BEFORE THE UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

RESPONDENT, BLAYNE S. DAVIS

FILE NUMBER – 3-15887

RESPONDENT'S SUR-REPLY

THIS MOTION IS MADE PURSUANT TO THIS COURT'S OCTOBER ORDER GRANTING RESPONDENT'S MOTION FOR LEAVE.

FOR THE REASONS SET FORTH BELOW, RESPONDENT REQUESTS THE COURT TO DENY THE COMMISSION'S MOTION FOR SWEEPING AND IRRATIONAL SANCTIONS AND RELIEF.

(1) – THE COMMISSION HAS MISLED THIS COURT BY ARGUING RESPONDENT USED INVESTOR FUNDS FROM "CAPITOL BLU" TO PAY INVESTORS BACK IN THE CRIMINAL CASE THAT UNDERPINS THIS PROCEEDING;

(2) – THE COMMISSION SEEKS RELIEF FOR CONDUCT PREVIOUSLY PUNISHED BY A TERM OF IMPRISONMENT AND PUNITIVE CIVIL SANCTIONS LEVIED BY A FEDERAL REGULATORY AGENCY CFTC (COMMODITIES FUTURES TRADING COMMISSION). ADDITIONAL PUNISHMENT, EVEN IN THE "CIVIL" CONTEXT IS FORECLOSED BY THE 5TH AMENDMENT'S DOUBLE JEOPARDY CLAUSE AND THE 8TH AMENDMENT'S EXCESSIVE FINES CLAUSE;

(3) - THE COMMISSION HAS FAILED TO CITE ANY LEGAL AUTHORITY ESTABLISHING A HISTORY OR GROUND WHERE THEY HAVE SUCESSFULLY RECEIVED SANCTIONS WHEN A DEFENDANT/RESPONDENT WAS PREVIOUSLY SUBJECTED TO IMPRISONMENT, SANCTIONED BY THEIR COMMODITES REGULATORY EQUAL (CFTC), AND THE COMMISSION WAS STILL ENTITLED TO RELIEF;

(4) - THE COMMISSION'S BLANKET SUGGESTION THAT A CONVICTION ON TITLE 18 OFFENSES IN A CRIMINAL COURT AUTOMATICALLY TRIGGERS THE AVAILABILITY/ENTITLEMENT TO SANCTIONS AND OTHER RELIEF IS DISTURBING AND EXCEEDS THEIR POWER;

(5) - THE COMMISSION HAS FAILED TO SHOW EXACTLY HOW THEIR JURISDICTION WAS IMPLICATED. THEY HAVE FAILED TO PRODUCE AN INVESTOR CONTRACT, STOCK TRANSACTION, OPTIONS TRANSACTION, OR ANY OTHER INSTRUMENT THAT REQUIRES REGISTRATION OR WOULD OTHERWISE FALL WITHIN THE COMMISSION'S PURVIEW;

(6) - THE COMMISSION HAS FAILED TO PRODUCE A "VICTIM", A SWORN STATEMENT OF AN INVESTOR, OR CAN SHOW THAT COMMISSION OR ANY OF IT'S AFFILIATES (NASD) RECEIVED COMPLAINTS THAT WOULD WARRANT SUCH DRACONIAN PUNISHMENT;

(7) - THE LITIGATION FOR THIS PROCEEDING IS PREMATURE. THE UNDERLYING CONVICTION THAT GIVES RISE TO THIS PROCEEDING IS ACTIVELY UNDER COLLATERAL ATTACK AND A REVERSAL OF THE CONVICTION WOULD UNDERMINE WHAT (IF ANY) RELIEF THIS HONORABLE COURT ORDERED.

ARGUMENT

(1) — THE COMMISSION HAS KNOWINGLY MISLED THIS COURT.

IN THE COMMISSION'S REPLY THEY ADVANCE A POORLY THOUGHT OUT "PETER TO PAUL" THEORY WHERE THEY CLAIM RESPONDENT TOOK MONEY FROM CAPITAL BLV AND PAID INVESTORS BACK IN THE UNDERLYING CRIMINAL CASE THIS ACTION RELATES. THE COMMISSION IS WRONG. WHILE THIS THEORY WAS POPULAR WITH THE GOVERNMENT AT TRIAL AND ON APPEAL, IT HAS BEEN CONCLUSIVELY DETERMINED THAT DID NOT OCCUR. AS CITED IN THE OPINION OF THE HONORABLE JUDGE ANTOON WHO PRESIDED OVER THE CASE.

