IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

U.S. Commodity Futures Trading Commission,	)	
Plaintiff,	)	**No. 09 cv 3332 (MJD/FLN)**
v.	)	**Hon. Michael J. Davis**
Trevor Cook d/b/a Crown Forex, LLC, Patrick Kiley d/b/a Crown Forex, LLC, Universal Brokerage FX and Universal Brokerage FX 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.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Dated: March 12, 2015

ATTORNEYS FOR THE PLAINTIFF

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Commodity Futures Trading Commission ("CFTC"), files this Motion for Summary Judgment Against Defendant Patrick Joseph Kiley d/b/a Crown Forex, LLC, Universal Brokerage FX and Universal Brokerage FX Diversified ("Kiley"), to enforce claims brought under the Commodity Exchange Act, 7 U.S.C. § 1 et seq. ("Act").[1] Kiley, individually and through at least six entities that he managed with another individual, engaged in a massive investment fraud, soliciting and accepting over $190 million from more than 1000 customers in the United States for the purported purpose of trading off-exchange foreign currency ("forex") contracts in so-called managed, segregated accounts that he claimed they placed with a Swiss entity, Crown Forex, SA. (Plaintiff's Statement of Facts ("SOF") ¶ 6) Throughout the relevant period between June 2008 and July 2009 charged in the Complaint, Kiley misrepresented investor profits, falsely claiming to have earned average annual profits of over 10 percent since 2003 with no risk of loss. (*Id*.¶ ¶ 9, 10) After accepting customer funds, Kiley misappropriated some of the funds rather than send all of the funds to Crown Forex, SA in Switzerland. (*Id*.¶¶ 32-36) He then lied to investors by distributing or posting false account statements that falsely showed that the investors' accounts were earning profits. (*Id*.¶ ¶ 18-20) Kiley solicited and accepted

[1] As amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 ("CRA")), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010), §§ 701-774, 124 Stat. 1376 (enacted July 21, 2010).

customer funds until July 2009 for the purported purpose of placing the funds in managed segregated accounts with Crown Forex, SA, even though the Swiss Financial Market Supervisory Authority ("FINMA") placed Crown Forex, SA into receivership in December 2008 and into bankruptcy liquidation on May 19, 2009. (*Id*.¶ ¶ 21-31)

The plaintiff, Commodity Futures Trading Commission ("CFTC" or "Commission"), has jurisdiction over Kiley's conduct occurring on or after June 18, 2008, during which time Kiley and others cheated and defrauded approximately 556 customers by fraudulently soliciting, accepting and misappropriating $79 million. (*Id.* ¶ 6) By virtue of this conduct and the further conduct described herein, Kiley has engaged, is engaging, or is about to engage in acts and practices in violation of Sections 4b(a)(2)(A)-(C) of the Act, 7 U.S.C. §§ 6b(a)(2)(A)-(C).

As demonstrated in the Statement of Undisputed Facts, there is no genuine dispute as to any material fact that precludes entry of judgment as a matter of law in favor of the Commission on the Complaint's charges against Kiley, and the Commission is entitled to judgment as a matter of law on those charges against Kiley pursuant to Federal Rule of Civil Procedure 56. Accordingly, the Court should grant the Commission's Motion for Summary Judgment and for a Permanent Injunction and Other Equitable Relief Against Defendant Patrick Joseph Kiley d/b/a Crown Forex, LLC, Universal Brokerage FX and Universal Brokerage FX Diversified ("Motion for Summary Judgment").

II. KILEY'S CRIMINAL CONVICTION

On June 12, 2012, Kiley was convicted on 15 counts of a Second Superseding Indictment against him in the matter captioned *USA v. Patrick Joseph Kiley et al.*, No. 11-228 (D. MN) (MJD/JJK)("*USA v. Kiley*"). (*See* Crim. Dkt. Nos. 162, 302, 307 and SOF ¶ 4) The Second Superseding Indictment charged Kiley with criminal violations arising from the same fraudulent scheme at issue in this case. On July 16, 2013, Kiley was sentenced to 240 months in prison and ordered to pay criminal restitution of $155,359,411.77. (*See* Crim. Dkt. No. 438.) As discussed below, Kiley's criminal conviction estops him from challenging any of the facts supporting the Commission's Motion for Summary Judgment (*infra* at III.B). Moreover, there is nothing in any of the documents Plaintiff obtained from Kiley or the other Defendants that is exculpatory in any way. Quite simply, there is nothing in the record to raise a genuine issue as to any material fact and the Commission is entitled to judgment on its behalf as a matter of law.

