy order he executed in the Aleph SICAV Account, resulting in an additional gain of $7,500 in Garofalo's Personal Account.

18. Similarly, during the Relevant Period between 8:52 p.m. CST and 8:54 p.m. CST, Garofalo entered two separate orders in the Personal Account to sell 10 contracts each of March 2010 Euro/U.S. Dollar European Style Premium options with a $13.70 strike price at a price of $.001 per contract and simultaneously entered corresponding orders to buy in the Aleph SICAV Account. Then at 8:57 p.m. CST, Garofalo offset those transactions by entering an order in his Personal Account to buy 20 options contracts for March 2010 Euro/U.S. Dollar European Style Premium options with a $13.70 strike price at a price of $0.0005 per contract and entering an order to sell 20 corresponding options in the Aleph SICAV Account, resulting in a gain of $1,250 to Garofalo.

19. Garofalo executed similar series of transactions in E-mini S&P 500 options. For example, during the Relevant Period, at 7:38 p.m., he entered a buy order in his Personal Account of 50 June 2010 E-mini S&P 500 options with a $12.25 strike price and entered a corresponding sell order in the Aleph SICAV Account designed to trade against his Personal Account; the transaction was executed at a price of $5.00 per contract. Then, at 8:03 p.m., Garofalo entered a sell order in his Personal Account for 50 June 2010 E-mini S&P 500 options with a $12.25 strike price and entered a corresponding buy order in the Aleph SICAV Account. The second transaction was executed at a price of $6.50 per contract resulting in a gain of $3,750 to Garofalo's Personal Account based on the series of transactions.

20. At 8:07 p.m., Garofalo entered an order in his Personal Account to buy and an order in the Aleph SICAV Account to sell 39 September 2010 E-mini S&P 500 options with a $12.00 strike price at a price of $22.00 per contract. At 8:10 p.m. CST, Garofalo simultaneously entered an order in the Personal Account to buy and an order in the Aleph SICAV Account to sell 30 September 2010 E-mini S&P 500 options with a $12.00 strike price at a price of $27.00 per contract. Garofalo's Personal Account gained $7,500 from this series of transactions, which resulted in a position of 9 open contracts in both the Personal Account and Aleph SICAV Account. At 8:12 p.m. CST, Garofalo initiated a series of transactions in order to close out the open positions in September 2010 E-mini S&P 500 options with a $12.00 strike price. He entered an order to buy 10 options in his Personal Account and an order to sell 10 options in the Aleph SICAV Account at a price of $22.00. At 8:16 p.m. CST, he offset those

transactions and ultimately closed out the positions by simultaneously entering an order in his Personal Account to buy 19 options contracts and an order in the Aleph SICAV Account to sell 19 options contracts for September 2010 E-mini S&P 500 options with a $12.00 strike, but this time at a price of $25.00 per contract. This second series of transactions resulted in an additional gain of $2,850.

21. The 119 transactions Garofalo executed for his Personal Account opposite the Aleph SICAV Account resulted in a gross gain, before commissions or fees, of $614,925 for the Garofalo Personal Account and an equal loss for the Aleph SICAV Account.

C. Conclusions Of Law

1. Garofalo Committed Fraud In Connection With Commodity Options Contracts.

22. By reason of his conduct, Defendant Garofalo executed unauthorized, noncompetitive trades and thereby misappropriated and diverted more than 400,000€ or $614,925 of Aleph SICAV's funds to his own Personal Account for use in violation of Section 4c(b) of the Act, 7 U.S.C. §6c(b), and Commission Regulation 33.10(a) and (c), 17 C.F.R. 17 C.F.R. §§ 33.10(a) and (c) (2009).

23. Each fraudulent transaction by Defendant Garofalo is a separate and distinct violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2008).