"THESE SUMS WERE TAKEN FROM CAPITAL BLV AND NOT THE FX FUND."

EXHIBIT 1 (PAGE 13)

THE COMMISSION STATED IN THEIR REPLY THAT RESPONDENT SHOULDN'T RECEIVE "CREDIT" FOR THE FACT THAT INVESTORS SUSTAINED NO LOSSES. HOWEVER, THAT SUGGESTION WAS BASED ON THEIR ERRONEOUS THEORY. SINCE THAT HAS NOW BEEN PROVEN WRONG — RESPONDENT SHOULD RECEIVE GREAT CONSIDERATION FOR THE UNUSUAL AND REMARKABLE FACT THAT NO INVESTOR SUSTAINED LOSSES AND WERE COMPENSATED MORE THAN TWO YEARS BEFORE INDICTMENT. IT IS HIGHLY UNLIKELY THE COMMISSION CAN LOCATE ANOTHER SIMILIAR SITUATION.

THE COMMISSION INCLUDED DOZENS OF EXHIBITS IN THEIR PLEADINGS. THE ABSENCE OF THE ACTUAL OPINION FROM THE CFTC CASE IS NOT BY HAPPENSTANCE. THE FINDINGS OF THE JUDGE COMPLETELY UNDERCUT THE CLAIMS OF THE COMMISSION AND THEIR STRETCHED REASONING. IT IS HARD TO IMAGINE A SCENARIO WHERE A MISREPRESENTATION WAS SO BLATANT AND OFFENSIVE.

(2)- THE 5th AND 8TH AMENDMENTS TO U.S. CONSTITUTION.

RESPONDENT WAS SENTENCED AND SERVED (36) MONTHS IN PRISON FOR THE (RE) TARGETED CONDUCT. THE CFTC LEVIED A FINE OF APPROXIMATELY 4.9 MILLION DOLLARS ALONG WITH A PERMANENT INJUNCTION FROM THE COMMODITIES TRADING BUSINESS. THIS INJUNCTION INCLUDES A LIFETIME TRADING BAN.

RESPONDENT RECOGNIZES THAT THE PROTECTION EMBODIED AND GUARANTEED BY THE DOUBLE JEOPARDY CLAUSE DOES NOT TYPICALLY EXTEND TO CIVIL SANCTIONS UNLESS THE CIVIL SANCTIONS RISE TO A LEVEL OF BEING SO PUNITIVE AS TO TRANSFORM WHAT HAS BEEN COINED "CIVIL" TO "CRIMINAL" IN NATURE. THE SUPREME COURT HAS ESTABLISHED A TEST USING THE "KENNEDY" FACTORS DRAWN FROM KENNEDY-MENDOZA CASE.[1] IT IS NOT NECESSARY TO WADE THROUGH THESE (7) FACTORS IN AN EXHAUSTIVE ILLUSTRATION BECAUSE OF THE STRAIGHT-FORWARD FACTS AND ATYPICAL NATURE OF THESE CIRCUMSTANCES. HOWEVER, RESPONDENT IS CERTAIN THAT THE KENNEDY TEST WOULD BE SATISFIED FOR THE FOLLOWING REASONS.

(1) RESPONDENT WAS IMPRISONED FOR CONDUCT; AND

(2) CFTC HAS EXCESSIVELY PUNISHED THE CONDUCT.

FOR THE COMMISSION TO NOW COME ALONG YEARS LATER AND TRY TO GET A THIRD BITE AT THE APPLE WOULD SURELY TRIGGER THE PROTECTION AFFORDED UNDER THE 5TH AMENDMENT'S GUARANTEE AGAINST SUCCESSIVE/MULTIPLE PUNISHMENT FOR THE SAME CONDUCT, AS WELL AS, THE 8TH AMENDMENT'S PROTECTION AGAINST EXCESSIVE FINES. UNLIKE MOST OF THE COMMISSION'S "FOLLOW-UP" CASES, RESPONDENT/DEFENDANT HAS ALREADY BEEN PUNISHED BY THE DOJ AND CFTC. THEREFORE, RESPONDENT FINDS REFUGE IN THE CONSTITUTIONAL AMENDMENTS AND THE COMMISSION'S CASE SHOULD BE DISMISSED.