III. STANDARD FOR SUMMARY JUDGMENT

A. Federal Rule of Civil Procedure 56

Under Federal Rule of Civil Procedure 56, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) ; *Gage v. HSM Elec. Prot. Servs., Inc.*, 655 F.3d 821, 825 (8th Cir. 2011); *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v.*

Liberty Lobby, Inc., 477 US 242, 249-50, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986). The court will view "the record in the light most favorable to the [non-moving party] and drawing all reasonable inferences in [that party's] favor." *Langford v. Norris*, 614 F.3d 445, 459 (8th Cir. 2010). The moving party need not negate the nonmoving party's claims by showing "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 325. Instead, "the burden on the moving party may be discharged by 'showing' ... that there is an absence of evidence to support the nonmoving party's case." *Id*. at 324.

To overcome a motion for summary judgment, the nonmoving party must present evidence creating more than a "metaphysical doubt as to the material facts," and must demonstrate through specific facts that there is a genuine issue for trial. *Nitro Distrib., Inc. v. Alticor, Inc.*, 565 F.3d 417, 422 (8th Cir. 2009) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)) "[T]he mere existence of *some* alleged factual dispute between the parties" will not defeat an otherwise properly supported motion for summary judgment. *Quinn v. St. Louis Cnty.*, 653 F.3d 745, 751 (8th Cir. 2011) (emphasis in original) (quoting *Anderson*, 477 U.S. at 247-48). The nonmoving party must show that there is evidence upon which a jury reasonably could find for him. *Anderson*, 477 U.S. at 248. Based upon Plaintiff's evidence, Plaintiff's Motion for Summary Judgment should be granted.

B. Collateral Estoppel Based on Kiley's Criminal Conviction

More important for the present case, "it is well established that prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was 'distinctly put in issue and directly determined' in the criminal

action." *SEC v. Gruenberg*, 989 F.2d 977, 978 (8th Cir. 1993) (internal citations and quotations omitted) (holding that defendant was collaterally estopped from disputing facts supporting SEC's motion for summary judgment where there existed an "identity of issues" between "each count of conviction of the indictment and the SEC allegations in each count of the civil complaint"); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 76 (8th Cir.), *cert. denied*, 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976) ("It is well established that prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was 'distinctly put in issue and directly determined' in the criminal action.") Because of his criminal conviction, Kiley is estopped from disputing the facts supporting the Commission's Motion for Summary Judgment because they were "distinctly put at issue" and "determined" in the criminal matter. *Id*.

IV. JURISDICTION AND VENUE

This Court has jurisdiction over this action pursuant to Section 6c of the Act, as amended, 7 U.S.C § 13a-1, which provides that whenever it shall appear to the Commission that any 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 promulgated thereunder, the Commission may bring an action against such person to enjoin such practice or to enforce compliance with the Act. The Commission has jurisdiction over the forex solicitations and transactions at issue in this case pursuant to Sections 2(c)(2)(C) and 6c of the Act, 7 U.S.C. §§ 2(c)(2)(C) and 13a-1.

Venue properly lies with the Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), because Kiley and the other Defendants reside in this District, most of Kiley and the other Defendants' customers reside in this District, and certain transactions, acts, practices, and courses of business alleged herein to have violated the Act occurred, are occurring, and/or are about to occur within this District.

V. REQUESTED RELIEF AND ARGUMENT

Unlike private actions, which are grounded in equity, Commission injunctive relief has its basis in Section 6c of the Act, 7 U.S.C. § 13a-1. Under 6c, the Commission must show only two things to obtain permanent injunctive relief: first, that a violation of the Act has occurred and second, that there is a reasonable likelihood of future violations. The Second Superseding Indictment and the declarations, excerpts of transcripts and documents offered by the Commission show that Kiley has engaged in serious violations of the Act. Permanent injunctive and other equitable relief is required to prevent Kiley from continuing his fraudulent conduct and to protect the public interest. The Second Superseding Indictment, documents, transcripts and detailed declarations presented in this case further show that Kiley engaged in a pattern of misconduct and violations of the Act and that, absent the entry of a permanent injunction, the violations will continue.

A. The Commission's Jurisdiction

The Commission has jurisdiction over the forex solicitations and transactions at issue in this matter, which occurred on or after June 18, 2008 and prior to July 16, 2011, pursuant to Section 2(c)(2)(C) of the Act, as amended by the CRA, 7 U.S.C. § 2(c)(2)(C)

(2006 and Supp. 2009). This provision grants the Commission jurisdiction over forex transactions if three criteria are met: (1) the transactions are offered to, or entered with, a person who is not an eligible contract participant ("ECP") on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis; (2) the transactions do not result in actual delivery within two days or otherwise create an enforceable obligation to deliver between a seller and buyer who have the ability to deliver and accept delivery, respectively, in connection with their line of business; and (3) neither the counterparty to the transactions nor the defendant is one of certain enumerated persons.[2] *See* Section 2(c)(2)(C)(i) and (ii) of the Act, as amended by the CRA, 7 U.S.C. § 2(c)(2)(C)(i), (ii) (2006 and Supp. 2009).

