UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Commodity Futures Trading Commission, **Plaintiff,** **v.** **Foreign Fund a/k/a First Bank, Ron Mealing, John Shirck, and Wolfgang J. Fastian,** **Defendants,** **Wally Dow, MW First Inc., MW First Trustees Inc., Wolfgang J. Fastian, Deana Whitely, and Star Connection Inc.,** **Relief Defendants.**	**O4 CIV 3 04 0898** **JUDGE ECHOLS/ BRYANT** **ORDER OF DEFAULT JUDGMENT FOR PERMANENT INJUNCTION, ANCILLARY EQUITABLE RELIEF, AND CIVIL MONETARY PENALTY AGAINST FOREIGN FUND**

I.

INTRODUCTION

This matter is before this Court on the motion of plaintiff United States Commodity Futures Trading Commission ("Commission") seeking entry of a judgment by default for the relief requested in its February 27, 2006 Amended Complaint ("Complaint") against defendant Foreign Fund a/k/a First Bank ("Foreign Fund") for Foreign Fund's failure to appear or otherwise defend in this cause.

On August 9, 2007, Foreign Fund was properly served with the Complaint pursuant to the terms of Rule 4(h) of the Federal Rules of Civil Procedure and Tenn. Stat. 20-2-202, by service upon the Secretary of State of Tennessee.

Foreign Fund failed to file an answer to the Complaint or otherwise appear herein. Accordingly, on December 26, 2007, the Clerk of this Court entered a certificate of default against Foreign Fund.

The Court has considered the Complaint, the allegations of which are well-pleaded and taken as true, and the other written submissions of the Commission filed with the Court, including the Commission's *Memorandum in Support of Plaintiff's Motion For Entry of Order of Final Judgment Against Foreign Fund For Permanent Injunction and Setting Amounts for Restitution, Disgorgement, and Civil Monetary Penalties* and *Motion For Statutory Ex Parte Restraining Order, Expedited Discovery, Preliminary Injunction, and Other Equitable Relief* and the exhibits thereto containing sworn testimonial evidence supporting the allegations in the Complaint and the relief requested. the evidence presented at the hearing for preliminary injunction held on February 28, 2005, ~~and~~ the *Summary Declaration of Patricia Gomersall in Support of the Default Judgment Against Foreign Fund*, the evidence presented at the trial on February 12, 2008, and the entire record. Being fully advised in the premises, the Court hereby:

GRANTS the Commission's motion against Foreign Fund and enters findings of fact and conclusions of law finding Foreign Fund liable as to all violations alleged in the Complaint. The Court further grants the Commission's request for injunctive and ancillary equitable relief and a civil monetary penalty pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, as set forth herein. Accordingly, the Court now issues the following Order Of Default Judgment For Permanent Injunction, Ancillary Equitable Relief, And Civil Monetary Penalty Against Foreign Fund ("Order").

II.

JURISDICTION AND VENUE

This Court has jurisdiction over this action pursuant to Section 6c of the Commodity Exchange Act, as amended (the "Act"), 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 transactions in foreign currency alleged herein. Pursuant to Sections 2(c)(2)(B) and 4(a) of the Act, 7 U.S.C. §§ 2(c)(2)(B) and 6(a), an agreement, contract or transaction in foreign currency that is a contract of sale of a commodity for future delivery, that is offered to, or entered into with a person that is not an eligible contract participant must be conducted on or subject to the rules of a board of trade designated or registered by the Commission as a contract market or derivatives transaction execution facility for such commodity, and executed or consummated by or through a contract market, unless the counterparty to the transaction one of the six regulated entities designated under Section 2(c)(2)(B)(ii) of the Act, 7 U.S.C. § 2. As set forth below, Foreign Fund was not a proper counterparty who could offer and/or enter into foreign currency futures transactions with persons who are not eligible contract participants, i.e., retail customers; and most if not all of Foreign Fund's customers were not eligible contract participants.

Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-(e), because Foreign Fund transacted business in the Middle District of Tennessee, and the acts and practices in violation of the Act occurred within this District, among other places.