1 - RESPONDENT REMAINS IN COUNTY JAIL [redacted] AND HAS NO ACCESS TO LAW MATERIALS ALL CASE REFERENCES ARE FROM MEMORY. RESPONDENT APOLOGIZES TO THE COURT

(3) NO PRECEDENT EXISTS.

THE COMMISSION HAS FAILED TO IDENTIFY ANY CASE PRECEDENT OR STATORY AUTHORITY SPECIALLY CARVED OUT FOR THE RELIEF SOUGHT. AS PREVIOUSLY STATED, THE CONDUCT HAS BEEN THOROUGHLY AND EXCESSIVELY PUNISHED WITHIN BOTH THE CRIMINAL AND CIVIL FRAMEWORK. PUT ANOTHER WAY, THE COMMISSION IS LATE TO THE PARTY AND LACKS STANDING.

(4) CRIMINAL CONVICTIONS PROVIDE THE NECESSARY LINK?

THE COMMISSION AVERS THAT A MERE CONVICTION OF WIRE FRAUD OR MAIL FRAUD RENDERS THE DEFENDANT "FAIR GAME" FOR ADDITIONAL SANCTIONS BY THE SEC. AS A THRESHOLD MATTER, THE MAIL AND WIRE FRAUD STATUTES ARE PERHAPS THE MOST ENCOMPASSING, EXAGERATED, AND POWERFUL WEAPONS IN THE ARSENAL OF A U.S. ATTORNEY. THE STATUTES ARE UNIVERSALLY OFFENDED IN EVERY WHITE-COLLAR PROSECUTION. FROM IDENTITY THEFT TO TAX SCHEMES, ONE OR BOTH STATUTES FIND THEIR WAY INTO A CRIMINAL INDICTMENT. TO CONSTRUE THE COMMISSION'S POSITION AS A "RIGHT" (AS THEY IMPLY) TO FREELY INSERT THEMSELVES ON THE HEELS OF ANY TITLE 18 CONVICTION WOULD BE GIVING THE COMMISSION MORE FREEDOM AND POWER THAN AUTHORIZED BY STATUTE.

(5)(6) WHERE'S THE PROOF?

NOT INCLUDED IN THE COMMISSION'S LITANY OF DOCUMENTS IS PROOF OF ONE CONTRACT, ONE TRANSACTION, ONE INVESTOR AGREEMENT, ONE SWORN STATEMENT OF A "VICTIM", NOR A SINGLE COMPLAINT THAT WAS LODGED AGAINST RESPONDENT. BESIDES THE RE-PRINTING OF AN INDICTMENT (WHICH IS NOT PROOF), RANDOM TRANSCRIPTS, AND THE 11th CIRCUIT COURT OF APPEALS OPINION, THE COMMISSION HAS SHOWN NOTHING. THE MOST LOGICAL CONCLUSION IS THAT THE COMMISSION (LIKE MOST OF THEIR CASES) WAS RELYING UPON

(7) — Respondent's Section 2255 Remains Pending.

On October 28, 2014, the Magistrate Judge overseeing the Section 2255 proceeding granted the undersigned's motion for an extension of time to reply to a recently required Government "Supplemental Response". Exhibit 2

The undersigned does not believe all the back and forth is for the Court's amusement. Rather, it is because there exists genuine issues with the conviction and sentence, and if determined in his favor would effect the instant proceeding. In the interest of judicial economy, it makes sense to wait/stay this proceeding pending adjudication of the 2255.

Conclusion

Respondent maintains that the Commission lacks legal traction for the relief sought for a myriad of reasons and that the action should be dismissed. Alternatively, a stay should be ordered.