Here, all three criteria are met, thereby granting the Commission jurisdiction over the forex solicitations and transactions in this matter. Some or all of the customers were not eligible contract participants[3]; the forex transactions did not result in actual delivery of any foreign currency within two days or otherwise; and neither Defendants nor any of

[2] These enumerated persons include financial institutions, registered brokers or dealers, insurance companies, financial holding companies, and investment bank holding companies, in addition to any such person's APs. See Section 2(c)(2)(C)(ii)(II) of the Act, as amended by the CRA, 7 U.S.C. § 2(c)(2)(C)(ii)(II) (2006 and Supp. 2009).

[3] The Act defines an ECP, in relevant part, as an individual who has amounts invested on a discretionary basis, the aggregate of which exceeds $10 million, or $5 million if the individual entered into the transaction to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by that individual. See Section 1a(18)(A)(iv) and (xi) of the Act, 7 U.S.C. § 1a(18)(A)(iv), (xi).

their counterparties are among the certain enumerated persons exempted from the application of Section 2(c)(2)(C) of the Act.

B. Section 4b(a): Fraud in Connection with Forex

Kiley - through his misrepresentations and omissions of material fact, issuance of false statements, and misappropriation – violated Section 4b(a)(2)(A)-(C) of the Act as amended, 7 U.S.C. § 6b(a)(2)(A)-(C).

1. Section 4b: Fraud By Misrepresentations And Omissions

Kiley defrauded and deceived members of the public through fraudulent misrepresentations regarding profit potential and risk of loss in trading forex and by failing to disclose actual trading losses and misappropriation. In order to establish that a defendant made fraudulent misrepresentations and/or omissions in violation of Section 4b(a) of the Act, the Division must prove three elements: (1) that a defendant misrepresented or failed to disclose certain information; (2) that the misrepresentation or omission was "material"; and (3) that the defendant knew the information was false and calculated to cause harm or recklessly disregarded the truth or falsity of the information, *i.e.*, that the defendant acted with scienter. *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002), *cert. denied*, 543 U.S. 1034 (2004). *See also In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,313 (CFTC July 19, 1999), *aff'd in relevant part and rev'd in part sub nom., Slusser v. CFTC,* 210 F. 3d 783 (7th Cir. 2000); and *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,654 (CFTC Mar. 1, 1990).

When determining whether a misrepresentation has been made, one must look to the "overall message" and the "common understanding of the information conveyed." *R.J. Fitzgerald & Co.*, 310 F.2d at 1328, *citing Hammond,* Comm. Fut. L. Rep. ¶ 24,617 at 36,657 and n.12. The materials should be viewed through the eyes of an objectively reasonable person who would interpret the overall message. *R.J. Fitzgerald & Co.*, 310 F.2d at 1331. The overall message of Kiley's solicitations was that he and others were earning 10% to 12% annual profits for customers with no risk of loss. (SOF ¶ 19) Kiley misrepresented his and others' trading performance and provided false account statements to customers. (*Id*. ¶¶ 18-20) Additionally, Kiley guaranteed profits while misappropriating customer funds, and failed to disclose to prospective and existing customers that their funds would not be used for forex trading. (*Id*. ¶¶ 22-25, 32-36)

Generally, misrepresentations concerning the likelihood of profiting from forex trading such as those made by Kiley are material and violate the antifraud provisions of the Act. *See, e.g., CFTC v. Avco Financial Corp.*, 28 F. Supp.2d 104, 115-16 (S.D.N.Y. 1998), *aff'd in part and remanded in part on other grounds sub nom. Vartuli v. CFTC*, 228 F.3d 94 (2nd Cir. 2000); and *First Nat. Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1340 (6th Cir. 1987). "Indeed, misrepresentations regarding profit potential and risk go to the heart of a customer's investment decision and are therefore material as a matter of law." *CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F.Supp.2d 676, 686 (D. Md. 2000), *aff'd in part, vacated in part, sub nom. CFTC v. Baragosh*, 278 F.3d 391 (4th Cir. 2002); and *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1160 (S.D.N.Y. 1979) (misrepresentations regarding profitability of investment are

material). Kiley's misrepresentations relating to his and others' trading performance were material and violated the antifraud provisions of the Act. *Hirk v. Agri-Research Council Inc.*, 561 F.2d 96, 103-104 (7th Cir. 1977) (misrepresentations regarding the trading record and experience of firm or broker are fraudulent because past success and experience are material factors to reasonable investors).