III.

FOREIGN FUND IS IN DEFAULT

1. The Complaint was filed on October 5, 2004 and amended on February 27, 2006.

2. Foreign Fund is an unincorporated entity that falsely maintained it was physically located in the King of Prussia, Pennsylvania but, in fact, had no known physical address. Foreign Fund conducted its business through Internet websites at www.foreign-fund.com and www.ff-bank.com.

3. On August 9, 2007 Foreign Fund was served with the Complaint and this Court's Summons by providing the Complaint and Summons to the Tennessee Secretary of State.

4. The affidavit of service of the Complaint and Summons on Foreign Fund was filed with the Court on August 14, 2007.

5. Foreign Fund has not filed an answer to the Complaint and has not otherwise appeared before this Court to defend in this cause.

6. Foreign Fund is neither an infant nor incompetent person, and is not eligible for relief under the *Soldiers' and Sailors' Civil Relief Act of 1940* (50 U.S.C. Appendix, § 501 *et seq.*).

7. On December 26, 2007, the Clerk of the Court entered a Default against defendant Foreign Fund pursuant to Fed. R. Civ. P. 55 based on Foreign Fund's failure to appear in this proceeding.

8. The allegations in the Complaint against Foreign Fund are deemed admitted based on Foreign Fund's failure to appear or defend in this proceeding and other evidence recognized by the Court.

IV.

FINDINGS OF FACT

A. Foreign Fund Engaged in Fraud

Fraudulently Solicited Customers

1. From at least November 2003 to October 2004, Foreign Fund fraudulently solicited retail customers throughout the United States and elsewhere to send monies to Foreign Fund for the purpose of engaging in foreign currency transactions by participating in the Foreign Fund.

2. Foreign Fund solicited customers to participate in the Foreign Fund through the Internet website address of www.foreign-fund.com and later at www.ff-bank.com ("Foreign Fund Websites"). In its solicitations, Foreign Fund represented to customers that their funds would be pooled with the funds of other customers for the purpose of engaging in foreign currency futures transactions.

3. Foreign Fund solicited customers to send funds that were deposited into domestic bank accounts, including accounts at Bank of America in Nashville, Tennessee, and at the Union Bank of California in Palo Alto. In addition, Foreign Fund directed customers to sent funds through the Internet value transfer firms -- e-gold, Intgold and Evocash.

4. Foreign Fund represented to customers that their funds would be invested in the foreign exchange currency markets, after Foreign Fund received them. Foreign Fund represented to customers that they could verify that their funds were invested and check the status of their investment in the Foreign Fund by accessing their individual account statements through the Foreign Fund Websites.

5. Foreign Fund failed to disclose to potential customers and customers the fact that, contrary to claims made in the website solicitation materials, customer funds were not used to

trade foreign currency futures contracts, but were instead used to pay other Foreign Fund customers and Foreign Fund employees or funneled to off-shore accounts.

Misrepresented Profits

6. As part of its solicitations, Foreign Fund represented to customers that as customers of "one of the leading companies specializing in the Foreign Exchange market" they could expect a return on their investment of up to 46% per month for non-compounded accounts and up to 100% per month for compounded accounts.

7. Contrary to Foreign Fund's representations of profits, few, if any, customers were able to make profits through their investment in the Foreign Fund because their funds were not transferred to a trading firm for the purpose of trading in foreign currencies and, instead, were misappropriated by Foreign Fund.

Misappropriated Customer Funds

8. From at least November 2003 to October 2004, Foreign Fund engaged in a willful and systematic fraud in connection with the purported operation of a foreign currency investment fund using the name Foreign Fund. Foreign Fund fraudulently solicited at least $7,700,000.00 from customers who established just over 16,000 accounts with Foreign Fund.

9. Foreign Fund fraudulently solicited individuals to send funds to accounts under its control at various domestic banks and to e-gold, Evocash and Intgold ("Internet value transfer firms") firms by falsely representing to investors that trading in the Foreign Fund was producing monthly profits of up to 100%.

