UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. NIKOLAI SIMON BATTOO; BC CAPITAL GROUP S.A.; BC CAPITAL GROUP INTERNATIONAL LIMITED a/k/a BC CAPITAL GROUP LIMITED a/k/a BC CAPITAL GROUP GLOBAL; AND BC CAPITAL GROUP HOLDINGS S.A., Defendants.	Case No. 12-cv-07127 Honorable Edmond E. Chang

DEFAULT JUDGMENT ORDER

I. Introduction

On September 6, 2012, the United States Commodity Futures Trading Commission filed its Complaint for Permanent Injunction, Civil Monetary Penalties, and Other Equitable Relief against Defendants Nikolai Simon Battoo (Battoo), BC Capital Group S.A. (BC Panama), BC Capital Group International Limited a/k/a BC Capital Group Limited a/k/a BC Capital Group Global (BC Hong Kong), and BC Capital Group Holdings S.A. (BC Switzerland) (for convenience's sake, collectively referred to as Defendants[1]) for violations of certain anti-fraud

[1] The Complaint originally included BC Capital Management LLP (BC London) as a Defendant. Later, however, the Commission moved to voluntarily dismiss BC London and vacate the default order entered against it. Dkt. Nos. 292-294.

provisions of the Commodity Exchange Act (the Act), 7 U.S.C. §§ 1 *et seq.*[2] and the Commission Regulations (Regulations) promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2012). Dkt. No. 1.

Pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure, this matter now comes before the Court on the Commission's Motions for Default Judgment and for Restitution, Disgorgement and Civil Monetary Penalty, as amended, (collectively called the "motions") and Memoranda in Support of the motions against Defendants after this Court's previous Order of Default Judgment for their failure to answer or otherwise respond to the Complaint. Dkt. Nos. 174-175, 209, 235-236, 458. This Court has considered the entire record in this matter, including the Commission's Motions, Memoranda in Support of the Motions and the exhibits to them, and finds that good cause exists for entry of the relief requested. Accordingly, the Commission's Motions are granted, as detailed below.

THE COURT HEREBY FINDS:

1. On September 6, 2012, the Commission filed a three-count Complaint and an Emergency *Ex Parte* Motion and Memorandum in Support for Statutory Restraining Order, Expedited Discovery, Preliminary Injunction, and Other Equitable Relief (the SRO Motion) against Defendants, alleging violations of certain anti-fraud provisions of the Act and Regulations. Dkt. Nos. 1, 9. After careful

[2] All citations to Sections of the Act that have not been amended will read as follows: "Section x of the Act, 7 U.S.C. § x (2006)." All citations to the Act as amended by the CRA, but not by the Dodd-Frank Act, will read as follows: "Section x of the Act, 7 U.S.C. § x (Supp. II 2009)." All sections of the Act that have been amended by the Dodd-Frank Act will read as follows: "Section x of the Act, 7 U.S.C. § x. (Supp. V 2012)."

consideration, this Court granted the Commission's SRO Motion and, among other things, froze all assets under the possession or control of Defendants. Dkt. No. 15-1.

2. On September 21, 2012, the Commission filed its Motion for Preliminary Injunction and for the Appointment of a Receiver (Preliminary Injunction Motion). Dkt. Nos. 18-19. This Court granted the Preliminary Injunction Motion, made findings of fact and conclusions of law, enjoined Defendants from future violations of the Act and Regulations, and placed Defendants under the temporary receivership of Robb Evans & Associates LLC (Receiver). Preliminary Injunction, Dkt. No. 22.

3. Defendants were effectively served with the Summons and Complaint on March 27, 2013. Dkt. No. 147. Therefore, Defendants' answers were due no later than April 17, 2013. *Id*. To date, none of the Defendants have filed answers or otherwise responded to the Complaint. Accordingly, the Commission requested a Clerk's Entry of Default, which was entered on June 25, 2013. Dkt. Nos. 150, 166.

4. On August 1, 2013, the Commission filed its Motion for Default Judgment and Memorandum in Support, seeking a finding of liability against Defendants, but reserving the amount of monetary damages until the Receiver completed its financial analysis. Dkt. Nos. 174-175. This Court granted the Commission's Motion for Default Judgment on August 5, 2013, and extended the Preliminary Injunction. Dkt. No. 209.

5. On December 4, 2013, the Receiver filed its Modified Report of Receiver's Activities January 18, 2013 Through November 22, 2013 (Modified

Report), which among other things, sets forth the financial analysis of the Defendants' fraudulent conduct. Dkt. No. 217.

6. On January 10, 2014, the Commission submitted its Motion for Restitution, Disgorgement, and Civil Monetary Penalty, which was based on the Receiver's analysis at that time. Dkt. Nos. 235-236.

7. On October 15, 2015, in light of additional documents obtained by the Receiver, the Commission filed an Amendment to its Motion for Restitution, Disgorgement, and Civil Monetary Penalty (Amendment). Dkt. No. 458.

