

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

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U.S. Commodity Futures Trading Commission,))
))
Plaintiff,))
))
v.))
))
Trevor Cook d/b/a Crown Forex, LLC, Patrick)	No. 09 cv 3332 (MJD/FLN)
Kiley d/b/a Crown Forex, LLC, Universal)	
Brokerage FX and Universal Brokerage FX)	Hon. Michael J. Davis
Diversified, Oxford Global Partners, LLC,)	
Oxford Global Advisors, LLC, Universal)	
Brokerage FX Advisors, LLC f/k/a UBS)	
Diversified FX Advisors, LLC, Universal)	
Brokerage FX Growth, L.P. f/k/a UBS)	
Diversified FX Growth L.P., Universal)	
Brokerage FX Management, LLC f/k/a UBS)	
Diversified FX Management, LLC and UBS)	
Diversified Growth, LLC,)	
)	
Defendants.)	
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**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION
TO STRIKE DEFENDANT PATRICK KILEY’S ANSWER**

I. FACTS

On November 23, 2009, Plaintiff Commodity Futures Trading Commission (“CFTC”) filed a Complaint against Defendant Patrick Kiley (“Kiley”) and others alleging violations of the Commodity Exchange Act (“Act”), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII, §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), to be codified at 7 U.S.C. § 1 *et seq.*, arising from Kiley’s solicitation of customers to trade off-exchange foreign exchange (“forex”)

contracts. At the same time, the CFTC filed a Motion for Preliminary Injunction and a Motion for *Ex Parte* Statutory Restraining Order seeking to enjoin Kiley from committing future violations of the Act (CFTC Dkt. #2, #3). The Court entered an *Ex Parte* Statutory Restraining Order against Kiley on November 23, 2009 (CFTC Dkt. #21), and on December 8, 2009, entered an Agreed Order for Preliminary Injunction and Other Ancillary Relief against Kiley (CFTC Dkt. #75).

Throughout the litigation arising from the CFTC's Complaint and parallel litigation initiated by the SEC, Kiley has been represented by an attorney, most recently Mr. H. Nasif Mahmoud. For example, in addition to appearing at various hearings and conferences on Kiley's behalf, "[a]ttorney H. Nasif Mahmoud . . . drafted [Kiley's] motion to dismiss the CFTC case . . . and found the case law for Kiley to put in the brief." (See Kiley Brief in Supp. Mot. to Refund Fee at 9 n.7 (SEC Dkt. #667).) Despite his admitted representation, Mahmoud has not filed an appearance on Kiley's behalf, and since at least October 14, 2010, Kiley has improperly signed and filed his pleadings as a "*pro se*" defendant, including the Motion to Dismiss the CFTC's Complaint (CFTC Dkt. #547) which Kiley admits Mahmoud researched and drafted for him.¹

Most recently, on May 12, 2011, Kiley filed an Answer to the CFTC's Complaint which he again submitted as a "*pro se*" pleading (CFTC Dkt. #752), despite the fact that it, too, was drafted in whole or in substantial part by Mahmoud. Three days before Kiley

¹ October 14, 2010, is the date Kiley filed his nominally *pro se* Answer in the parallel SEC case (SEC Dkt. #535), which Kiley later admitted Mahmoud drafted for him as well. (See Kiley Brief in Supp. Mot. to Refund Fee at 9 n.7 (SEC Dkt. #667).)

filed his Answer, “Attorney H. Nasif Mahmoud” submitted to counsel for the CFTC a “draft” of the Answer, apparently in response to the CFTC’s May 6, 2011, Application for Entry of Default against Kiley (CFTC Dkt. #747). (*See* May 9, 2011, Mahmoud Email, attached hereto as Exhibit A.) In response, the CFTC reminded Mahmoud that draft pleadings were irrelevant unless filed, and notified Mahmoud that if he intended to continue to represent Kiley he was required to file an appearance on his behalf. (*Id.*) In his response email, Mahmoud acknowledged that he was still representing Kiley, but declined the CFTC’s invitation to file an appearance on Kiley’s behalf. (*Id.*) To emphasize his declination, Mahmoud claimed—contrary to the relevant case law—that “what I do in my private time to assist” Kiley “is my business.” (*Id.*)

II. ARGUMENT

Federal Rule of Civil Procedure 11(a) provides, in relevant part, “[e]very pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney’s name—or by a party personally if the party is unrepresented. . . . The court must strike an unsigned paper unless the omission is corrected after being called to the attorney’s or party’s attention.” Fed. R. Civ. P. 11(a). Nominally *pro se* pleadings that are actually prepared “in any substantial part” by an attorney “constitute[] a misrepresentation to th[e] court by litigant and attorney” and violate the signature requirements of Federal Rule 11(a). *Duran v. Carris*, 238 F.3d 1268, 1272-73 (10th Cir. 2001); *see also Ellis v. State of Main*, 448 F.2d 1325, 1328 (1st Cir. 1971) (“If a brief is prepared in any substantial part by a member of the bar, it must be signed by him.”);

Johnson v. Board of County Comm'rs, 868 F. Supp. 1226, 1231-32 (D. Colo. 1994) (observing that “pleadings seemingly filed *pro se* but drafted by an attorney would give [the defendant] the un-warranted advantage of having a liberal pleading standard applied,” and holding that “[i]f a brief is prepared in any substantial part by a member of the bar, it must be signed by him”).

As discussed above, Mahmoud and Kiley admit that Mahmoud is actively representing Kiley in this matter, and that Mahmoud is substantially participating in drafting Kiley’s pleadings, including Kiley’s Motion to Dismiss and his recently-filed Answer to the CFTC’s Complaint. Despite this admission, Mahmoud has not filed an appearance on behalf of Kiley and has signed none of Kiley’s pleadings, thereby allowing Kiley to improperly benefit from the more lenient pleading standards applicable to *pro se* litigants. *Johnson*, 868 F. Supp. at 1223. Mahmoud’s and Kiley’s conduct amounts to a misrepresentation to this Court and violates Rule 11(a). *Duran*, 238 F.3d at 1272-73. The Court should therefore strike Kiley’s Answer to the CFTC’s Complaint. *See* Fed. R. Civ. P. 11(a).

III. CONCLUSION

For the reasons set forth above, Mahmoud and Kiley have violated the signature requirements of Federal Rule of Civil Procedure 11(a), and in doing so have misrepresented to the Court the true nature of Mahmoud’s participation in this case. Per the requirements of that Rule, the CFTC respectfully requests that the Court strike

Kiley's Answer to the CFTC's Complaint and grant whatever further relief the Court deems appropriate.

Dated: May 16, 2011

Respectfully submitted,

/s/ David Slovick

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