2. Garofalo Entered into Fictitious Sales in Violation of Section 4c(a) of the Act.

24. By reason of his conduct, Garofalo entered into transactions that were noncompetitive, fictitious sales involving the purchase or sale of a commodity for future

delivery or any option on such transaction, which transaction was used or may have been used to hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity; or to determine the price basis of any such transaction in interstate commerce in the commodity; or to deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction in violation of Section 4c(a)(2)(A)(ii) of the Act, 7 U.S.C. § 6c(a)(2)(A)(ii) (2008).

25. Each noncompetitive, fictitious transaction by Defendant Garofalo is a separate and distinct violation of Section 4c(a) of the Act, 7 U.S.C. §6c(a) (2008).

3. Garofalo Executed Noncompetitive Trades in Violation of Regulation 1.38(a).

26. By reason of his conduct, Defendant Garofalo knowingly caused illegitimate, noncompetitive orders to be entered on the Globex system in violation of Commission Regulation 1.38(a), 17 C.F.R. §1.38(a).

27. Each noncompetitive, fictitious transaction by Defendant Garofalo is a separate and distinct violation of Commission Regulation 1.38(a), 17 C.F.R. §1.38(a).

4. Permanent Injunction

28. Section 6c of the Act, 7 U.S.C. § 13a-1 (2008), authorizes and directs the Commission to enforce the Act and Regulations.

29. To issue a permanent injunction prohibiting future violations of the Act and regulations, the Court must find (1) illegal activity has occurred and (2) there is a reasonable likelihood that the wrong will be repeated. *SEC v. Carriba Air*, 681 F.2d 1318, 1322 (11th Cir. 1982); *see also CFTC v. Rosenberg*, 85 F. Supp.2d 424, 454

(D.N.J. 2000); *Kelley v. Carr*, 567 F. Supp. 831, 839-40 (W.D. Mich. 1983); *CFTC v. Morgan, Harris & Scott*, 484 F. Supp. 669, 676-77 (S.D.N.Y. 1979) ("Unlike private injunctive actions, which require a showing of irreparable harm or the lack of an adequate remedy at law, statutory injunctive actions brought by the Commission require merely that there is a reasonable likelihood of future violations of the law by the defendant.").

30. A reasonable likelihood that the wrong will be repeated is shown "when the inferences that flow from a defendant's prior illegal conduct, viewed in light of present circumstances, betoken a 'reasonable likelihood' of future transgressions." *SEC v. Zale Corp.*, 650 F.2d 718, 720 (5th Cir. 1981). Significantly, "the commission of past illegal conduct is highly suggestive of the likelihood of future violations." *CFTC v. Crown Colony Commodity Options*, 434 F. Supp. 911, 919 (S.D.N.Y. 1977); *see also CFTC v. Am. Bd. of Trade*, 803 F.2d 1242 (2d Cir. 1986); CFTC v. Fleury, No. 03-61199, 2010 WL 5146283, at *18 (S.D. Fla. June 18, 2010).

31. The Court finds that Defendant Garofalo violated and, unless permanently restrained, may continue to violate the Act. In addition to the prior fraudulent conduct, there is other evidence demonstrating the reasonable likelihood of repeat misconduct: Garofalo's failure to cooperate with his prior lawyers in defending against this action shows a disregard for the consequences of the misconduct, and Garofalo's failure to follow court orders resulted in the default judgment.

32. Thus, permanent injunctive relief is warranted against Defendant Garofalo.

5. Restitution.

33. Section 6c of the Act, 7 U.S.C. § 13a-1 (2008), allows the Commission to seek and the Court to issue all forms of ancillary equitable relief, including monetary restitution and disgorgement.

34. Courts regularly order defendants to pay restitution in federal regulatory enforcement actions. *See CFTC v. CoPetro Mrktg. Group Inc.*, 680 F.2d 573, 583-84 (9th Cir. 1982); *CFTC v. Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979); *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1163 (S.D.N.Y. 1979); *SEC v. Manor Nursing Centers Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) (upholding an order requiring return of investment proceeds to investors in a public offering); *SEC v. Penn Central Co.*, 425 F. Supp. 593, 599 (E.D.Pa. 1976); *SEC v. R.J. Allen & Assoc.*, 386 F. Supp. 866, 880 (S.D. Fla. 1974) (holding corporations and principals jointly and severally liable for restitution of funds received from investors); *SEC v. Dimensional Entertainment Corp.*, 493 F. Supp. 1270, 1279 (S.D.N.Y. 1980).