II. Findings of Fact

8. In view of the default, the allegations of the Complaint must be accepted as true; these findings bind the named Defendants. This Order is supported by the following facts:

A. Parties

9. **United States Commodity Futures Trading Commission** is an independent federal regulatory agency that is charged by Congress with the administration and enforcement of the Act and the Regulations promulgated thereunder. The Commission maintains its principal office at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

10. **Nikolai Simon Battoo** is an individual who is believed to reside in Switzerland. Until around 2007, Battoo was a resident of Florida. Until April 2013, Battoo was a principal of a Commission-registered commodity pool operator (CPO) and commodity trading advisor (CTA) located in Lincoln, Nebraska.

11. **BC Capital Group S.A.** is incorporated under the laws of the Republic of Panama. BC Panama has never been registered in any capacity with the Commission.

12. **BC Capital Group Limited** is incorporated under the laws of Hong Kong. BC Hong Kong has never been registered in any capacity with the Commission.

13. **BC Capital Group Holdings S.A.** is incorporated under the laws of Switzerland. BC Switzerland has never been registered in any capacity with the Commission.

B. Structure of the BC Common Enterprise

14. Battoo controlled BC Panama, BC Hong Kong, and BC Switzerland and operated them as a common enterprise (the BC Common Enterprise) in connection with the Private International Wealth Management (PIWM) and Private International Wealth Management–Insurance (PIWM-I) portfolios (collectively, the PIWM Portfolios). Although each entity purportedly performed different functions in operating the PIWM Portfolios, Defendants did not differentiate between the various corporations in solicitation materials or in communications with United States residents and others (pool participants). Instead, some corporations were mere shells with no actual offices. All actual operations of the BC Common Enterprise occurred at Battoo's office in London and his home office in Switzerland.

15. BC Panama purports to be the "manager and managing company" of the PIWM Portfolios. Battoo is identified as the contact person for BC Panama in

the 2009 due diligence questionnaire (DDQ) that Defendants prepared and provided to pool participants.

16. BC Hong Kong purports to be the "appointed financial investment advisor" to BC Panama. BC Panama and BC Hong Kong are "responsible for the customization and implementation (investment management) of the custom tailored PIWM portfolio strategies for each mandate." Battoo is identified as the principal of and contact for BC Hong Kong in the 2009 DDQ.

17. BC Panama and BC Hong Kong are both shell companies. Battoo subleased a section of office space from Alliance Investment Management (Alliance), a Bahamas registered broker-dealer, to use as BC Panama's and BC Hong Kong's "office." Battoo and other employees, agents, and principals of the BC Common Enterprise would occasionally use Alliance's office for meetings with pool participants and investment advisors. But no employee, agent, or principal of the BC Common Enterprise operated from Alliance's offices on a full-time basis. Instead, Alliance staff would receive mail and forward it unopened to Battoo. BC Panama and BC Hong Kong shared telephone and facsimile numbers with Alliance.

18. BC Switzerland is an affiliated company to BC Hong Kong and purports to provide research and development, along with trading and execution, under contract to BC Hong Kong. Battoo works from BC Switzerland's office, which is believed to be located in Battoo's residence. Battoo used BC Switzerland's office to call investment advisors in the United States about the status of redemption requests made by U.S. pool participants. Battoo is identified as the only contact

person for BC Switzerland. The telephone number for BC Switzerland provided in the 2009 DDQ is the same as for Alliance, BC Panama, and BC Hong Kong.

19. Solicitation materials that Defendants provided to prospective pool participants do not distinguish between the different entities comprising the BC Common Enterprise. For example, the DDQ identifies "BC Capital Group" as the PIWM Portfolios' "Global Overseer" and lists offices in the Bahamas, Hong Kong, London, Panama, Singapore, and Switzerland. According to organizational charts, all entities comprising the BC Common Enterprise share the same "Professional Executive Board" and "Investment Advisory Board," with Battoo as Senior Advisor to the Investment Advisory Board. Battoo did not identify on behalf of which entity comprising the BC Common Enterprise he was acting when communicating with pool participants. Instead, account statements and letters to pool participants were written on "PIWM" and "PIWM-I" letterhead.

C. Summary of the Fraud Scheme

20. From at least January 2003 to the present, the BC Common Enterprise, by and through its agents, employees and principals including but not limited to Battoo, and Battoo directly, solicited pool participants to invest in the PIWM Portfolios. Solicitation materials provided by Defendants to prospective pool participants state that the PIWM Portfolios would engage in the trading of commodities, futures contracts, and equities, along with other investment strategies. Based on these solicitations, at least 250 U.S. pool participants invested at least $140 million into the PIWM Portfolios.

21. In 2008, investments made by the PIWM Portfolios into various funds of which Battoo acted as investment advisor suffered significant losses. However, Defendants failed to disclose some losses, while affirmatively misleading pool participants about the extent of other losses. Defendants made further misrepresentations to pool participants between 2009 and 2011 about the value of the PIWM Portfolios' underlying investments and the location of the pools' funds.