Kiley acted with the requisite scienter. This may be established by showing that: (1) the defendant knew his misrepresentations were false and calculated to cause harm; or (2) the defendant made the representations with a reckless disregard for their truth or falsity. *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988) (recklessness is sufficient to satisfy scienter requirement); *see also CFTC v. Noble Metals Int'l, Inc*., 67 F. 3d 766, 774 (9th Cir. 1995) (discussing Section 4b's scienter requirement). The Commission need not prove that Kiley possessed an evil motive or intent to injure a client or that he subjectively wanted to cheat or defraud his customers. *Cange v. Stotler & Co. Inc.*, 826 F.2d 581, 589 (7th Cir. 1987); *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985) ("Proof of an evil motive is unnecessary"). "It is enough that he acted deliberately." *Haltmier v. CFTC*, 554 F.2d 556, 562 (2nd Cir. 1977). Moreover, "the element of knowledge cannot be precluded by ignorance brought about by willfully or carelessly ignoring the truth." *CFTC v. Savage*, 611 F.2d 270, 283 (9th Cir. 1979).

Specifically, scienter is established here because Kiley knew that his and others' representations were false. Kiley knew that his and others' statements that customer funds would be traded at Crown Forex SA in Switzerland were false because the $79

million of customer funds that he and others solicited between June 2008 and July 2009 were not sent there, but were deposited by Kiley and others in a domestic bank account of the same name. (SOF ¶ 33) Kiley even continued to solicit and accept funds from customers to invest with Crown Forex SA through July 18, 2009 when he knew that FINMA had prohibited Crown Forex SA from accepting new customers as of December 9, 2008 and from accepting any additional funds as of May 19, 2009. (SOF ¶¶ 24-25) Further, Kiley's representations regarding trading performance were false because he and others did not achieve the profits represented. (*Id*. ¶ 20) *Cf. CFTC v. Commonwealth Financial Group, Inc.*, 874 F. Supp. 1345, 1354-55 (S.D. Florida, December 28, 1994) , *vacated on other grounds,* 79 F. 3d 1159 (11th Cir. 1986)(The scienter requirement also is satisfied when the principals and brokers are aware of the significant losses suffered by their customers and fail to disclose them.) Finally, Kiley knew that he and others misappropriated customer funds because he used the customer funds that he and others solicited and accepted for forex trading for other purposes. (SOF ¶¶ 32-36)

2. Fraud by False Reports

Section 4b(a)(2)(B) of the Act provides in pertinent part that "[i]t shall be 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 … (ii) willfully to make or cause to be made to such other person any false report or statement thereof…." 7 U.S.C. § 6b(a)(2)(B). From at least June 18, 2008 until July 18, 2009, Kiley made or caused to be made false statements to misrepresent the value of customers' investments. (SOF ¶¶ 18-20)

Numerous courts have found that the making of false reports concerning profitability of trading violates Section 4b(a)(2)(B) of the Act. *See, e.g.*, *Noble Wealth Data Info. Serv., Inc.*, 90 F.Supp.2d at 686 (defendant's profit claims constituted false reports and fraud within the meaning of the Act); *Commodity Futures Trading Com'n ex rel. Kelly v. Skorupskas*, 605 F.Supp. 923, 932-33 (E.D. Mich. 1985) (defendants violated Section 4b of the Act by issuing false monthly statements to customers). Thus, Kiley is directly liable for these violations, pursuant to Section 2(a)(1)(B) of the Act. *See, e.g.*, *CFTC v. Sorkin*, [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); *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 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).

3. Fraud by Misappropriation

Kiley violated Sections 4b(a) of the Act by misappropriating $13,233,449.97 in customer funds to pay personal expenses, including credit card bills, legal fees, and to finance a casino in Panama. (SOF ¶¶ 32-36) Misappropriation of customer funds constitutes "willful and blatant" fraud in violation of Sections 4b(a) of the Act. *CFTC v. Morse*, 762 F.2d 60, 62 (8th Cir. 1985) (defendant's use of customer funds for personal use violated Section 4b of the Act), *CFTC v. Noble Wealth Data Info. Servs., Inc.*, 90 F. Supp. 2d at 687 (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), *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); *Weinberg*, 287 F. Supp. at 1106 (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 (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 v. McLaurin*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,768 at 44,180 (N.D. Ill. 1996) (defendant violated Section 4b of the Act by depositing customer funds in accounts in which the customers had no ownership interest and making unauthorized disbursements for his own use).