35. Accordingly, the Court will award $614,925 in restitution. The bank in which Aleph SICAV held its trading account has represented to the Commission that the bank has incurred the loss in the account. The Commission shall file a motion for distribution of the seized proceeds to the bank when the Commission receives sworn confirmation that the bank, and not Aleph SICAV, has incurred the loss in the account.

6. Civil Monetary Penalties

36. Section 6c(d)(1) of the Act, 7 U.S.C. 13a-1(d)(1) (2008), "the Commission may seek and the Court shall have jurisdiction to impose, … on any person found in the action to have committed any violation, a civil penalty in the amount of not more than the higher of $100,000 or triple the monetary gain to the person for each violation." 7 U.S.C. §13a-1(d)(1) (2008).

37. Specifically, Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(c), and Commission Regulation 143.8(a)(1)(iv), 17 C.F.R. § 143.8(a)(1)(iv) (2010), permits the Court to impose civil monetary penalties against each defendant in the amount of not more than the higher of $140,000 or triple the monetary gain for each violation of the Act committed on or after October 23, 2008 (the regulation differs from the statute in that the regulation provides for inflation-adjusted maximum civil monetary penalties). Here, it is appropriate to award triple the $614,925 gain to Garofalo. Although Garofalo did not transfer the proceeds out of his account, the funds are still considered "gain" because he did obtain control over the funds prior to the seizure order. Thus, this actual "gain" is unlike an attempted gain or an intended gain in which funds did not come under the defendant's control. Triple the monetary gain is equal to $1,844,775.

III. Order of Permanent Injunction and Other Relief

It is hereby ORDERED and adjudged, pursuant to Section 6c(a) of the Act, 7 U.S.C. §13a-1, and the Court's equitable powers that:

A. Defendant Garofalo is liable for violating Sections 4c(a) and 4c(b) of the Act, 7 U.S.C. §§ 6c(a), 6c(b) (2008), Regulations 1.38(a) and 33.10(a) and (c), 17 C.F.R. §§ 1.38(a) and 33.10(a), (c) (2009);

B. Garofalo and any other person or entity acting at his direction, including any successor thereof, are permanently enjoined and prohibited from engaging, directly or indirectly, in:

1. conduct in violation of Sections 4c(a) and 4c(b) of the Act, 7 U.S.C. §§ 6c(a), 6c(b) (2008), Regulations 1.38(a) and 33.10(a) and (c), 17 C.F.R. §§ 1.38(a) and 33.10(a), (c) (2009);

2. entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2009)) ("commodity options"), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act as amended by the CRA, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i)) ("forex contracts") for Garofalo's own personal account or for any account in which Garofalo has a direct or indirect interest;

3. having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on Garofalo's behalf;

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

5. 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, and/or forex contracts;

6. 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 Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2009); and/or

7. acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2009)), agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2009).

C. Garofalo, and any successors thereof, shall make full restitution to every investor who suffered losses as a result of acts and practices which constituted violations of the Act and Regulations, as described herein, and interest thereon from the date of such violations. Specifically, he is ordered to make restitution of $614,925 for the losses incurred by the Aleph SICAV Account, whether to Aleph SICAV or to the bank that held the account, whichever entity incurred the loss.

D. Garofalo and any successors thereof, is hereby assessed a civil monetary penalty in the amount of $1,844,775, which is equal to three times the monetary gain, for each violation by Garofalo of the Act and Commission Regulations.

IT IS SO ORDERED.

Edmond E. Chang

Honorable Edmond E. Chang
United States District Judge

Date: May 5, 2011