D. Defendants' Solicitation of Pool Participants

22. The BC Common Enterprise, while acting as a CPO, and Battoo, while acting as an Associated Person (AP) of a CPO, solicited pool participants, both directly and by soliciting U.S.-based investment advisors to recommend investments by their clients, at offshore conferences hosted by investment advisors between at least 2006 and 2010. Battoo, along with other agents or employees of the BC Common Enterprise, gave presentations at the conferences about the PIWM Portfolios. Defendants provided prospective pool participants with copies of the DDQs and Power Point presentations describing the investment strategies used for the PIWM Portfolios. Defendants also provided prospective pool participants with one-page documents on PIWM letterhead that show the purported monthly returns of the PIWM Portfolios since at least 2001, along with information on the underlying investments held by the portfolios (the Tear Sheets).

23. Defendants told prospective pool participants that a portion of the PIWM Portfolios would be used for futures trading. The DDQs identify "Financial Futures" and "Commodities" as part of the "Underlying Investments" made by the

PIWM Portfolios. Moreover, Tear Sheets given to pool participants indicated that a portion of the PIWM Portfolios is invested in "Multi-Strategy Futures & Commodities." The DDQs represent that Battoo is the registered principal of a CTA registered with the National Futures Association (NFA) in the United States. The DDQs also state that BC Hong Kong is affiliated with a registered CTA located in Singapore. The Power Point presentations tout that Battoo is an "accomplished financial trader" with over fifteen years' experience specializing in the futures and commodities markets.

24. Since at least January 2003, pool participants sent funds, directly or through offshore companies with the intent of investing in the PIWM Portfolios, to an account in the name of BC Panama at Alliance. Alliance told at least some pool participants that pool participants shared all profits or losses of the PIWM Portfolio in which they invested on a pro rata basis. Defendants established at least eleven PIWM Portfolios in which U.S. pool participants invested funds (the "U.S. Participant Pools").

25. Defendants told pool participants that the PIWM Portfolios contained $1.5 billion as of May 2012, down from $2.2 billion in March 2009. Defendants also told pool participants that there were sixty-eight separate PIWM Portfolios as of March 2009.

E. Defendants' Investments and Trading on Behalf of the PIWM Portfolios

26. The PIWM Portfolios functioned as a fund of funds, whereby Defendants invested pool participant funds into a variety of other hedge funds.

Defendants told pool participants that the PIWM Portfolios would pursue several different strategies to generate returns, including strategies involving futures trading. Although each PIWM Portfolio held slightly different combinations of funds, the underlying investments of each portfolio fall into three general categories: (a) hedge funds for which Battoo acted as investment advisor; (b) hedge funds and commodity pools operated by third parties; and (c) "Managed Accounts."

27. Defendants told pool participants that a portion of the PIWM Portfolios was invested with five hedge funds for which Battoo acted as investment advisor: (a) FuturesOne Diversified Fund (F1 Diversified); (b) FuturesOne Innovative Fund (F1 Innovative); (c) Anchor Hedge Fund (Anchor Fund); (d) Galaxy Fund; and (e) Two Oceans Fund (collectively, the Battoo-Operated Funds). Each Battoo-Operated Fund contained multiple "share classes" in which the PIWM Portfolios invested. Several share classes of F1 Diversified held trading accounts at futures commission merchants (FCMs) in the United States and actively traded futures and options on futures contracts on U.S. exchanges.

28. Defendants told pool participants that a portion of the PIWM Portfolios was also invested in various hedge funds operated by entities unaffiliated with Battoo. These investments included some of the largest global hedge funds, as well as commodity pools run by at least four third-party CPOs. At least three of these third-party CPOs are located in the United States.

29. Finally, Defendants told pool participants that Defendants traded a portion of the PIWM Portfolios in six "Managed Accounts" held at Alliance. One

"Managed Account" was termed "Multi-Strategy Futures & Commodities." Defendants told pool participants in the U.S. Participant Pools that up to 18.79% of their portfolios' funds were in the "Multi-Strategy Futures & Commodities" managed account.

F. Defendants' Undisclosed Losses and Misrepresentations in 2008

The 2008 Trading Losses and Failure to Disclose: October to December 2008

30. Between April 2008 and October 2008, the PIWM Portfolios suffered significant losses, potentially as high as $140 million that Defendants failed to disclose to pool participants. As of December 31, 2008, the PIWM Portfolios held significant investments in six share classes of the Anchor Fund, Galaxy Fund, and F1 Diversified Fund (Phi R2 share classes). Between April 2008 and October 2008, the Phi R2 share classes suffered significant losses from trading on a London-based investment platform (the Phi R2 Fund losses). Because of the Phi R2 Fund losses, the Anchor Fund, Galaxy Fund, and F1 Diversified Fund suspended redemptions of the Phi R2 share classes between October 13, 2008 and December 18, 2008.

31. Battoo, as investment advisor to the Anchor Fund, Galaxy Fund, and F1 Diversified Fund, knew or was reckless in not knowing of the Phi R2 Fund losses and the resulting suspensions of redemptions. Despite this knowledge, Defendants did not inform some PIWM Portfolio pool participants that a significant portion of their portfolios were negatively impacted by the Phi R2 Fund losses and the resulting suspensions of redemptions. Defendants accepted additional funds from

existing pool participants after the PIWM Portfolios suffered the Phi R2 Fund losses without disclosing the losses to pool participants.