VI. IMPOSITION OF A PERMANENT INJUNCTION AND OTHER RELIEF

The Commission is entitled to entry of a permanent injunction against Kiley imposing relief requested in the Complaint, including a permanent injunction, permanent trading and registration bans and disgorgement.

A. The Court Should Enter a Permanent Injunction Enjoining Kiley from Committing Further Violations of the Act, Including Trading and Registration Bans

Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a), authorizes the CFTC to seek injunctive relief when it appears that a person or entity has engaged, is engaging, or is about to engage in any act or practice that violates the Act or Regulations, while Section 6c(b) of the Act, 7 U.S.C. § 13a-1(b), provides that upon a proper showing, a permanent injunction shall be granted without bond. To make a proper showing, the Commission "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." *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978) . "Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations." *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979).

Previous violations suggest a likelihood of future violations; "[w]hen the violation has been founded on systematic wrongdoing, rather than an isolated occurrence, a court should be more willing to enjoin future misconduct." *Id.* at 1220; *see also CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir. 1999) (finding no abuse of discretion in permanently enjoining further violations "[i]n light of the likelihood of future violations"). In drawing an inference of future violations from previous violations, the court must consider the totality of the circumstances, including whether there is any indication that previous violations were an isolated occurrence. *Hunt*, 591 F.2d at 1220. Courts should also consider "[t]he egregiousness of the defendants' actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the

defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1346 (11th Cir. 2008) (*citing SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982)).

The Commission has made a prima facie case that Kiley violated core anti-fraud provisions of the Act. These violations were not isolated occurrences; rather, Kiley, individually and through at least six entities that he and others controlled, repeatedly misrepresented his and others success trading commodity futures and that customer funds would be placed in segregated accounts and deposited at Crown Forex, SA for the purpose of trading forex between June 2008 and July 2009, and misappropriated $$13,233,449.97 in customer funds during that time. (SOF ¶¶ 6, 7, 9, 10, 18-20, 22, 35-36) Kiley concealed his fraud for at least a year, including by providing customers with false periodic account statements and tax records. (*Id*. ¶¶ 14, 16)

The ongoing and lengthy nature of Kiley's blatant misconduct, in addition to Kiley's failure to recognize the wrongfulness of his and other Defendants' conduct in this action, is highly suggestive of future violations of the Act. Permanent injunctive relief is therefore proper and warranted. The Court should permanently enjoin Kiley from further violating the Act and impose on him permanent trading and registration bans.

B. Restitution

Kiley's violations of the Act merit the award of significant restitution. However, the Commission recognizes that Kiley is subject to criminal judgment restitution

obligations of $155,359,411.77 entered in *United States v. Patrick Joseph Kiley*, Docket No. 11-228 (D. Minn.) on June 12, 2012 for the misconduct at issue in this civil action. Because the criminal court awarded restitution to defrauded customers, the Commission is not seeking additional restitution in this matter.

C. Disgorgement

The court should order Kiley to disgorge the monetary benefits of his unlawful activity. "District courts have the power to order disgorgement as a remedy for violations of the Act for 'the purpose of depriving the wrongdoer of his ill-gotten gains and deterring violations of the law." *CFTC v. American Metals Exchange Corp.*, 991 F.2d 71, 76 (3rd Cir. 1993) (citing *CFTC v. British Am. Commodity Corp.*, 788 F.2d 92, 94 (2d Cir. 1986). From June 18, 2008 through July 2009, Kiley received $13,233,449.97 as a result of the fraudulent scheme and should be ordered to disgorge that amount. (SOF ¶¶ 35-36) The SEC is seeking disgorgement of $155,928,583 from Kiley for the same conduct at issue in this case as well as additional conduct occurring prior to the relevant time period here. (CITE) Consequently, any disgorgement that Kiley pays to the SEC that exceeds $142,695,133.03 should result in a dollar for dollar reduction of his disgorgement obligation in this matter.

VII. CONCLUSION

This case is ripe for disposition via summary judgment. The facts necessary to support Plaintiff's claims of violations of the antifraud provisions of the Act are supported by affidavits, Kiley's admissions in his criminal case, and documents. Kiley can present no significant probative evidence in opposition to the motion. For purposes

of this civil motion, Kiley's admissions in his criminal case, and Plaintiff's other evidence, should compel summary judgment in Plaintiff's favor. This Court should conclude that there is no genuine issue for trial and enter summary judgment in Plaintiff's favor.

Dated: March 12, 2015

Respectfully submitted,

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