10. Contrary to Foreign Fund's representations that the funds sent to the account were being used to trade foreign currencies, Foreign Fund used virtually all the funds sent to the firm either to pay earlier customers or transferred them to persons or entities unrelated to foreign currency trading.

$1,216.463 RBE

11. Foreign Fund misappropriated at least $1,2~~48,463~~ in customer funds. Foreign Fund also used customer monies to pay others customers in what amounted to a Ponzi scheme to defraud customers.

Provided False Trading Reports

12. To conceal misappropriation of funds and trading losses, Foreign Fund provided false trading reports to customers through the Foreign Fund Internet Websites. Foreign Fund represented on the Internet account statements that accounts had achieved gains each month. These statements and reports were false because there is no evidence that the funds received by Foreign Fund from customers were transferred to any trading firm for the purpose of trading foreign currency futures contracts.

13. Foreign Fund sent emails to customers informing them of expected investment gains. In an e-mail of May 31, 2004 Foreign Fund told customers that the "Euro that were exchanged in March is leading to our announced interest increase in June. It is estimated that the profits from the exchange may be close to 500% within a 60 day time span." These statements and reports were false because there is no evidence that the funds received by Foreign Fund from customers were transferred to any trading firm for the purpose of trading foreign currency futures contracts.

B. Foreign Fund's Illegal Off-Exchange Futures Contracts Solicitation

14. Foreign Fund purported to offer participants the opportunity to "take advantage of currency price fluctuations to make profit[s]" through the Foreign Fund. In fact, the contracts Foreign Fund offered were illegal off-exchange foreign currency futures contracts.

15. Foreign Fund marketed these contracts to the general public by soliciting participation in the Foreign Fund. Neither the Foreign Fund nor the underlying investors anticipated taking, or in fact took, delivery of the foreign currencies the Foreign Fund may have

purchased. Instead, the Foreign Fund's customers, through the Foreign Fund, entered into these transactions to speculate and profit from anticipated price fluctuations in the markets for these currencies.

16. Foreign Fund did not offer, sell, enter into, confirm the execution of, and/or conduct business of soliciting or accepting any order for or otherwise dealing in off-exchange foreign currency contracts in connection with foreign currency futures transactions on or subject to the rules of a board of trade that has been designated by the Commission as a contract market or derivatives transaction facility, nor were any of these transactions executed or consummated by or through a member of such a contract market or derivatives transaction execution facility.

17. Section 2(c)(2)(B)(i) and (ii) of the Act, 7 U.S.C. § 2, provides that the Commission shall have jurisdiction over an agreement, contract or transaction in foreign currency that is a sale of a commodity for future delivery, so long as the contract is "offered to, or entered into with, a person that is not an eligible contract participant" unless the counterparty, or the person offering to be the counterparty, is a regulated entity as specified in Section 2(c)(2)(B)(ii) of the Act, 7 U.S.C. § 2.

18. Foreign Fund offered and/or entered into foreign currency futures contracts with the Foreign Fund and through the Foreign Fund with the individual customers. At least some, if not the vast majority, the underlying individual investors in the Foreign Fund were not eligible contract participants. In addition, the Foreign Fund was not a proper counterparty for retail foreign currency transactions.

V.

CONCLUSIONS OF LAW

A. Fraud in Connection with Futures Transactions

1. From at least November 2003 to October 2004, Foreign Fund, either directly or through other persons or entities either under its employ, supervision and control or acting in combination or concert with it, in or in connection with the orders to make, or the making of, contracts of sale of commodities for future delivery, made or to be made, for or on behalf of any other persons, where such contracts for future delivery were or could be used for the purposes set forth in Section 4b(a) of the Act, 7 U.S.C. 7 U.S.C. § 6b(a), cheated or defrauded or attempted to cheat or defraud customers or prospective customers, willfully made or caused to be made false statements to customers or prospective customers, and willfully deceived or attempted to deceive customers or prospective customers by, among other things, misrepresenting the profits and risk of loss associated with commodity futures trading, issuing false statements and reports, and misappropriating customer funds all in violation of Sections 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii), and Commission Regulation 1.1(b), 17 C.F.R. § 1.1(b).