The Madoff-Related Losses and Misrepresentations: December 2008

32. Defendants made misrepresentations to pool participants about the PIWM Portfolios' exposure to the Ponzi scheme operated by Bernard Madoff (the Madoff scheme).

33. Tear Sheets that Defendants provided to pool participants during sales solicitations indicate that, as of October 2008, between 7% and 20% of each PIWM Portfolio was invested in certain share classes of the Anchor Fund and Galaxy Fund (Madoff share classes). Unknown to pool participants, the Madoff share classes ultimately invested in the Madoff scheme.

34. Between December 18, 2008 and December 22, 2008, after the Madoff scheme was exposed and Madoff was arrested, the Anchor Fund and Galaxy Fund suspended redemptions of the Madoff share classes because of losses sustained in the Madoff scheme.

35. As the investment manager of the Anchor Fund and Galaxy Fund, Battoo knew or was reckless in not knowing of the funds' suspensions of redemptions.

36. Despite knowing about the PIWM Portfolios' substantial exposure to the Madoff scheme, on or about December 16, 2008, Battoo sent an email to two investment advisors advising U.S. pool participants stating that "PIWM-Insurance

will be issuing a letter by end of week to all clients to inform them that the current Madoff situation will have practically no impact to its portfolios."

37. On or about December 19, 2008, an agent of the BC Common Enterprise operating from Florida sent an email to some U.S. pool participants and attached a letter from Battoo, dated December 19, 2008. Battoo's letter states that:

> PIWM did carry a small nominal percentage of approx (0.20% - 2.9%) portion of **indirect** exposure through a diversified hedge fund. Thus when accounted for, the impact will be less than (0.05% - 0.78%) depending on each client's custom-tailored portfolio which is very low and well under 1.0%.

38. Battoo's December 19, 2008 letter misrepresents the PIWM Portfolio pool participants' exposure to the Madoff scheme.

39. Defendants also failed to disclose losses associated with the Madoff scheme when Battoo discussed the PIWM Portfolios' performance at a conference for PIWM Portfolio pool participants held in Las Vegas, Nevada, in January 2009. Defendants accepted additional funds from existing pool participants after the PIWM Portfolios suffered the Madoff scheme losses without disclosing such losses to pool participants.

G. Defendants Made Misrepresentations Regarding the Value of Underlying Investments and Location of Funds

40. Following the undisclosed losses suffered by the PIWM Portfolios in 2008 due to the Phi R2 Fund and the Madoff scheme losses, Defendants made additional misrepresentations to pool participants about the value of the underlying investments in the PIWM Portfolios and the location of the PIWM Portfolios' assets. These misrepresentations began as some pool participants were placing additional

funds in the PIWM Portfolios and continued as pool participants demanded redemptions starting in 2011.

The Fraudulent Asset Verifications: September 2009

41. In or around September 2009, Defendants provided pool participants in the eleven U.S. Participant Pools with asset verifications conducted by the PIWM Portfolios' third-party administrator (Asset Verifications). These eleven Asset Verifications purportedly provide the value of investments made by the PIWM Portfolios as of December 31, 2008. While the Asset Verifications were issued by the third-party administrator, they were based on information provided to the third-party administrator by Defendants. Further, Battoo, not the third-party administrator, sent the Asset Verifications to some if not all pool participants via email.

42. The Asset Verifications grossly overstate the net asset value of the U.S. Participant Pools' investments with commodity pools operated by four third-party CPOs. The Asset Verifications state that the U.S. Participant Pools had investments worth over $21.8 million with commodity pools operated by these four third-party CPOs. However, the total value of all investments with these third-party CPOs made by any entity associated with Defendants totaled less than $8 million. Further, the Asset Verifications backdate investments in funds operated by two CPOs that occurred after the purported valuation date. At a minimum, the Asset Verifications overstate investments with the four third-party CPOs by $13.9 million.

Misrepresentations Regarding Funds Held at MF Global

43. Beginning in October 2011, Battoo made representations to pool participants that the PIWM Portfolios were significantly impacted by the collapse of MF Global Inc. (MF Global), a registered FCM that filed for bankruptcy at the end of October 2011. Citing the MF Global collapse, Defendants suspended valuations and redemptions of PIWM Portfolios on November 11, 2011. In letters sent to pool participants on or about November 11, 2011, Battoo told pool participants that a portion of the PIWM Portfolios' assets were held in "underlying managed accounts at MF Global, along with CTAs and hedge fund investments that cleared through MF Global." Defendants told pool participants that all PIWM Portfolios were affected. In a later letter sent to pool participants via email on or about December 9, 2011, Battoo states that, while "each portfolio would have a varying exposure to MF Global[,]" the exposure ranged from 17% to 39% of each portfolio.

44. According to the most recent account statements that Defendants provided to pool participants, the U.S. Participant Pools have a value of at least $130 million. Therefore, at a minimum, the U.S. Participant Pools' exposure to MF Global should be at least $22 million, or 17% of $130 million.