Respectfully Submitted,

Blayne S. Dapps

Dated - Nov 8, 2014

Respondent, Pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

-vs-

Case No. 6:09-cv-508-Orl-28DAB

CAPITAL BLU MANAGEMENT, LLC; DD INTERNATIONAL HOLDINGS, LLC; DONOVAN DAVIS JR.; BLAYNE DAVIS; and DAMIEN BROMFIELD,
Defendants.

ORDER

The three individual Defendants in this case, Donovan Davis Jr. ("D. Davis"), Damien Bromfield ("Bromfield"), and Blayne Davis ("B. Davis") (collectively "the Individual Defendants"), are intelligent young men who come from successful and supportive families. They shared a common goal—to get rich quickly. These men were so driven to attain this goal that they were willing to violate the law to do so. They misappropriated money entrusted to them by investors, including friends and family members; they issued false statements deceiving those investors; and they illegally commingled invested funds—all in violation of the Commodity Exchange Act ("the CEA" or "the Act").[1] The question now pending is what equitable remedies should be imposed to redress these violations.[2]

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[1]7 U.S.C. § 1 et seq.

[2]The pertinent filings now before the Court are: Plaintiff's Memorandum in Support of Relief Requested Against Defendants Damien Bromfield and Donovan Davis Jr. (Doc. 315); Defendant Donovan Davis Jr.'s Memorandum in Opposition (Doc. 316); Defendant Damien Bromfield's Post-Trial Memorandum Concerning Available Remedies (Doc. 318);

EXHIBIT 1

and Count Four—Commodity Pool Fraud (7 U.S.C. § 6*o*(1)). The jury found that D. Davis and Bromfield committed each of these violations both directly and as controlling persons of Capital Blu. Additionally, on Count Five, the jury found that Capital Blu was a commodity pool operator, that Capital Blu violated 17 C.F.R. § 4.20(b) or (c), and that D. Davis and Bromfield were controlling persons of Capital Blu.

Following the jury trial, a hearing was set before the Court to consider equitable remedies sought by the Commission. Defendants D. Davis and Bromfield were given an opportunity to present evidence regarding the appropriateness of the relief sought by the Commission, but they waived the right to do so. Additionally, pursuant to Federal Rule of Civil Procedure 55(b)(2) the Commission submitted its Application for Entry of Default Judgment (Doc. 322) against the defaulted Defendants—Capital Blu, DDIH, and B. Davis —seeking equitable relief against those Defendants as well. Having considered the evidence presented at trial, the filings of record, and the arguments of counsel, I conclude that the Commission's request for equitable relief should be granted against all Defendants in the form of an injunction, restitution, and civil monetary penalties.

II. Factual Summary[4]

In mid-2006, Bromfield and B. Davis were introduced to one another in a social context. At that time, B. Davis was trading in foreign currency contracts ("forex"), and Bromfield was the information technology director at a software company. Bromfield was

[4]The facts of the case as presented at trial are fairly and accurately summarized in the Commission's Memorandum (Doc. 315). I have adopted much of the Commission's description of the facts in this Summary.

and Bromfield. (See PPM, Pl.'s Trial Ex. 637, at 18). Once the FX Fund was established, the Capital Blu managed account customers—at the suggestion of Defendants—simply rolled their accounts over into the FX Fund.

Initially, the business went very well, attracting investors from Melbourne and elsewhere. Some of the investors were wealthy and sophisticated, while others were trying to manage modest retirement plans and a few were young people trying to get a good financial start in life. To encourage potential FX Fund investors ("Participants"), the Individual Defendants explained that only 20% of an investment in the Fund would be at risk. They also boasted that Capital Blu, from its inception in January 2006, had consistently earned profits; in fact, however, Capital Blu did not even exist until January 2007.

In January 2008, the FX Fund took a drastic downward turn, losing $1.8 million. Knowing of the loss, Defendants falsely issued a statement reporting that the FX Fund had enjoyed a 1.6% gain. This was done to conceal from Participants that the FX Fund had experienced a loss in excess of the 20% Defendants had represented was at risk. Things got worse in February 2008, and D. Davis and Bromfield caused another false statement to be sent to the Participants. About that time, Bromfield coined the term "the gap" to refer to the difference between the value reported to the Participants and the actual value of the FX Fund account. Once the FX Fund began losing money, Defendants used FX Fund money to pay the operational expenses of Capital Blu. Although trading improved and the FX Fund earned profits in April, May, and June 2008, "the gap" persisted and Defendants continued to send false reports to Participants. In August 2008, the FX Fund sustained substantial losses, and Defendants decided to "lock up" the FX Fund, meaning that the participants

shortfall, D. Davis and Bromfield used funds of Participants in the FX Fund to pay Capital Blu operating expenses.

Additionally, D. Davis and Bromfield contend that their responsibility is diminished because of the conduct of Lewis Freeman ("Freeman"), whom I appointed to serve as receiver at the inception of this case, (see Order, Doc. 8). In his capacity as receiver, Freeman was charged with taking possession of Capital Blu property for the benefit of victims. Freeman's resumé indicated that he was an attorney with vast experience as a receiver. His work had earned him the trust of the bench and bar in south Florida, from which he hailed. As it turned out, confidence in Freeman was severely misplaced. He stole from estates with which he had been entrusted, including that of Capital Blu. During the pendency of this case, he was convicted in the Southern District of Florida of criminal wrongdoing and has been sentenced to prison, though the offenses for which Freeman was prosecuted and sentenced did not involve his conduct with regard to Capital Blu.

Bromfield and D. Davis have also attempted to blame Freeman for missing Capital Blu computers. However, evidence was presented that either Bromfield or D. Davis directed that those computers be delivered to the office of D. Davis's attorney in downtown Orlando, but the attorney never received them. The mysterious disappearance of the computers has never been solved, but the Court cannot conclude that either Freeman or counsel for the Defendants is responsible for their loss.

These Defendants' argument that they are less culpable because of the wrongful conduct of others is unavailing. B. Davis's diversion of funds does not excuse the fraud perpetrated by them, and for the purposes of determining what equitable relief is to be

likely—the district court may infer likelihood of future violations from a defendant's past violations. CFTC v. Am. Bd. of Trade, Inc., 803 F.2d 1242, 1251 (2d Cir. 1986). Such inferences are appropriate in certain cases because the number and manner in which past violations have occurred may be an indication that future violations will occur if injunctive relief is not granted. In the instant case, the Commission correctly notes that even though the violations by the Individual Defendants were egregious and recurrent, D. Davis and Bromfield have failed to recognize the wrongful nature of their conduct. These factors weigh significantly in favor of imposition of a permanent injunction. See CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir. 1979).

Defendants' conduct makes it clear that extensive injunctive relief is required. Although the Defendants present varying degrees of risk, significant restrictions on future conduct are required as to each. From the testimony offered in this case, the Court has learned that B. Davis committed violations of the law prior to the formation of Capital Blu, and he has been found guilty on three of five charged counts of criminal wire fraud[5] in a case before another judge in this district. He is currently awaiting sentencing for those convictions. B. Davis presents a great risk of violating the law in the future. Injunctive relief severely limiting his future conduct is required.

Comprehensive injunctive relief is also necessary to restrict the activities of Bromfield. His violations were manifold and were designed to deceive investors. Much was revealed by Bromfield's trial testimony. Notwithstanding overwhelming evidence against him,

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[5]18 U.S.C. § 1343.

Eleventh Circuit Court of Appeals has repeatedly held that the equitable remedy of restitution under the CEA "does not take into consideration the plaintiff's losses[] but only focuses on the defendant's unjust enrichment." Wilshire, 531 F.3d at 1345. Thus, "[t]he proper measurement [of restitution] is the amount that [the defendants] wrongfully gained." Id.; accord CFTC v. Levy, 541 F.3d 1102, 1113 (11th Cir. 2008) (noting that the defendant "can only be liable in restitution to the extent of his unjust enrichment" (citing Wilshire)).

The Commission has correctly calculated the amount of restitution with a straightforward arithmetical computation. Starting with the amount in the FX Fund account in January 2008, the Commission then added the amount of investor money paid into the FX Fund by participants from January 2008 to September 2008. The resulting amount was the total sum contributed by FX Fund Participants. From that total, the following were subtracted: amounts redeemed by Participants between January 2008 and September 2008; fee and expense reimbursements to which Defendants were entitled; the amount lost in trading; and the funds on hand in the FX Fund as of September 30, 2008. The remainder—$2,463,592.12—is what Defendants used to pay Capital Blu operating expenses, including payments they made to themselves or otherwise used for their own purposes.

D. Davis and Bromfield argue that there should be further reduction in the requested amount of restitution based upon their payment of legitimate Capital Blu business expenses. Included in the request for reduction is $20,000 in legal fees paid in an effort to remove B. Davis as a Capital Blu partner. The question is not whether the Capital Blu expenses were legitimate, as the expense for removing B. Davis very well may have been; rather, the

$600,000 due Capital Blu that B. Davis secretly diverted for his own benefit. Also included is a fee of over $200,000 that B. Davis paid to his criminal defense attorney using Capital Blu funds. These sums were taken from Capital Blu and not the FX Fund. While D. Davis and Bromfield may have a cause of action against B. Davis for misappropriating Capital Blu funds, that has nothing to do with Defendants' obligation to pay restitution in this action brought by the CFTC.

The Defendants should be held jointly and severally liable for restitution. Acting in concert with one another, they caused harm to FX Fund Participants and unjustly enriched themselves. The Defendants have failed to advance a reasonable basis for apportionment of liability, and the Court finds no basis for doing so. "'[W]here joint tortfeasors cause a single and indivisible harm for which there is no reasonable basis for division according to the contribution of each, each tortfeasor is subject to liability for the entire harm.'" United States v. Alcan Aluminum Corp., 964 F.2d 252, 268-69 (3d Cir. 1992) (quoting Restatement (Second) of Torts § 881).

In sum, the Defendants will be ordered to pay restitution in the amount computed by the Commission—$2,463,592.12. The Defendants shall be held jointly and severally liable for this sum.[6]

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[6]The Commission also requested that prejudgment interest be added to the restitution award. However, the Commission did not set forth a basis for such an award of prejudgment interest, which is within this Court's discretion. See, e.g., CFTC v. Schafer, No. C.A. H-96-1213, 1999 WL 33650356, at *7 (S.D. Tex. May 28, 1999); cf. SEC v. Huff, 758 F. Supp. 2d 1288, 1363 (S.D. Fla. 2010). Under the circumstances of this case and in light of the fact that restitution is awarded in this circuit in the amount of the Defendants' unjust enrichment rather than the amount of the victims' loss, prejudgment interest will not be added to the restitution amount.

via Capital Blu's commingling of the funds of FX Fund Participants as alleged in Count V of the Amended Complaint. The maximum monetary penalty available under the CEA for these 552 violations is $71,760,000.

A district court is not obligated to impose the maximum monetary penalty available under the Act. Instead, the penalty must be "rationally related to the offense charged or the need for deterrence." Id. at 1112. In applying this standard, it is appropriate to take into account "the general seriousness of the violation[s] as well as any particular mitigating or aggravating circumstances that exist." Wilshire, 531 F.3d at 1346. Factors that may be considered include: "(1) the relationship of the violation at issue to the regulatory purposes of the Act; (2) [the defendant]'s state of mind; (3) the consequences flowing from the violative conduct; and (4) [the defendant]'s post-violation conduct." R&W Technical Servs. Ltd. v. CFTC, 205 F.3d 165, 177 (5th Cir. 2000).

Proportionality is central in determining an appropriate monetary penalty—the most serious penalties should be reserved for the most serious offenders. The Commission has gone some distance in recognizing the importance of proportionality in determining monetary penalties, seeking $8 million in relief instead of the statutory maximum of in excess of $71 million. The $8 million penalty requested by the Commission is approximately equal to the sum of the $2.4 million misappropriated by Defendants and the $5.6 million lost in FX Fund trading.

1. Relationship of Violation to the Regulatory Purposes of the CEA

Defrauding customers has been recognized as violative of "'core provisions of the [CEA's] regulatory system'" and "'should be considered very serious even if there are

redemption of their investments, D. Davis and Bromfield executed Bromfield's preconceived plan to impose a "lock up" of Participants' funds, meaning that Participants would be barred access to their funds. On September 3, 2008, D. Davis and Bromfield posted a letter on the Capital Blu website advising investors that a four-month lock up had been put in place. That same day, they issued a statement reporting a .16% gain in the FX Fund, knowing full well that the report was false.

Although D. Davis and Bromfield are in some respects unsophisticated, they clearly understood the fraudulent nature of their conduct. The distance they went to deceive is relevant in assessing an appropriate civil penalty. When they became aware of the $1.8 million loss in January 2008, D. Davis instructed Capital Blu's controller to report a gain. When the controller objected, D. Davis instructed her to speak to Bromfield. Bromfield told the controller that he and D. Davis had a plan to put money back into the FX Fund. When the January report issued, it falsely reported a 1.6% gain. The controller, a certified public accountant, persisted in expressing her concern about lying to Participants and using Participants' money to pay operational expenses of Capital Blu.

To placate the controller, Bromfield offered to place a conference telephone call to Brent Gillett, a lawyer with the Investment Law Group. During the resulting March 7 conference call, Gillett made it clear that reports to Participants should be accurate and that Capital Blu could not use FX Fund money to pay for Capital Blu operations. Gillett underscored the seriousness of the question by advising that he had a client who had been sent to prison for using client funds to pay for operating expenses. Upon learning of the contents of the conversation with Gillett, D. Davis explained to the controller that "we're

identical to those in this case. The defendants in the Colorado case were accused of having operated a hedge fund as a limited partnership, using investors' money to pay their operating expenses, issuing false statements to investors, and improperly investing in a jet airplane. The second email message, sent at 3:44 a.m., described the importance of getting the business in order within the ensuing three months. (See Pl.'s Trial Ex. 582). Bromfield wrote: "I almost think we should sell the jet and get rid of that 50k a month bill." (Id.).

3. Consequences Flowing from the Violative Conduct

It is this factor more than any other that drives the Commission's demand that the civil monetary penalty set at $8 million. As noted earlier, $5.6 million of that sum represents the amount lost in trading during the period that Defendants engaged in fraudulent conduct, and the other $2.4 million is the amount of FX Fund money misappropriated by Defendants. The Commission's suggestion is problematic, however, because there is no way of accurately determining how much of the $5.6 million loss was due to Defendants' malfeasance. It is reasonable to conclude that had Defendants been honest in their representations to Participants, many Participants would have redeemed their investments and many others would not have made an investment in the first place, but it is not reasonable to conclude that full and honest disclosure by Defendants would have resulted in no loss. Common sense leads me to believe that some market-related losses likely would have occurred regardless of Defendants' conduct.

Imposing a monetary penalty of $8 million would satisfy the element of deterrence, but I am not satisfied that that amount is sufficiently related or proportional to the conduct of Defendants. Nonetheless, the consequences of Defendants' conduct borne by the

Participants. However, in executing the plan to close "the gap" in the first instance, D. Davis and Bromfield were already deceiving Participants—issuing false statements in order to hide the FX Fund's losses and the fact that they had used FX Fund resources to pay Capital Blu operating expenses. On the other hand, notwithstanding the $15,000 per month income and other benefits that they enjoyed in part as a result of using FX Funds to pay Capital Blu expenses, neither D. Davis nor Bromfield received large amounts of cash. Moreover, there is no evidence that any of the Defendants currently owns significant assets.

6. Conclusion as to Civil Penalty

A civil monetary penalty should be reasonably related and proportional to the illegal conduct of Defendants, but because the remedy is punitive, it also should be carefully measured. The penalty should be sufficient but not harsher than necessary to meet the goals of relatedness, proportionality, and deterrence. Considering the totality of the circumstances, I find that a civil monetary penalty of $4,927,184.24, an amount equal to twice the Defendants' gain, meets that test. Cf. CFTC v. Equity Fin. Group LLC, 537 F. Supp. 2d 677, 700 (D.N.J. 2008) (concluding that the egregious nature of the defendants' conduct warranted imposition of civil monetary penalties of double the amount of the defendants' gains). Each Defendant except Capital Blu[9] will be ordered to pay a penalty in this amount.

IV. Conclusion

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** that the

[9] See n.7 supra.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

-vs- **Case No. 6:09-cv-508-Orl-28DAB**

CAPITAL BLU MANAGEMENT, LLC; DD INTERNATIONAL HOLDINGS, LLC; DONOVAN DAVIS JR.; BLAYNE DAVIS; and DAMIEN BROMFIELD;
Defendants.

JUDGMENT

Defaults have been entered against Defendants Capital Blu Management, LLC, DD International Holdings, LLC, and Blayne Davis, and this action was tried by a jury on the issue of liability, with only Defendants Damien Bromfield and Donovan Davis Jr. appearing. The jury rendered a verdict, and thereafter the issue of equitable relief was determined by the Court.

It is ordered as follows:

A. Permanent Injunction

1. Defendants Capital Blu Management, LLC, DD International Holdings, LLC, Donovan Davis Jr., Blayne Davis, and Damien Bromfield are hereby permanently restrained, enjoined, and prohibited from directly or indirectly engaging:

a. in conduct that violates Sections 4b(a)(1)(A)-(C), 4b(a)(2)(A)-(C), 4c(b) or 4*o*(1) of the Commodity Exchange Act ("the Act"), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII

B. Restitution

1. Defendants Capital Blu Management, LLC, DD International Holdings, LLC, Donovan Davis Jr., Blayne Davis, and Damien Bromfield shall pay, jointly and severally, restitution in the amount of $2,463,592.12 plus post-judgment interest. All restitution payments are immediately due and owing.

2. Post-judgment interest shall accrue beginning on the date of entry of this Judgment and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Judgment, pursuant to 28 U.S.C. § 1961(a).

3. To effect payment by Defendants and the distribution of restitution, the Court hereby appoints the National Futures Association ("NFA") as Monitor. The Monitor shall collect restitution payments from Defendants and shall make distributions as set forth below. Because the Monitor is not being specially compensated for these services and because these services are outside the normal duties of the Monitor, the Monitor shall not be liable for any action or inaction arising from its appointment as Monitor except for actions involving fraud.

4. Defendants shall make their required restitution payments payable in the name of "CBM FX Fund, LP—Restitution Fund" and shall send such restitution payments by either electronic funds transfer or by U.S. postal money order, certified check, bank cashier's check, or bank money order to the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois, 60606, under a cover letter that identifies the paying Defendant and the name and docket number of this proceeding. The paying Defendant shall simultaneously transmit copies of the cover letter and the form of

portion of the restitution amount that has not been paid, to ensure compliance with any provision of this Judgment, and to hold Defendants in contempt for any violations of any provision of this Judgment.

C. Civil Monetary Penalties

1. Defendant Damien Bromfield shall pay a civil monetary penalty in the amount of $4,927,184.24 plus post-judgment interest.

2. Defendant Blayne Davis shall pay a civil monetary penalty in the amount of $4,927,184.24 plus post-judgment interest.

3. Defendant Donovan Davis Jr. and DD International Holdings shall pay, jointly and severally, a civil monetary penalty in the amount of $4,927,184.24 plus post-judgment interest.

4. Post-judgment interest shall accrue beginning on the date of entry of this Judgment and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Judgment, pursuant to 28 U.S.C. § 1961(a).

5. Defendants' civil monetary penalties are immediately due and owing.

6. Defendants shall pay their civil monetary penalties by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, the payment shall be made payable to the Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
Attn: Marie Bateman—AMC-300
DOT/FAA/MMCA
6500 S. MacArthur Blvd.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BLAYNE DAVIS,

Petitioner,

v.

Case No. 6:12-cv-1870-Orl-22GJK
(6:10-cr-190-Orl-22GJK)

UNITED STATES OF AMERICA,

Respondent.

ORDER

This case is before the Court on the following motion:

MOTION: Petitioner's Motion for Extension of Time (Doc. No. 27, filed October 23, 2014).

Thereon it is **ORDERED** that the motion is **GRANTED**. Petitioner shall have **FORTY-FIVE (45) DAYS** from the date of this Order to file a reply to the Government's supplemental response.

DONE AND ORDERED in Orlando, Florida on October 28, 2014.

GREGORY J. KELLY
UNITED STATES MAGISTRATE JUDGE

Copies to:
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EXHIBIT 2