2. Foreign Fund, by reason of the fraudulent misappropriation and fraudulent solicitation by individuals acting as Foreign Fund's agent, is vicariously liable for violations of Sections 4b(a)(2)(i) and (iii) of the Act, and Commission Regulation 1.1(b)(1) and (3), pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2002).

B. Offer and Sale of Illegal Off-Exchange Futures Contracts

3. From at least November 2003 to October 2004, Foreign Fund, either directly or through other persons or entities either under its employ, supervision and control or acting in combination or concert with it, offered to enter into, entered into, executed, confirmed the execution of, or conducted an office or business in the United States for the purpose of soliciting, accepting any order for, or otherwise dealing in transactions in, or in connection with, a contract for the purchase or sale of a commodity for future delivery when: (a) such transactions have not been conducted on or subject to the rules of a board of trade which has been designated or

registered by the Commission as a contract market or derivatives transaction execution facility for such commodity, and (b) such contracts have not been executed or consummated by or through a member of such contract market, in violation of Section 4(a) of the Act, 7 U.S.C. § 6(a).

VI.

PERMANENT INJUNCTION

A. **IT IS HEREBY ORDERED** that Foreign Fund is permanently restrained, enjoined, and prohibited from directly or indirectly:

1. Cheating or defrauding or attempting to cheat or defraud other persons and willfully deceiving or attempting to deceive other persons by making false, deceptive or misleading representations of material facts, by failing to disclose material facts, and by misappropriating customer funds in or in connection with orders to make, or the making of, contracts of sale of commodities for future delivery, made or to be made for or on behalf of any other person in violation of Section 4b(a) of the Act, 7 U.S.C. § 6b(a), and Commission Regulation 1.1(b), 17 C.F.R. § 1.1(b);

2. Offering to enter into, entering into, executing, confirming the execution of, or conducting an office or business in the United States for the purpose of soliciting, accepting any order for, or otherwise dealing in transactions in, or in connection with, a contract for the purchase or sale of a commodity for future delivery when: (a) such transactions have not been conducted on or subject to the rules of a board of trade which has been designated or registered by the Commission as a contract market or derivatives transaction execution facility for such commodity, and (b) such contracts have not been executed or consummated by or through a member of such contract market, in violation of Section 4(a) of the Act, 7 U.S.C. § 6(a);

B. **IT IS HEREBY FURTHER ORDERED** that Foreign Fund is permanently restrained, enjoined, and prohibited from directly or indirectly engaging in any activity related to trading in any commodity, as that term is defined in Section 1a(4) of the Act, 7 U.S.C. § 1a(4) ("commodity interest"), including, but not limited to, the following:

1. Trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29);

2. Engaging in, controlling, or directing the trading of any commodity interest account for or on behalf of any other person or entity, whether by power of attorney or otherwise;

3. Soliciting or accepting any funds from any person in connection with the purchase or sale of any commodity interest contract;

4. Introducing customers to any other person engaged in the business of commodity interest trading;

5. Issuing statements or reports to others concerning commodity interest trading;

6. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9), or acting as a principal, agent, officer or employee of any person registered, required to be registered, or exempted from registration, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9); and

7. Engaging in any business activities related to commodity interest trading;

C. **IT IS HEREBY FURTHER ORDERED** that the injunctive provisions of this Order shall be binding upon Foreign Fund, any person insofar as he or she is acting in the capacity of officer, agent, employee, or attorney of Foreign Fund, and upon any person who receives actual notice of this Order, by personal service or otherwise, insofar as he or she is acting in active concert or participation with Foreign Fund.

VII.

RESTITUTION, CIVIL MONETARY PENALTY, AND ANCILLARY RELIEF

IT IS FURTHER ORDERED THAT:

A. **Restitution**

1. Foreign Fund shall pay restitution in the amount of $1~~,240,463~~ 1,216,463, plus post-judgment interest, within ten days of entry of this Order.