45. Despite Battoo's statements to pool participants, MF Global had no "managed accounts" in the name of PIWM or the PIWM Portfolios. In fact, the only accounts with any connection to Defendants were in the name of the F1 Diversified Fund and held less than $2.7 million in net liquidation value at the time of MF Global's bankruptcy.

46. Given the relatively small exposure that the PIWM Portfolios had to the MF Global collapse, Defendants misrepresented to pool participants either (a) the value of the PIWM Portfolios or (b) the extent to which the PIWM Portfolios were affected by the MF Global collapse.

III. Conclusions of Law

A. Jurisdiction & Venue

47. This Court has personal jurisdiction over Defendants and subject matter jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), which authorizes the Commission to seek injunctive relief against any person whenever it appears 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.

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

B. Defendants' Failure to Answer Warrants Entry of Default Judgment

49. "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . the clerk must enter the party's default." FED. R. CIV. P. 55(a). As indicated *supra*, Defendants were properly served on March 27, 2013, and thus were required to answer or otherwise respond to the Complaint on or before on April 17, 2013. Dkt. No. 147. Defendants failed to answer

or otherwise respond to the Complaint in the time permitted by the Federal Rules of Civil Procedure. Accordingly, the Commission requested a Clerk's Entry of Default, which was entered on June 25, 2013. Dkt. Nos. 150, 155.

50. Once the Clerk has entered a default, the party seeking the default is then required to apply to the court for a default judgment. *See* FED. R. CIV. P. 55(b)(2). Entry of default judgment is left to the sound discretion of the district court. *See Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1322 (7th Cir. 1983); *see also C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1206 (7th Cir. 1984) (noting although the law favors trial on the merits, these considerations must be balanced against the need to promote efficient litigation and to protect the interests of all litigants). Defendants' failure to answer or otherwise respond to the Complaint merits entry of this Order. The interests of those who will make claims for restitution will be protected in the claims-verification process; the fact-findings in this Order bind the named Defendants.

C. Defendants Violated Certain Anti-Fraud Provisions of the Act and Regulations

51. "Upon default, the well-pled allegations of the complaint relating to liability are taken as true, but those relating to the amount of damages suffered ordinarily are not." *Wehrs v. Wells*, 688 F.3d 886, 892 (7th Cir. 2012) (citing *United States v. Di Mucci*, 879 F.2d 1488, 1497 (7th Cir.1989); FED. R. CIV. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied."). "A default judgment establishes, as a matter of law, that defendants are liable to plaintiff on

each cause of action alleged in the complaint." *Wehrs*, 688 F.3d at 892 (quoting *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 602 (7th Cir. 2007)). Accordingly, the Court finds Defendants liable for each violation of the Act and Regulations alleged in the Complaint.

Defendants Violated Sections 4b(a)(1)(A)-(C), 7 U.S.C. §§ 6b(a)(1)(A)-(C) (Supp. V 2012)

52. Sections 4b(a)(1)(A)-(C) of the Act make it unlawful

> for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity 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; [or] (C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, in regard to any act of agency performed, with respect to any order or contract for or, in the case of paragraph 2, with the other person.

7 U.S.C. §§ 6b(a)(1)(A)-(C) (Supp. V 2012).

53. As set forth above, Defendants violated Sections 4b(a)(1)(A)-(C) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)-(C) (Supp. V 2012), by knowingly or recklessly making material misrepresentations and omissions to pool participants regarding (1) the PIWM Portfolios' exposure to the Phi R2 losses and the Madoff scheme, (2) the value and location of assets purportedly held by the PIWM Portfolios, and (3) the PIWM Portfolios' exposure to the MF Global bankruptcy.

Defendants Violated Section 4o(1), 7 U.S.C. § 6o(1) (2006)

54. Section 4o(1) of the Act, 7 U.S.C. 6o(1) (2006), prohibits fraudulent transactions by CPOs and APs of CPOs. Section 4o(1)(A) of the Act, 7 U.S.C. 6o(1)(A) (2006), makes it unlawful for a CPO, or an AP of a CPO, to employ any device, scheme or artifice to defraud any participant or prospective participant by use of instrumentalities of interstate commerce. Section 4o(1)(B) of the Act, 7 U.S.C. 6o(1)(B) (2006), makes it unlawful for a CPO, or an AP of a CPO, to engage in any transaction, practice or course of business that operates as a fraud or deceit upon any participant or prospective participant by use of instrumentalities of interstate commerce.

55. As set forth above, Defendants violated Section 4o(1) of the Act, 7 U.S.C. 6o(1) (2006), by knowingly or recklessly making material misrepresentations and omissions to pool participants regarding (1) the PIWM Portfolios' exposure to the Phi R2 losses and the Madoff scheme, (2) the value and location of assets purportedly held by the PIWM Portfolios, and (3) the PIWM Portfolios' exposure to the MF Global bankruptcy.

Defendants Violated Section 4c(b), 7 U.S.C. 6c(b) (2006) and Regulations 33.10(a)-(c), 17 C.F.R. §§ 33.10(a)-(c) (2012)

56. Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006), provides that "[n]o person shall . . . enter into or confirm the execution of any transaction involving any . . . option . . . contrary to any . . . regulation of the Commission." In turn, Regulations 33.10(a)-(c), 17 C.F.R. §§ 33.10(a)-(c) (2012), provide 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

> record 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 connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.

57. As set forth above, Defendants violated Sections 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulations 33.10(a)-(c), 17 C.F.R. §§ 33.10(a)-(c) (2012), by knowingly or recklessly making material misrepresentations and omissions to pool participants regarding (1) the PIWM Portfolios' exposure to the Phi R2 losses and the Madoff scheme, (2) the value and location of assets purportedly held by the PIWM Portfolios, and (3) the PIWM Portfolios' exposure to the MF Global bankruptcy.

Battoo is Liable for the Violations of the Act and Regulations Committed by BC Panama, BC Hong Kong, and BC Switzerland, as a Control Person Pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2006)

58. Section 13(b) of the Act defines a controlling person "[a]ny person who, directly or indirectly, controls any person who has violated any provision of the Act [if that controlling person] did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation." 7 U.S.C. § 13c(b) (2006). This provision includes individuals, associations, partnerships, corporations and trusts that exercise control over persons who violate the Act and fail to act in good faith. *See Monieson v. CFTC*, 996 F.2d 852, 859-60 (7th Cir. 1993) (finding control person liability when defendant made management and hiring decisions and oversaw the day-to-day operations). Indeed, "[a] fundamental purpose of section 13(b) is to allow the Commission to reach behind the corporate entity to the controlling individuals

of the corporation and to impose liability for violations of the Act directly on such individuals as well as on the corporation itself." *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1567 (11th Cir. 1995) (quoting *In re Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,251 at 38,794 (CFTC Mar. 11, 1992)

59. A controlling person acts in bad faith if he "did not maintain a reasonably adequate system of internal supervision and control over the [employee] or did not enforce with any reasonable diligence such system." *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 881 (7th Cir. 1992) (citations omitted). At a minimum, the controlling person must act recklessly; negligence alone is insufficient to support liability. *See G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 959-60 (5th Cir. 1981) (holding that recklessness is sufficient to establish liability for a controlling person where he was involved in day-to-day operations and could influence corporate policy). *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 209 n.28 (1976) (noting that the controlling person provision of the Securities Exchange Act of 1934 requires more than negligence).

60. To establish the "knowing inducement" element, the Commission must show that "the controlling person had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue." *JCC, Inc.*, 63 F.3d at 1568. Controlling persons cannot avoid liability by deliberately or recklessly avoiding knowledge about potential wrongdoing. *See United States v. Ramsey*, 785 F.2d 184, 188-89 (7th Cir. 1986) (allowing an "ostrich" jury instruction because "actual knowledge and deliberate avoidance of knowledge are the same

thing"). To support a finding of constructive knowledge, the Commission must show that a defendant "lack[ed] actual knowledge only because [he] consciously avoided it." *JCC, Inc.*, 63 F.3d, at 1568 (citations omitted).

61. Battoo is a "controlling person" of the BC Common Enterprise. First, Battoo has the requisite control over each of the entities that comprise the BC Common Enterprise. As discussed above, Battoo is the "Senior Advisor" to the "Investment Advisory Board" of the BC Common Enterprise. Battoo hires and manages employees of the BC Common Enterprise. Second, Battoo had knowledge of and participated in the fraudulent activity committed by the BC Common Enterprise discussed above. In particular, Battoo made presentations at conferences and sent communications to pool participants containing misrepresentations about the PIWM Portfolios' exposure to the Madoff schemes and to MF Global's bankruptcy. These presentations and communications show that Battoo knowingly induced the BC Common Enterprise in its violations of the Act and the Regulations. Therefore, Battoo is liable for the acts of BC Panama, BC Hong Kong, and BC Switzerland.

BC Panama, BC Hong Kong, and BC Switzerland are Liable for Battoo's Violations of the Act and Regulations Pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2012)

62. Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2012), impose strict liability upon principals for the actions of their agents acting within the scope of their employment. *See Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986) (finding that principals are strictly

liable for the acts of their agents).[3] Battoo, as well as other employees and agents, committed the acts and omissions described herein within the course and scope of their employment with BC Panama, BC Hong Kong, and BC Switzerland. Therefore, BC Panama, BC Hong Kong, and BC Switzerland are liable under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2012), as a principal for its agents' acts, omissions or failures as they relate to violations of the Act and Regulations.

IV. Order for Permanent Injunction, Restitution, Disgorgement, A Civil Monetary Penalty And Other Ancillary Relief

63. Section 6c(b) of the Act provides in pertinent part that "[u]pon a proper showing, a permanent . . . injunction . . . shall be granted without bond." 7 U.S.C. § 13a-1(b) (2006). Unlike private injunctive actions, which are rooted in the equity jurisdiction of the federal courts, a Commission enforcement action seeking injunctive relief is a creature of statute. *See CFTC v. Garofalo*, No. 10-cv-2417, 2011 WL 4954082, at *5 (N.D. Ill. May 5, 2011) (citing *CFTC v. Morgan, Harris & Scott Ltd.*, 484 F. Supp. 669, 676-77 (S.D.N.Y. 1979)). As a result, restrictive concepts ordinarily associated with private injunctive actions, such as proof of irreparable injury or inadequacy of other remedies, are inapplicable. *See CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979)); *see also Garofalo*, 2011 WL 4954082, at *5.

[3] Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), states: "The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person."

In order to obtain a permanent injunction, the Commission must show that a violation of the Act and/or Regulations occurred, and that there is some reasonable likelihood of future violations. *See Hunt*, 591 F.2d at 1220; *see also Garofalo*, 2011 WL 4954082, at *6. Furthermore, "the commission of past illegal conduct is highly suggestive of the likelihood of future violations." *Garofalo*, 2011 WL 4954085, at *6 (quoting *CFTC v. Crown Colony Commodity Options Ltd.*, 434 F. Supp. 911, 919 (S.D.N.Y.1977)).

64. In its Preliminary Injunction, this Court found that the Commission made a *prima facie* showing that Defendants violated Sections 4b(a)(1)(A)-(C), 4o, and 4c(b) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)-(C), 6o, and 6c(b) (2006 and Supp. V 2012), and Regulations 33.10(a)-(c), 17 C.F.R. §§ 33.10(a)-(c) (2012), by making material misrepresentations and omissions concerning, among other things, the suspensions of redemption caused by the Phi R2 losses, the PIWM Portfolios' exposure to the Madoff scheme, and the value and location of the PIWM Portfolios' assets—with the knowledge that the statements were false. This Court has also held that there is a reasonable likelihood of future violations by Defendants.

65. The Commission has shown that Defendants have engaged, are engaging, and are about to engage in acts and practices which violate Sections 4b(a)(1)(A)-(C), 4o(1), and 4c(b) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)-(C) and 6c(b) (2006 and Supp. V 2012), and Regulations 33.10(a)-(c), 17 C.F.R. §§ 33.10(a)-(c) (2012). Notwithstanding their default, the Commission has made a *prima facie* showing that the defendant has engaged, or is engaging, in illegal conduct and that, unless

restrained and enjoined by this Court, there is a reasonable likelihood that Defendants will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of the Act and the Regulations. Therefore, a permanent injunction is warranted.

IT IS HEREBY ORDERED THAT:

66. Defendants have violated Sections 4b(a)(1)(A)-(C), 4o(1), and 4c(b) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)-(C), 6o(1), and 6c(b) (2006 and Supp. V 2012), and Regulations 33.10(a)-(c), 17 C.F.R. §§ 33.10(a)-(c) (2012). Therefore, judgment shall be and hereby is entered in favor of the Commission and against Defendants as follows:

A. Prohibition on Violations

67. Defendants, all persons and entities insofar as they are acting in the capacity of agents, servants, employees, successors, assigns, or attorneys of Defendants, and all persons and entities insofar as they are acting in concert or participation with Defendants who receive actual notice of this order by personal service or otherwise, shall be permanently prohibited, enjoined and restrained from directly or indirectly engaging in any conduct in violation of Sections 4b(a)(1)(A)-(C), 4o(1), and 4c(b) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)-(C), 6o(1), and 6c(b) (2012), and Regulations 33.10(a)-(c), 17 C.F.R. §§ 33.10(a)-(c) (2015).

B. Trading, Solicitation and Registration Prohibitions

68. Permanent trading, solicitation and registration bans are appropriate when a defendant's violation of the Act and/or Regulations poses a threat to the

integrity of the markets regulated by the Commission. *See Monieson*, 996 F.2d at 863 (finding a trading ban appropriate and noting the CFTC takes a broad view of what threatens the integrity of the markets); *see also In re Staryk*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,826, at 56,452 (CFTC July 23, 2004) (explaining that a bar prohibiting a defendant is appropriate when the record shows that a [defendant's] misconduct represents an inherent threat to the integrity of the futures markets in the public eye); *In re Miller*, [1994-1996 Transfer Binder] CCH ¶ 26,440, at 42,914 (CFTC June 16, 1995), *remanded on other grounds*, *Miller v. CFTC*, 197 F.3d 1227 (9th Cir. 1999) (CFTC affirming with "no difficulty" the trial court's permanent trading ban because defendant's pattern of wrongdoing that extended over several years posed a danger to the integrity of the market sufficient to warrant a permanent ban).

69. Furthermore, in view of Defendants' fraudulent conduct, there is no basis for allowing them to participate in the commodities markets. *See CFTC v. Harrison*, 2015 WL 1322837, at *1-2 (D.S.C. Mar. 23, 2015) (imposing permanent trading and registration bans in fraud case); *see also Garofalo*, 2011 WL 4954082 (same).

70. Therefore Defendants, all persons and entities insofar as they are acting in the capacity of agents, servants, employees, successors, assigns, or attorneys of Defendants, and all persons and entities insofar as they are acting in concert or participation with Defendants who receive actual notice of this order by

personal service or otherwise, shall be permanently prohibited, enjoined and restrained from directly or indirectly:

a. Trading on or subject to the rules of any registered entity (as that term is defined in Section 1a of the CEA, 7 U.S.C. § 1a (2012));

b. Entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in 17 C.F.R. § 1.3(hh) (2015)) ("commodity options"), security futures products, foreign currency (as described in 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i) (2012)) (forex contracts), and/or "swaps" (as that term is defined in 7 U.S.C. § 1a(47) (2012), and as further defined by 17 C.F.R. § 1.3(xxx) (2015)), for their own personal account or for any account in which they have a direct or indirect interest;

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

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

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

f. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in 17 C.F.R. § 4.14(a)(9) (2015); and

g. Acting as a principal (as that term is defined in 17 C.F.R. § 3.1(a) (2015)), agent or any other officer or employee of any person (as that term is defined in 7 U.S.C. § 1a (2012)) registered, exempted from registration or required to be registered with the Commission except as provided for in 17 C.F.R. § 4.14(a)(9) (2015).

C. Restitution, Disgorgement, and Civil Monetary Penalty

Restitution and Disgorgement

71. The Court's authority to order restitution is ancillary to the Court's authority to order injunctive relief under Section 6c of the Act, 7 U.S.C. § 13a-1 (Supp. V 2012). This authority is founded on the well-established legal principle articulated by the Supreme Court in *Porter v. Warner Holding Co.*:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete

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

Porter, 328 U.S. 395, 398 (1946) (internal citations omitted); *see also CFTC v. Hunt*, 591 F.2d 1211, 1222-23 (7th Cir. 1979).

72. The Supreme Court reaffirmed this principle in *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 296 (1960), where it found that the district court had jurisdiction to order an employer to reimburse employees for lost wages in a suit by the Secretary of Labor to restrain violations of the Fair Labor Standards Act. "'[T]he comprehensiveness of [the court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable reference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Id.* at 291 (quoting *Porter*, 328 U.S. at 398). Therefore, Defendants are liable for restitution in the amount of $294,246,741.63, to be paid in accordance with a distribution plan approved by this Court. This amount represents the amount of funds solicited by Defendants from pool participants ($460,246,767.13), less any funds returned to pool participants ($166,000,025.50).

73. Following these principles, the Seventh Circuit has held that a district court has the authority to order restitution, and may compel disgorgement of illegally obtained profits pursuant to the Act. *See CFTC v. Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979); *see also CFTC v. Sarvey*, No. 08-C-192, 2012 WL 426746, at * 6

(N.D. Ill. Feb. 10, 2012). Furthermore, the Seventh Circuit has held that it would frustrate the spirit of the regulatory scheme to allow a violator to retain the profits from his violations. *See Hunt*, 591 F.2d at 1223 (citing *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971) and *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972)). There is no basis to permit Defendants to benefit from their fraudulent conduct. Therefore they must disgorge their ill-gotten gains in the amount of $49 million.

Civil Monetary Penalty

74. Section 6c(d)(1) of the Act provides that "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) (2006). The Regulations adjust the statutory civil monetary penalty of $100,000 for inflation. *See* 17 C.F.R. § 143.8. For the period at issue, the statutory civil monetary penalty was $130,000 per violation (for violations committed prior to October 23, 2008) and $140,000 per violation (for violations committed thereafter). *Id.* By not responding to the CFTC's complaint, Defendants offer no justification why the Court should not impose a civil monetary penalty of treble the Defendants' gain. Treble damages is a common multiplier of damages when imposing a penalty; enough to punish a serious past violation and enough to deter future violations, but no so much as to amount to an unreasonable

punishment. Here, treble damages would be $49,000,000 times three, specifically, $147,000,000.

VI. Miscellaneous Provisions

IT IS FURTHER ORDERED THAT:

75. The Court determines that the continued appointment of the Receiver, Robb Evans & Associates LLC, is warranted. The Receivership shall continue until such time as the Court dissolves it, upon motion of the Receiver or the Commission.

76. The Receiver is hereby instructed to liquidate assets under the control of the Receivership, including but not limited to assets under the control of Battoo, and to liquidate such assets in such a way as he reasonably believes will maximize their value. The Receiver is instructed to maintain the proceeds of such assets for purposes of providing restitution to Defendants' victims in a manner to be determined by this Court at a future date.

77. Copies of this Order may be served by any means, including facsimile transmission, email, United Parcel Service and Federal Express, upon Defendants or any other entity or person that may be subject to any provision of this Order. Amanda Burks, Andrew Ridenour, Kathleen Banar, Rick Glaser, and Erica Bodin, all employees of the Commission, are hereby specially appointed to serve process, including this Order and all other papers in this cause.

78. All pleadings, correspondence, notices or other materials required by this Order shall be sent to Amanda Burks, Trial Attorney, Division of Enforcement,

Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street N.W., Washington, D.C. 20581.

79. This Court shall retain jurisdiction of this cause to assure compliance with this Order and for all other purposes related to this action.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: January 11, 2016