2. Post-judgment interest shall accrue beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate of 2.08%, being the rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

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

4. Foreign Fund shall make restitution payments under this order in the name "Foreign Fund - Restitution Fund" and shall send such restitution payments by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier check, or bank money order, to Office of Administration, National Futures Association, 200 W. Madison Street #1600, Chicago, Illinois 60606-3447 under cover letter that identifies ~~himself~~ itself and the name and docket number of the proceeding. Foreign Fund shall simultaneously transmit copies of the cover letter and the form of payment to (a) the Director, Division of Enforcement, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, and (b) the Chief, Office of Cooperative Enforcement, Division of Enforcement, at the same address.

5. The Monitor shall oversee Foreign Fund's restitution obligation, and shall have discretion to determine the manner for distribution of funds in an equitable fashion to defrauded Foreign Fund customers, as appropriate, or may defer distribution until such time as it deems appropriate. In the event that the amount of restitution payments to the Monitor are of a *de minimis* nature such that the Monitor determines that the administrative costs of the making a

restitution distribution is impractical, the Monitor may, in its discretion, treat such restitution payments as civil monetary penalty payments, which the Monitor shall forward to the Commission following the instructions for civil monetary penalty payments set forth in Part VII.B., below.

6. Foreign Fund shall cooperate with the Monitor as appropriate to provide such information as the NFA deems necessary and appropriate to identify Foreign Fund customers to whom the Monitor, in his sole discretion, may determine to include in any plan for distribution of any restitution payments.

7. Pursuant to Rule 71 of the Federal Rules of Civil Procedure, Foreign Fund's former customers who opened accounts at Foreign Fund from November 2003 through October 2004 are explicitly made intended third-party beneficiaries of this Order and may seek to enforce compliance with this Order to obtain satisfaction of any portion of the restitution that has not been paid by Foreign Fund, to ensure continued compliance with any provision of this Order and to hold Foreign Fund in contempt for any violations of any provision of this Order.

8. Further, the amount payable for restitution set forth above shall not limit the ability of any Foreign Fund customer from proving that a greater amount is owed from Foreign Fund or any other person or entity, and nothing herein shall be construed in any way to limit or abridge the rights of any customer that exist under state or common law.

B. Civil Monetary Penalty

1. Foreign Fund shall pay a civil monetary penalty in the amount of ~~$1,240,463~~ $1,216.463 plus post-judgment interest, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1. The civil monetary penalty shall be paid within ten days of entry of this Order.

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

3. Foreign Fund shall pay this civil monetary penalty 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 Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
Attn: Marie Bateman-AMZ-300,
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: 405-954-6569

If the payment is to be made by electronic funds transfer, Foreign Fund shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Foreign Fund shall accompany the payment of this penalty with a cover letter that identifies Foreign Fund and the name and docket number of this proceeding. Foreign Fund shall simultaneously transmit copies of the cover letter and the form of payment to (a) the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, D.C. 20581, and (b) the Chief, Office of Cooperative Enforcement, Division of Enforcement, at the same address.

C. <u>Priority of Monetary Sanctions and Partial Payments</u>

1. All payments by Foreign Fund pursuant to this Order shall first be applied to satisfaction of its restitution obligation, consistent with the authority granted the Monitor in Part VII.A., above. After satisfaction of its restitution obligation, payments by Foreign Fund pursuant to this Order shall be applied to satisfy Foreign Fund's civil monetary penalty obligation.

2. Any acceptance by the Commission and/or Monitor of partial payment of Foreign Fund's restitution obligation and/or civil monetary penalty shall not be deemed a waiver of the respective requirement to make further payments pursuant to this Order, or a waiver of the Commission's and/or Monitor's right to seek to compel payment of any remaining balance.

E. <u>Equitable Relief Provisions</u>

The equitable relief provisions of this Order shall be binding upon Foreign Fund and any person who is acting in the capacity of officer, agent, employee, servant or attorney of Foreign Fund, and any person acting in active concert or participation with Foreign Fund who receives actual notice of this Order by personal service or otherwise.

Done and Ordered this 12th **day of** February **2008, at Nashville, Tennessee.**

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE