

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

U.S. COMMODITY FUTURES)
TRADING COMMISSION and)
OKLAHOMA DEPARTMENT OF)
SECURITIES *ex rel.* IRVING L.)
FAUGHT,)

Plaintiffs,)

v.)

Civil Action No. 09-CV-1284 (DLR)

PRESTIGE VENTURES CORP., a)
Panamanian corporation, FEDERATED)
MANAGEMENT GROUP, INC., a Texas)
corporation, KENNETH WAYNE LEE,)
an individual, and SIMON YANG (a/k/a)
XIAO YANG a/k/a SIMON CHEN), an)
individual,)

Defendants; and)

SHEILA M. LEE, an individual, DAVID)
A. LEE, an individual, and DARREN)
LEE, an individual,)

Relief Defendants.)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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COMES NOW Plaintiffs U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”) and the Oklahoma Department of Securities (“ODS”) (collectively “Plaintiffs”) and hereby move this honorable Court, pursuant to Federal Rule of Civil Procedure 56(a), for an Order granting Plaintiffs’ motion for summary judgment as to liability against Defendants Prestige Ventures Corp., Federated Management Group, Inc., Kenneth Wayne Lee and Simon Yang and Relief Defendants Sheila M. Lee, David A. Lee, and Darren Lee.

I. INTRODUCTION

From approximately March 2003 through November 20, 2009 (the “relevant period”), the corporate defendants Prestige Ventures Corp. (“Prestige”) and Federated Management Group, Inc. (“Federated”), acting as a common enterprise (collectively, the “Prestige Enterprise”), and individual defendants Kenneth Wayne Lee (“Kenneth Lee” or “Lee”) and Simon Yang (“Yang”) (collectively, “Defendants”) fraudulently solicited and accepted at least \$8.7 million from at least 140 members of the general public (“pool participants” or “investors”) to participate in commodity pools for trading commodity futures contracts and other financial instruments, including stocks, stock options, and foreign currency, in violation of the Commodity Exchange Act (“Act”), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (subtitled “CFTC Reauthorization Act of 2008” (“CRA”)), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), 7 U.S.C. §§ 1 *et seq.*, the Commission’s Regulations (“Regulations”), 17 C.F.R. §§ 1.1 *et seq.*, promulgated under the Act, and the Oklahoma Uniform Securities Act of 2004 (“OUSA”), Okla. Stat. tit. 71, §§1-101 through 1-701 (Supp. 2004).

Contrary to Defendants' representations to investors, Lee and the Prestige Enterprise lost investors' funds through trading commodity futures and foreign currency and misappropriated investors' funds for personal use by Lee and his wife and sons: relief defendants Sheila Lee, David Lee, and Darren Lee (collectively, "Relief Defendants"). The Relief Defendants provided no legitimate services to the Prestige Enterprise or to its pool participants and otherwise have no legitimate entitlement to, or interest in Prestige Enterprise pool participant funds.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Parties

1. Plaintiff U.S. Commodity Futures Trading Commission is an independent federal regulatory agency that is charged by Congress with responsibility for administering and enforcing the provisions of the Act and Regulations.

2. Plaintiff Oklahoma Department of Securities is an agency of the state of Oklahoma that is charged with responsibility for administering and enforcing the provisions of the OUSA. The Department brings this action by and through its Administrator, Irving L. Faught.

3. Defendant Kenneth Wayne Lee is an individual whose last known address is in Mt. Pleasant, South Carolina (Lee Answer ¶ 29). Defendants, orally and through written solicitation materials, described Lee variously as the lead trader, president, director, chairman, beneficial owner and/or principal portfolio manager of Federated and Prestige (Lee Answer ¶ 35; Lee Dep. at 58:9-17; Lee Dep., Ex. 4; Mucha Decl. ¶ 16; Pendleton Decl., Ex. B, F). Lee's email address is klee88@prestigeventures.com (Lee Dep. at 12:1-2). Lee has never been registered with the Commission in any capacity or under the OUSA, or any predecessor act (Lee

Answer ¶ 29; Gruis Decl. ¶ 4 (Oct. 2009)).

4. Lee was incarcerated from 1996 to 2001. (Lee Answer ¶ 52); *U.S. v Lee*, 3:94-CR-349-X (N.D. Tex. 1995). His incarceration stemmed from a federal conviction for bank fraud and Texas state convictions for securing execution of a document by deception and theft over \$750. *U.S. v Lee*, 3:94-CR-349-X (N.D. Tex. 1995); *State v. Lee*, F-92-052-CA (Denton Co. Tex. 1995); *State v. Lee*, F-91-1222-CA (Denton Co. Tex. 1995). Lee admitted to causing an individual to execute a check by stating that the monies would be invested when no such investment occurred. On February 6, 1996, the Denton County, Texas, court entered a civil judgment of over \$3 million against Federated and Lee for defrauding plaintiffs in connection with investment fraud and breach of contract. *Smith v. Lee*, 96-50014-367. The judgment remains unpaid by Lee. (Lee Dep. at 16:3-17:12.)

5. Defendant Simon Yang, also known as Xiao Yang, is an individual whose last known address is in Edmond, Oklahoma (Mucha ¶ 14). Yang has held “a commission-based position as an independent contractor” for Federated and Prestige. (Yang’s Resp. Req. Admis. ¶ 1.) Yang has never been registered, in any capacity, with the Commission or under the OUSA, or any predecessor act (Yang Dep. at 128:22-24; 129:10-18; 145:22-146:12; Mucha ¶ 17; Gruis ¶ 4 (Oct. 2009)). Yang has used the email addresses simonyang@fmg.com, simonyang@prestigeventures.com, and simon@federatedmanagement.com. (Yang Dep. at 104:19-23; 140:3-10; 147:1-3.)

6. Defendant Prestige Ventures Corp. (“Prestige”) is a corporation Lee registered in Panama on July 7, 2003. Prestige’s last known address is P.O. Box 5956, El Dorado, Panama City, Republic of Panama, Zona 6 (Lee Answer ¶ 27). However, Prestige has also operated out

of an office at 6777 Camp Bowe Boulevard, Suite 229, Fort Worth, Texas and, during the relevant period, operated out of Lee's home in Mt. Pleasant, South Carolina (Lee Answer ¶ 27; Mucha ¶ 13; Yu Decl.¹ ¶¶ 2, 7; Yue Decl. ¶¶ 2, 6; Southwell Decl. ¶ 2, Ex. U; Zhang Decl. ¶¶ 2, 4).

7. Prestige has never been registered, in any capacity, with the Commission or under the OUSA, or any predecessor act (Lee Answer ¶ 27; Mucha ¶ 17; Gruis ¶ 4 (Oct. 2009)). Prestige also has not registered any securities or filed any notices of intent to rely on an exemption from registration, under the OUSA (Maillard Decl. ¶¶ 3-5).

8. Defendant Federated Management Group ("Federated") is a corporation that Lee formed in Texas on November 16, 2001 (Lee Dep. at 115:18-116:8; Lee Dep. at Ex. 7) and allowed to forfeit registration in October 2003 (Lee Answer ¶ 28). During the relevant period, Federated operated variously out of an office at 6777 Camp Bowe Boulevard, Suite 229, Fort Worth, Texas and Lee's home in Mt. Pleasant, South Carolina (Lee Answer ¶ 28; Mucha ¶ 16; Pendleton, Ex. B). Federated also has conducted business activities in and around Oklahoma City, Oklahoma (Lee Answer ¶ 28; Yu ¶¶ 2, 7; Yue ¶¶ 2, 6; Southwell ¶ 2; Zhang ¶¶ 2, 4).

9. According to Federated disclosure materials, Federated was Trading Advisor to a commodity pool called FMG Fund (also known as Federated Management Group Hedge Fund Program) ("FMG Fund") (Lee Dep., Ex. 5).

10. Federated has never been registered, in any capacity, with the Commission or under the OUSA, or any predecessor act (Lee Answer ¶ 28; Mucha ¶ 17; Gruis ¶ 4 (Oct. 2009)).

¹ Although Defendants and Relief Defendants' own admissions and documents establish their liability under the law, Plaintiffs have cited to and attached for the Court's reference several declarations prepared by the Prestige Enterprise's pool participants.

Federated also has not registered any securities or filed any notices of intent to rely on an exemption from registration, under the OUSA (Maillard ¶¶ 3-5).

11. Relief Defendant Sheila Marjorie Lee is an individual whose last known address is in Mt. Pleasant, South Carolina (Sheila Lee Answer ¶ 3, Sheila Lee Dep. at 8:17-21). Sheila Lee is Defendant Lee's wife. Mrs. Lee has never been registered with the Commission in any capacity or under the OUSA, or any predecessor act (Sheila Lee Answer ¶ 3; Gruis ¶ 4 (Jan. 2010)).

12. Relief Defendant David Armstrong Lee is an individual whose last known address is in Mt. Pleasant, South Carolina (David Lee Dep. at 8:20-22). David Lee is one of Defendant Lee's sons (David Lee Dep. at 6:20-24). David Lee has never been registered with the Commission in any capacity or under the OUSA, or any predecessor act (David Lee Answer ¶ 33; David Lee Resp. to Interrog. ¶¶ 21, 22; Gruis ¶ 4 (Jan. 2010)).

13. Relief Defendant Darren Alexander Lee is an individual whose last known address is in Mt. Pleasant, South Carolina (Darren Lee Dep. at 7:3-5). Darren Lee is one of Defendant Lee's sons (Darren Lee Dep. at 6:14-16). Darren Lee has never been registered with the Commission in any capacity or under the OUSA, or any predecessor act (Darren Lee Answer ¶ 33; Darren Lee Resp. Interrog. ¶¶ 21-22; Gruis ¶ 4 (Jan. 2010)).

B. Federated and Prestige Were a Common Enterprise

14. In their solicitation and misappropriation of investor funds, Defendants Federated and Prestige acted as a common enterprise ("Prestige Enterprise"). Federated and Prestige shared offices, telephone numbers, and solicitation materials (Lee Answer ¶ 35; Mucha ¶ 16; Yu, Ex. E-F; Yue, Ex. C).

15. Prestige and Federated both claimed to use the Legacy Trading System and the same investment strategy to trade on behalf of the pools (Yang Dep. at 161:1-18; Pendleton, Ex. G; Southwell, Ex. B).

16. Prestige and Federated earned the same amount in purported returns (Yang Dep. at 161:1-18) and Lee was Director and President of both (Lee Answer ¶ 35; Mucha ¶ 16). Not surprisingly, pool participants often did not know the difference between the two companies (Lee Answer ¶ 35; Yu ¶ 22; Z. Luo Decl. ¶ 17), as Lee did not think it was pertinent for participants to know the difference between the two companies (Lee Answer ¶ 11).

C. Defendants Fraudulently Solicited Pool Participants

17. From March 2003 until November 2009, Defendants solicited and accepted at least \$8.7 million in funds from at least 140 members of the general public, residing in Oklahoma and other states, for the purpose of pooling those funds to trade commodity futures as well as other financial instruments, including foreign currency, stocks and stock options (Grossman Decl. ¶¶ 9a, 17; Yu ¶ 4; Z. Luo ¶ 4; E. Luo Decl. ¶ 7; Yue ¶ 4; Southwell ¶ 4; Zhang ¶ 5; Lee Dep. Ex. 5-6).

18. Defendants told prospective pool participants that the funds from individual participant accounts would be pooled together to trade commodity futures and other financial instruments (Z. Luo ¶ 14; Yue ¶ 11) and that pool participants would be able to withdraw their funds at any time (Yu ¶ 18; Z. Luo ¶ 14; Yue ¶ 12; Yang Answer at 3:20; 10:11).

19. Indeed, not only did the Defendants state that Lee's trading was always profitable, Lee and Yang told the prospective participants that the profits Lee earned were consistently high (Yu ¶ 20; Z. Luo ¶ 15; Yue ¶ 12).

20. Moreover, Lee and Yang told participants that their accounts would be insured (Z. Luo ¶ 15).

21. Lee provided the Prestige Enterprise solicitation and disclosure materials (Lee Dep. at 97:6-7). The marketing materials contained false and misleading information about himself and the Prestige Enterprise. For example, performance charts in the FMG Fund Disclosure Document showed consistently high returns for the FMG Fund from January 1987 through April 2003 without a single losing month and largely tracked the purported returns achieved using the Legacy Trading System (Lee Dep., Ex. 6). The annual returns, the document claimed, averaged over 30% (Lee Dep., Ex. 6).

22. In the FMG Fund Disclosure Document, Defendants also claimed that, during the 16-year period from 1987 to 2003, its assets under management grew from less than \$2 million to over \$379 million (Lee Dep., Ex. 6). In the Federated Audit Report, Defendants boasted that Federated had over \$190 million in assets in 2000 (Lee Dep., Ex. 6).

23. In the marketing materials as well as in the oral solicitations, Defendants failed to disclose that during much of the time that the Prestige Enterprise was allegedly managing million of dollars and outperforming other hedge funds, Lee, its President and head trader, was in prison (*supra* ¶4; Lee Dep. Ex. 5-6).

24. The marketing materials also did not state that, at the end of 2003, the Prestige Enterprise bank accounts showed a balance of just \$126,950.44 (Grossman ¶ 16).

25. According to the Prestige Enterprise marketing materials, Lee used the Legacy Trading System, a purportedly successful and propriety trading system that Defendants claimed achieved annual profits ranging from 16.89% in 1991 to 51.04% in 2003 (Yu, Ex. G; Southwell,

Ex. B). According to the same materials, the Legacy Trading System outperformed both the S&P 500 and the futures Managed Account Reports (“MAR Futures”) during the same period (Southwell, Ex. B). It stated, “Amazingly there has been no a [sic] single loss year for Legacy Trading System over the 18-year history” (Southwell, Ex. B). On the Prestige website, Yang wrote, “Past performance--performance does not guarantee the future performance. However, a solid superior track record of Legacy Trading System thus demonstrate (sic) the proven investment strategies and the hard working of its developers” (Yang Dep. at 197:19-199:9).

26. There is no Legacy Trading System (Lee Dep. at 102:1-5). In developing their misrepresentations, Yang suggested the name “Legacy Trading System” because, “If you don’t have a history of trading record, you cannot convince anyone. So, you need to . . . show the longtime investment” (Yang Dep. at 176:16-177:10).

27. Yang told the Prestige investors that Prestige was a successful trading company (Yang Dep. at 83:1-4).²

28. Yang, in concert with Lee, provided prospective pool participants with the Prestige Enterprise’s marketing materials (Yang Answer at 4:23-24; Yang Dep. at 195:1-12; 200:15-201:8).

29. Lee had created these materials and forwarded them to Yang for distribution to prospective pool participants (Lee Dep., Ex. 5-6, 8; Lee Dep. at 97:2-7; 107:21-108:4; 117:3-

² Some investors called Yang or emailed Yang for answers and discussions. Before and after 2006, Yang spent many hours helping investors. (Yang Answer at 29.) Lee received an email from an angry investor on Jan. 29, 2007. Lee asked Yang to handle it for him. Yang talked to the investor and reported back to Lee. (Yang Answer, Ex. 9.) Yang communicated by email regularly with some PVC investors. (Yang Dep. at 54:7-17.) One of the webpages for PVC’s website says “Contact us. For more information on Prestige Ventures and application, please contact Simon Yang.” (Yang Dep. at 196:20-197:2.)

118:15). The materials included the Disclosure Document of the Federated Management Group, Inc. Hedge Fund Program, dated May 23, 2003 (“FMG Fund Disclosure Document”) (Yang Dep., Ex. 8; Yang Dep. at 146:19-147:13, 154:8-14), Disclosure Document of the Prestige Ventures Corp., dated July 3, 2003 (“Prestige Disclosure Document”) (Yang Dep. Ex. 10; Yang Dep. at 169:4-8), an account application form (Yang Dep. 195:1-12; Yang Dep., Ex. 15), and a Federated audit report (“Federated Audit Report”) (Yang Dep., Ex. 9; Yang Answer at 3:21, 20). Yang also distributed a printout of the Prestige website (Yang Dep., Ex. 16; Yang Dep. at 195:18-196:7).

30. Lee solicited customers directly via emails; sometimes offering “new” investment opportunities along with the transmittal of Prestige Enterprises’ fictitious account statements that showed profits purportedly earned that month. (Southwell, Ex. M, R, V; Zhang ¶ 26, Ex. G.)

31. In their solicitations, Defendants primarily targeted the greater Oklahoma City area’s ethnic Chinese community through oral statements, marketing materials, email correspondence, a website, and other forms of solicitation (Lee Dep. at 61:10-62:7; Yu ¶ 7; Z. Luo ¶ 7; E. Luo ¶ 4; Yue ¶ 6; Southwell ¶¶ 6, 16; Zhang ¶¶ 4-5). Defendants, through Yang, specifically targeted members of a certain religious congregation in Edmond, Oklahoma of which he is a member (“Church”) (Yang Answer at 2:9; 6:9; Yang Dep. at 8:3-15; Yu ¶ 7; Z. Luo ¶ 7; E. Luo ¶ 4; Yue ¶ 6; Southwell ¶ 6; Zhang ¶¶ 4-5).

32. In his personal solicitations at the Church, Yang told prospective pool participants about Lee, Federated and Prestige (Yang Answer at 1; Yu ¶ 7; Z. Luo ¶ 7; E. Luo ¶ 4; Yue ¶ 6; Southwell ¶ 6; Zhang ¶¶ 4-5). Yang represented that Lee, through Federated and Prestige,

traded various financial instruments, including commodity futures, stocks, stock options, and foreign currency (Yang Answer at 6:4; 7:14; 8:29; 9:10; 10:4; 12:13; 12:15; 13:4; Yu ¶ 4; Z. Luo ¶ 4; E. Luo ¶ 7; Yue ¶ 4; Southwell ¶ 4; Zhang ¶ 5). He told prospective pool participants that Federated “performed so well that one could not find among the mutual funds” (Yang Answer at 2:9; 2:17; 6:9; 10:6; 11:5; 20). In addition, Yang told prospective pool participants that he was merely an investor and that Lee was a good, honest person (Yu ¶ 9-10; Yue ¶ 12; Z. Luo ¶¶ 9-10).

33. In or around June 2003, Yang arranged a meeting between Lee and several of Yang’s friends from Oklahoma (Yang Answer at 3:14; 7:12; 10:7; 11:6; 20). The purpose of the meeting was for these prospective pool participants to learn more about Lee and Federated and verify what Yang had told them (Yang Answer at 3:14; 11:6; 20). Lee held the meeting at the Prestige Enterprise’s Fort Worth office and the participants drove from Oklahoma to attend (Lee Answer ¶ 40; Lee Dep. at 61:10-62:7; Yang Dep. at 83:7-9, 187:25-188:5, 281:9-12). At the meeting, Lee and Yang confirmed Yang’s representations about Lee’s purportedly successful trading and stated that the Prestige Enterprise and Lee had never suffered any trading losses (Yu ¶ 16; Z. Luo ¶¶ 15, 22; Yue ¶¶ 8-11; Yang Answer at 3:17).

34. On January 18, 2006, Yang sent the Prestige investors an email with the subject “Closing to New” and attached a letter written on Prestige letterhead. The letter described to investors, among other things, how Prestige would be closing to new investors and to new funds from existing investors until April 1, 2006. The letter also stated that, “[t]he existing investors of the company are entitled to withdraw their funds with a seven-day advanced notification as they may need portions or all of their funds.” (Southwell, Ex. K)

35. On April 7, 2006, Yang sent an email to investors about the “PVC margin issue.” In the email, Yang told investors that 36% of PVC funds are invested in the futures market and the remaining 64% was used for maintenance and margin calls. Yang also stated that Lee had used over \$2 million of his personal funds to “prevent margin calls from the brokerage house,” but decided to not continue to use his own funds because “some investors did not appreciate or respect Lee’s hard work and kindness and used PVC as a bank account even a money market fund.” (Southwell, Ex. P; Yang Answer at 13:32.)

36. In December 2007, Yang emailed Southwell, an Oklahoma resident, and other investors an offer to invest in a foreign currency exchange program called FENIX. In the same email, Yang wrote that Federated is the parent company of Prestige and also of the credit union, Federated Asset Management. (Southwell, Ex. BB; Yang Answer at 13:46.) Lee and Yang offered Southwell the Rosetta 6 program, on August 10 and August 23, 2008 (Southwell, Ex. DD; Yang Answer at 13:47.) Yang forwarded Southwell an email dated February 5, 2009, saying that he was going to invest \$5,000 and hoped that she would too (Southwell, Ex. HH; Yang Answer at 13:58). Lee and Yang sent Southwell the emails attached as Exhibit II to Southwell Decl. (Yang Answer at 13:66). Yang sent Southwell the PVC Outline (Yang Answer at 13:64, 70).

37. On about July 25, 2008, Yang prepared a document titled “Distribution” with information obtained from Lee (Yang Dep. at 65:2-5). Yang distributed the document to Southwell and about fifty other pool participants (Yang Dep. at 65:6-14; Southwell, Ex. FF; Yang Answer at 13:49). Yang did not do any independent research to determine whether or not the statements made in “Distributions” were correct (Yang Dep. at 67:6-13; 68:8-16; 71:17-25).

Yang never reviewed or asked to see trading account statements for FMG or PVC (Yang Dep. at 81:6-82:10).

38. Beginning in 2006, Defendants began refusing pool participant requests to have their funds returned. (Yu ¶ 35; Yue ¶ 14; Yang Dep. at 202:3-8.) Instead, Defendants responded with more investment offers, excuses about margin calls and market fluctuations, and promises that accounts could be closed at a future date. (Yu ¶ 35, Ex. E, M; E. Luo, Ex. D; Yue ¶¶ 23-25; Southwell ¶¶ 42, 45, 52, Ex. AA; Zhang ¶ 17.) Defendants' refusal to return pool participant funds continues to this day.³ (Yu ¶ 39; Z. Luo ¶ 29; E. Luo ¶ 11; Southwell ¶ 52.)

Defendants' Other Material Misrepresentations and Omissions

39. According to the FMG Fund Disclosure Document, Federated's marketers and solicitors are members of the NFA and registered with the Commission. (Pendleton, Ex. B.) To the contrary, Prestige, Federated, Lee or Yang have never been registered with the Commission or been a member of the NFA (Mucha ¶ 17).

40. In their solicitations of prospective participants, Defendants did not provide prospective participants with a disclosure document containing the information required by Regulations 4.24 and 4.25, 17 C.F.R §§ 4.24 and 4.25 (2008) (Yu ¶ 48; Yue ¶ 28; Southwell ¶ 64). Further, Defendants never obtained signed and dated acknowledgements from participants stating that they had received a disclosure document (Yu ¶ 49; Yue ¶ 28; Southwell ¶ 65).

Defendants Did Not Disclose Lee's Criminal History

41. In their solicitations, Defendants did not inform prospective and existing pool

³ Defendants have made repeated requests of this Court to allow Lee to trade in an effort to recover lost investor funds. This Court has, judiciously, not acquiesced to such requests.

participants that Lee committed three felonies involving theft and fraud, served prison time and was the defendant in a civil suit involving investment fraud (Lee Answer ¶ 52-53; Yu ¶ 46; Z. Luo ¶ 32; E. Luo ¶ 18; Yue ¶ 27; Southwell ¶ 63; Zhang ¶¶ 27-28). Defendants' failure to disclose this information is compounded by the fact that representations were made about Prestige Enterprise's returns during a period when Lee, its trader and manager, was in jail.

42. Yang does not dispute that he did not tell prospective investors about Lee's criminal record and civil judgment, that Lee was using investors' funds to pay himself and Lee's family, and that Federated and Prestige credited more returns to investor accounts than they earned through actual trading (Yang Answer at 5:46; 6:51-52; 8:32-35; 9:17-21; 11:27, 30-32; 12:27-13:31; 13:63, 67, 68, 69).

D. The Prestige Enterprise and Lee Lost Funds Trading and Misappropriated Funds

43. During the relevant period, Defendants directed participants to wire funds directly to the Prestige Enterprise bank accounts or to make checks payable to Federated or Prestige (Yang Dep. at 146:19-149:4; 159:4-17; Yang Dep., Ex. 8; Pendleton, Ex. D; Yu ¶ 28; Zhang ¶ 16; Southwell ¶ 18).

44. Lee controlled the known bank accounts of the Prestige Enterprise (Grossman ¶¶ 4-6).

45. Once the investor funds entered the Prestige Enterprise bank accounts, Lee disbursed these funds to trading accounts at futures and currency brokerage firms, other investors, himself and his family members and for the purchase of personal assets and payment of personal expenses on behalf of himself and his family (Grossman ¶ 10).

46. Contrary to Defendants' representations, Lee and the Prestige Enterprise were not successful traders (Mucha ¶ 23). Throughout the relevant period, the Prestige Enterprise opened and maintained at least 30 commodity futures or foreign currency trading accounts in the name of Federated or Prestige at various Futures Commission Merchants ("FCMs") registered with the Commission or at an off-shore currency firm (Mucha ¶ 19-20). The Prestige Enterprise sustained net losses of \$4.3 million trading in these accounts (Mucha ¶ 23).

47. Lee opened and controlled the majority of those trading accounts (Mucha ¶ 21). He opened the accounts as corporate proprietary accounts, rather than in the name of a pool, and did not disclose to the FCMs involved that he was trading participant funds (Mucha ¶¶ 33, 34).

48. Lee also opened and controlled two securities trading accounts in which he traded some securities and options on securities, and sustained net losses of approximately \$70,000 in those accounts (Mucha, note 4).

49. The Prestige Enterprise and Lee misappropriated millions of dollars in pool participant funds (Grossman ¶ 10). For example, Lee misappropriated pool participant funds for personal use and used the Prestige Enterprise bank accounts as his personal bank accounts by funneling pool participant funds to his wife, sons and himself, in spite of the fact that his trading did not generate profits (Grossman ¶ 12-14).

50. During the relevant period, Lee also transferred, or withdrew funds, directly from the Prestige Enterprise bank accounts for use on personal expenses such as houses, cars, yachting fees, lawn care and cable television (Grossman ¶ 10-14).

51. As further evidence that Defendants were operating a "Ponzi" scheme, the Prestige Enterprise and Lee also used pool participant funds to make purported profit payments to other

pool participants (Grossman ¶ 10a; Yu ¶¶ 41-42). Indeed, in one February 2009 email to a pool participant who requested that Defendants return her funds, Lee virtually admitted he was operating a Ponzi scheme, writing, “[y]ou need to hope that someone DOES invest more in [Prestige] as that is what will get your account closed or be able to release funds to you” (emphasis in original) (Ex. 13 to Lee Dep.; Lee Dep. at 133:18-134:9; Yu ¶ 42, Ex. Q; E. Luo ¶13, Ex. D; Southwell ¶ 56, Ex. II).

52. When Yang first learned of FMG, he thought there was a 99% chance that it was a Ponzi scheme. “There’s an overwhelming chance of Ponzi scheme” (Yang Dep. at 75:17-25; 78:5-6). FMG was “too good to be true in several ways: all positive returns over 16 years, about 30% annual returns, and very consistent year over year and month over month, offshore operation from Panama City, Republic of Panama” (Yang Answer at 15).

E. Defendants Used False Statements to Conceal Misappropriation and Trading Losses

53. Throughout the relevant period, to conceal their trading losses and misappropriation, the Prestige Enterprise and Lee issued, or caused to be issued false statements to pool participants reflecting consistent monthly profits generated by the Prestige Enterprise and Lee’s trading. The account statements showed monthly profits of up to 4% and no losses (Yu, Ex. H-J; Southwell, Ex. G, O, W, Y).

54. For example, from September 2005 to February 2009, Lee prepared and sent monthly account statements to one pool participant falsely showing that the pool participant’s total investment of \$20,000 had more than doubled to \$41,020.12 and that Defendants had not sustained a single month of trading losses (Southwell, Ex. G, O, W).

55. The monthly account statements that Lee sent to a group of pool participants who

shared an account falsely showed that their account earned money every single month from July 2003 through January 2009, and that their total combined investment of \$100,000 increased to over \$340,000 (Yu, Ex. H-J; Z. Luo, Ex. D, E & F; Yang Answer at 8:27).

56. Account statements were sent from the Prestige Enterprise by Lee (Yang Answer at 5:45; 8:3; Lee Dep. Ex. 9 [Ming's statement]; Lee Dep. at 118:19-119:10).

57. Defendants, through Yang, also issued or caused to be issued monthly reports to pool participants reflecting purported returns the Prestige Enterprise had generated as a result of trading with the Legacy Trading System (Southwell ¶¶ 23-25, Ex. B, H-J; Zhang, Ex. B; E. Luo, Ex. B-C). In one email to participants forwarding a Legacy Trading System statement, Yang wrote, "Lee/[Prestige] have worked very hard for all us to produce these wonderful returns" (Southwell, Ex. I). The reports falsely indicate that, for the past 16 years, the Legacy Trading System outperformed the S&P 500 and the MAR Futures (Southwell, Ex. I). The reports even indicate that Prestige achieved positive returns for every month during the period beginning January 2007 and ending April 2009. (E. Luo, Ex. B-C; Yang Answer at 9:9.) Yet, in the years 2007 through 2009, investors could not make withdrawals (*supra* ¶ 37; Yang Dep. at 178:22-179:24).

58. Defendants told pool participants they used the Legacy Trading System to trade on behalf of the Prestige Enterprise pools (Yu ¶ 26; Z. Luo ¶ 21; E. Luo ¶ 7; Southwell ¶ 9; Zhang ¶ 13).

59. Once pool participants started receiving the monthly statements showing consistent profits and withdrew purported profits, pool participants decided to invest more money with Defendants and new pool participants were convinced to invest with Defendants (E. Luo ¶ 5;

Zhang ¶ 16; Southwell ¶¶ 6, 29; Yu ¶¶ 33-34).

60. After investing with Defendants, several pool participants were able to withdraw funds, as promised by Defendants, from their accounts (Yu ¶ 33; Z. Luo ¶ 28; Yue ¶ 14; Zhang ¶ 17). However, starting in April 2006, Defendants began refusing pool participant requests to withdraw funds with excuses about margin requirements, market fluctuations and lack of new investments (Yu ¶ 35, Ex. E, M; E. Luo, Ex. D; Yue ¶¶ 23-25; Southwell ¶¶ 42, 45, 52, Ex. AA; Zhang ¶ 17).

61. Defendants still refuse to return pool participant funds (Yu ¶ 39; Z. Luo ¶ 29; E. Luo ¶ 11; Southwell ¶ 52).

F. Relief Defendants Received Ill-Gotten Gains

62. During the relevant period, Lee and the Prestige Enterprise diverted approximately \$2 million in pool participant funds to the Relief Defendants (Grossman ¶¶ 10-14). As reflected in the Declaration of Glen Grossman, upon the availability of investor funds in the Prestige bank account at Bank of America, Lee and his family used investor funds to purchase personal assets, to pay themselves, and to pay for their personal expenses (Grossman ¶¶ 10-14).

63. During the relevant period, Lee and the Prestige Enterprise purchased or paid for the following items for David and Darren Lee: a car for Darren Lee (Darren Lee Dep. at 74:15-75:15; Grossman ¶ 14b) and two cars for David Lee (David Lee Dep. at 70:16-72:18; 111:14-113:15; Grossman ¶ 13b), a house for each (David Lee Dep. at 102:24-104:23; Darren Lee Dep. at 83:6-84:13; Grossman ¶¶ 13c, 14c), house repairs (Darren Lee Dep. at 84:21-85:3), a boat and boat-related expenses (David Lee Dep. at 114:8-116:2; Darren Lee Dep. at 85:4-86:2; Grossman ¶¶ 13-14), gifts, living expenses, and health insurance (David Lee Dep. at 107:6-108:18;

Grossman ¶¶ 13-14); and Darren's wedding and honeymoon (Darren Lee Dep. at 81:18-82:3).

In addition, for at least a portion of that time period, Lee and the Prestige Enterprise gave David and Darren each a \$1,500 check on an almost weekly basis. (David Lee Dep. at 106:12-23; Darren Lee Dep. at 76:10-19; Grossman ¶¶ 13a, 14a.)

64. Similarly, between 2003 and 2009, Mrs. Lee received the benefit of ill-gotten gains from Lee and the Prestige Enterprise in the form of cash, credit card payments, a car, a house, a boat, living expenses, and medical insurance premiums. (Grossman ¶ 12.) During the time period beginning March 1, 2003 and ending November 30, 2009, Sheila Lee received approximately \$233,624 from the Prestige Enterprise bank accounts that was paid directly to her. (Grossman ¶ 12a.) During that same time, Sheila Lee received \$24,188.77 from the Prestige Enterprise bank accounts for the purchase of a vehicle. (Grossman ¶ 12b.) Sheila Lee also received \$288,000 from the Prestige Enterprise bank accounts for the purchase of the home at 1660 Jorrington Street, Mount Pleasant, South Carolina 29466 (Sheila Lee Resp. Req. Admis. ¶ 3; Grossman ¶ 12c) and \$28,160.30 for the payment of her health insurance premiums (Grossman ¶ 12d). Lee and Prestige Enterprise paid Sheila Lee's medical insurance payments, utilities for the home at 1600 Jorrington Street, and credit card payments from the Prestige Enterprise bank accounts (Sheila Lee Dep. at 84:14-87:13). During the relevant period, Sheila Lee received funds from the Prestige Enterprise bank accounts for housing expenses such as lawn care and utility bills. (Grossman ¶ 12; Sheila Lee Dep. at 84:25-13.)

G. Relief Defendants Provided No Services to the Prestige Enterprise

65. David Lee testified that the only services, if any, he provided to the Prestige Enterprise were watching the markets, watching Lee trade, and doing odd jobs, such as mowing

the lawn, around Lee's house. (David Lee Dep. at 105:3-106:1.)

66. Darren Lee testified that, in exchange for the \$1,500 he collected from the Prestige Enterprise every week, he performed menial tasks around Lee's home such as mowing the lawn and spent a large part of the day "scanning software" and looking at charts. (Darren Lee Dep. at 31:24-33:15; 76:20-78:2.) Darren Lee stated under oath that he did not consider himself to be an employee of Federated or Prestige, that any involvement he had in Federated ceased sometime between 2001 and 2003, and that he is not involved with Prestige in any way. (Darren Lee Dep. at 9:6-10:18; 32:19-33:15; 75:24-76:9.) Darren Lee testified that he did not make any trading decisions on behalf of the pool participants. (Darren Lee Dep. at 77:15-22.) In fact, he said he did not know anything about investors. (Darren Lee Dep. at 76:20-78:2.)

67. Lee testified that Darren Lee and David Lee were not Prestige Enterprise employees. (Lee Dep. at 305:21-25.)

68. Sheila Lee has not had a job since 2003. (Sheila Lee Dep. at 21:20-21.) Sheila Lee has never been part of the businesses of Kenneth Lee. (Sheila Lee Dep. at 25:17-18, 26:6-9; Sheila Lee Resp. Req. Admis. ¶ 18). Sheila Lee had no money in savings in 2003. (Sheila Lee Dep. at 32:22-25.) Sheila Lee knew that Kenneth Lee had investments and investors. (Sheila Lee Dep. at 35:22-25.)

69. Beginning in 2003, Sheila Lee received money from Kenneth Lee from the Prestige Enterprise bank accounts to pay housekeeping expenses. (Sheila Lee Dep. at 33:13-18, 35:3-18; Sheila Lee Answers Interrogs. ¶ 12.)

70. Sheila Lee was never an employee of Prestige or Federated. (Sheila Lee Dep. at 82:8-12, Sheila Lee Resp. Req. Admis. ¶ 20.) Sheila Lee has never provided good or services to

Prestige or Federated. (Sheila Lee Dep. at 82:13-15; Sheila Lee Resp. Req. Admis. ¶¶ 1, 2.)

71. Sheila Lee never had a brokerage account or trading account. (Sheila Lee Dep. at 47:4-10; Sheila Lee Resp. Req. Admis. ¶ 18.)

III. ARGUMENT

A. Summary Judgment Standard of Review

Summary judgment is appropriate if the pleadings and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). “[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact.” *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir.1977). The movant bears the initial burden of demonstrating the absence of material fact requiring judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material if it is essential to the proper disposition of the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

If the movant carries this initial burden, the non-movant must then set forth “specific facts” outside the pleadings and admissible into evidence which would convince a rational trier of fact to find for the nonmovant. Fed.R.Civ.P. 56(e). These specific facts may be shown “by any of the kinds of evidentiary materials listed in Rule 56(c) except the mere pleadings themselves.” *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548, 91 L.Ed.2d 265. Such evidentiary materials include affidavits, deposition transcripts, or specific exhibits. *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir.1992). “The burden is not an onerous one for the nonmoving party in each case, but does not at any point shift from the nonmovant to the

district court.” *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir.1998). All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538; *Brown v. Value Family Properties, LLC*, 2008 WL 1909223, 1 (W.D.Okla. 2008) (DLR).

B. Defendants Committed Fraud in Connection with Futures in Violation of Sections 4b(a)(2)(i)-(iii) and 4b(a)(1)(A)-(C) of the Act⁴

Sections 4b(a)(2)(i)-(iii) 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 for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (A) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (B) determining the price basis of any transaction in interstate commerce in such commodity, or (C) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—(i) to cheat or defraud or attempt to cheat or defraud such other person; (ii) willfully to make or cause to be made to such other person any false report or statement thereof, . . .[or]; (iii) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person.

Similarly, Sections 4b(a)(1)(A)-(C) of the Act as amended by the CRA make it unlawful

⁴ On June 18, 2008, Congress enacted Section 4b(a)(1)(A)-(C), 7 U.S.C. §§ 6b(a)(2)(A)-(C), with the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act (“CRA”)), §§ 13101-13204, 122 Stat. 1651, which modified and re-designated what was Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2). However, the CRA’s modifications to that Section of the Act do not apply, and have no substantive effect, on the facts of this case. Accordingly, Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2), applies to violations occurring before June 18, 2008 and Section 4b(a)(1)(A)-(C), 7 U.S.C. §§ 6b(a)(2)(A)-(C), *as amended by the CRA*, applies to violations occurring on or after that date.

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] (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, or in regard to any act of agency performed, with respect to any order or contract for ... the other person.

Proposed Defendants, through their misrepresentations and omissions of material fact, misappropriation, and issuance of false account statements, violated Sections 4b(a)(2)(i)-(iii) of the Act and Sections 4b(a)(1)(A)-(C) of the Act as amended by the CRA.

(1) Fraudulent Solicitation by Misrepresentations and Omissions

To establish Proposed Defendants violated Sections 4b(a)(2)(i) and (iii) of the Act and Sections 4b(a)(1)(A) and (C) of the Act as amended by the CRA (for the period June 18, 2008 to the present) through misrepresentations and omissions, Plaintiffs must prove that: (1) a misrepresentation or omission was made; (2) with scienter; and (3) that the misrepresentation or omission was material. *CFTC v. R.J. Fitzgerald & Co.*, 310 F. 3d 1321, 1328-29 (11th Cir. 2002).

a) Defendants Made Misrepresentations and Omissions to Customers

“Whether a misrepresentation has been made depends on the ‘overall message’ and the ‘common understanding’ of the information conveyed.” *R.J. Fitzgerald* at 1328 (citing *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24, 617 (CFTC Mar. 1, 1990)). A statement is material if “it is substantially likely that a reasonable investor would consider the matter important in making an investment

decision.” *R.J. Fitzgerald*, 310 F.3d at 1328; *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 447 (D.N.J. 2000); *see also CFTC v. Commonwealth Fin. Group*, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994). Any fact that enables customers to assess independently the risk inherent in their investment and the likelihood of profit is a material fact. *See In re Commodities Int’l Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943 at 44,563-64 (CFTC Jan. 14, 1997).

In soliciting prospective participant and existing participants, Defendants misrepresented that: (1) Lee was consistently profitable and never suffered losses in his trading on behalf of the Prestige Enterprise, (2) the profits Lee generated in his trading on behalf of Prestige Enterprise were extraordinarily high, (3) Prestige Enterprise and its agents were members of the NFA and registered with the Commission, (4) in December 2003, Federated had up to \$379 million, (5) pool participant accounts were insured by Federated’s credit union, (6) pool participants could withdraw money from their accounts at any time, (7) by using a particular trading program with a highly successful track record, the Legacy Trading System, the Prestige Enterprise would achieve profitable returns on all investments, and (8) Yang was merely a Prestige Enterprise investor. Defendants also failed to adequately disclose the risk of trading commodity futures and off-exchange leveraged foreign currency contracts. Additionally, none of the prospective or actual pool participants were told of Lee’s extensive criminal history/ incarceration involving fraud while he was supposedly earning consistently high returns for Prestige Enterprise, and the related \$3 million civil judgment against him. Defendants also failed to disclose that Yang was not only an investor but also an active participant in the Prestige Enterprise; whose activities included marketing, providing information to pool participants and issuing false statements to

participants concerning the Legacy Trading System. Defendants also failed to disclose that they had been the subject of an investigation in 2005 and had provided false and misleading information, and omitted material information in responding to a Commission subpoena. Defendants' misrepresentations and omissions caused participants to invest, re-invest additional money and remain invested in the pools and induced new participants to give Defendants funds to trade.

b) Defendants Acted with Scienter

The scienter element is established when an individual's acts are performed "with knowledge of their nature and character." *Wasnick v. Refco, Inc.*, 911 F.2d 345, 348 (9th Cir. 1990). Plaintiffs need only show that a defendant's actions were "intentional as opposed to accidental." *Lawrence v. CFTC*, 759 F. 2d 767, 773 (9th Cir. 1985). Scienter only requires a showing that defendant committed the alleged wrongful acts intentionally or "that the representations were made with a reckless disregard for their truth or falsity." *National Inv. Consultants*, 2005 WL 2072105 at *8, citing *CFTC v. Noble Metals Int'l, Inc.*, 67 F. 3d 766, 774 (9th Cir. 1995); *Do v. Lind-Waldock & Co.* (1994-1996 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 25,516 at 43,321 (CFTC Sept. 27, 1995) (a reckless act is one where there is so little care that it is "difficult to believe the (actor) was not aware of what he was doing"). Scienter can be inferred from circumstantial evidence. *In re JCC, Inc.*, CFTC No. 89-4, 1994 WL 183817, *11 (CFTC May 12, 1994) *aff'd sub nom. JCC, Inc. v. CFTC*, 63 F.3d 1557 (11th Cir. 1995).

Here, Defendants made misrepresentations or omissions of material fact with the requisite scienter. As the person operating the Prestige Enterprise, soliciting customers and handling customer funds, Lee well knew that the Prestige Enterprise was not using the \$8.7

million solicited to trade on behalf of pool participants, that his trading was not successful and/or that pool participant funds were either being misappropriated for personal use or to return funds to other customers. Lee likewise knew that: 1) the Legacy Trading System was a fiction and did not guarantee returns; 2) the account statements and balances provided to pool participants falsely represented that pool participants' investments were earning profits as a result of the Defendants' trading; and 3) he had been convicted of fraud and had an outstanding civil judgment of almost \$3 million against him for similar, fraudulent conduct but failed to disclose this important information to potential pool participants. Yang knew that 1) certain pool participants had opened accounts with the Prestige Enterprise as a result of his solicitations; 2) he continued to solicit on behalf of the Prestige Enterprise after representing to the Commission that he had stopped soliciting for Federated; and 3) he was not merely an investor, but an active solicitor for, and agent on behalf of the Prestige Enterprise. Thus, the undisputed evidence firmly establishes that Defendants acted with the requisite scienter.

c) Defendants' Misrepresentations and Omissions Were Material

A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *R.J. Fitzgerald*, 310 F.3d at 1328. Any fact that enables customers to assess independently the risk inherent in their investment and the likelihood of profit is a material fact. *In re Commodities Int'l Corp.*, (1996-1998 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 26,943 at 44,563-64 (CFTC Jan. 14, 1997); *see also, e.g., Commonwealth Fin. Group*, 874 F. Supp. at 1353-54 (misrepresentations regarding firm's trading record are fraudulent because past success and experience are material factors to reasonable investors); *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1160

(S.D.N.Y. 1979) (misrepresentations regarding profitability of investment).

Here, Defendants' misrepresentations and omissions concerned the success and status of the Prestige Enterprise, the profitability of its trading and its use of customer funds, all of which are material to the reasonable investor.

(2) Fraud by Misappropriation

Misappropriation of customer funds constitutes "willful and blatant" fraud in violation of Sections 4b(a)(1)(A) and (C) of the Act as amended by the CRA and Regulations 1.1(b)(1) and (3). *CFTC v. Weinberg*, 287 F. Supp. 2d. 1100, 1106 (C.D. Cal. 2006) (misappropriating participant funds violated Section 4b(a)(2)(i) and (iii) of the Act (the predecessor to 4b(a)(1)(A) and (C)); *CFTC v. Noble Wealth Data Info. Servs., Inc.*, 90 F. Supp. 2d 676, 687 (D. Md. 2000) (defendants violated Section 4b(a)(2)(i) and (iii) by diverting investor funds for operating expenses and personal use,) *aff'd sub nom. CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002); *see also CFTC v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985).

Here, the undisputed evidence clearly establishes that Defendants misappropriated clients' funds to: 1) meet redemption requests of other clients; 2) pay for personal expenses; and 3) transfer funds to family members.

(3) Fraud by Issuing False Account Statements to Customers

Defendants violated Section 4b(a)(1)(B) of the Act as amended by the CRA and Regulation 1.1(b)(2) by providing false account statements to customers, purportedly showing continuous profitable returns on their investment in order to conceal their misappropriation and lack of trading. *See, e.g., Weinberg*, 287 F. Supp. 2d. at 1107 (false and misleading statements as to the amount and location of investors' money violated Section 4b(a) of the Act.); *Noble*

Wealth, 90 F. Supp. 2d. at 685-87. Based on these statements, pool participants kept reinvesting their principal and purported profits and made new capital contributions to continue trading commodity futures, foreign currency, and other financial products.

C. Federated and Prestige Committed Fraud as Commodity Pool Operators, and Lee and Yang Committed Fraud as Associated Persons in Violation of Section 4o(1)⁵

Section 4o(1) of the Act broadly prohibits fraudulent transactions by Commodity Pool Operators (“CPO(s)”)⁶ and Associated Persons (“AP(s)”)⁷ thereof. Sections 4o(1)(A) and (B) apply to all CPOs and APs, whether registered, required to be registered, or exempted from registration. *Skorupskas*, 605 F. Supp. at 932-33. Section 4o(1)(A) of the Act makes it unlawful for a CPO or Associated Person to employ any device, scheme, artifice or to advertise in manner that defrauds any participant or prospective participant. Section 4o(1)(B) of the Act makes it unlawful for a CPO or Associated Persons to engage in any transaction, practice, course of business or to advertise in manner that operates as a fraud or deceit upon any participant or prospective participant.

⁵ Federated and Prestige each violated Commission Regulation 4.20(a)(1) and (b) by failing to operate the commodity pools as a legal entity separate from themselves and by receiving commodity pool funds in their own names rather than in the names of the pools. Federated and Prestige solicited and accepted funds from pool participants without providing the requisite form of disclosure to the pool participants before or after they invested, in violation of Section 4.21 of the Regulations.

⁶ The Act defines Commodity Pool Operator as any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market. 7 U.S.C. §1a(5) (2006).

⁷ The Act defines Associated Person as any person associated with a commodity pool operator as a partner, employee, consultant, or agent in any capacity that involves the solicitation of funds, securities or property for a participation in a commodity pool. 7 U.S.C. §6k(2) (2006).

Significantly, unlike Section 4b and 4o(1)(A) of the Act, Section 4o(1)(B) has no scienter requirement. *In re Kolter*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,262 at 42,198 (CFTC Nov. 8, 1994) (citing *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cir. 1988)).

The Prestige Enterprise acted as CPOs, and Lee and Yang acted as APs such that the same misappropriation, misrepresentations, and omissions that violate Section 4b of the Act, as set forth above, also violate Section 4o(1). *Skorupskas*, 605 F. Supp. at 932 (finding that the defendants' violation of Section 4(b) of the Act also violated Section 4o); *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,313 (CFTC July 19, 1999) ("Where the record establishes that the respondents engaged in fraudulent conduct in violation of section 4b the Division has, as the ALJ observed, surpassed its burden of proof with respect to section 4o"), *aff'd in relevant part and rev'd sub nom, Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000); *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,218 (CFTC Aug. 11, 1992) (the same conduct that violates section 4b can be used to establish a violation of section 4o(1)(A) and (B)), *aff'd in part and modified sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993) (affirming liability, modifying sanctions).

D. Federated and Prestige Violated Section 4m(1) of the Act by Failing to Register as Commodity Pool Operators and Lee and Yang Violated Section 4k(2) of the Act by Failing to Register as Associated Persons

Federated and Prestige acted as CPOs and Lee and Yang as APs thereof, without registering with the Commission, in violation of Sections 4m(1) and 4k(2) of the Act, 7 U.S.C. §§ 6m(1) and 4k(2), respectively. Section 4m(1) of the Act provides that it is unlawful for any

CPO, unless registered under the Act, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as a CPO. Section 4k(2) of the Act requires any AP of a CPO to be registered as such with the Commission.

Using instrumentalities of interstate commerce, Federated and Prestige solicited and received funds from customers for the purpose of pooling customer funds to trade commodity futures. Thus, Federated and Prestige were acting as CPOs without being registered as required by Section 4m(1) of the Act and Lee and Yang were acting as Associated Persons of Federated and Prestige without being registered as required by Section 4k(2) of the Act.

E. Federated and Prestige Constitute a Common Enterprise

“When determining whether a common enterprise exists, courts look to a variety of factors, including: common control, *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973), *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427,431 (7th Cir.), cert. denied, 377 U.S. 992 (1964); the sharing of office space and officers, *Zale Corp. and Corrigan-Republic, Inc. v. FTC*, 473 F.2d 1317, 1320 (5th Cir. 1973), *Delaware Watch Co. v. FTC*, 332 F.2d 745,746 (2d Cir. 1964); whether business is transacted through ‘a maze of interrelated companies,’ *Delaware Watch*, 332 F.2d at 746; the commingling of corporate funds and failure to maintain separation of companies, *SEC v. Elliot*, 953 F.2d 1560, 1565 n.1 (11th Cir. 1992); unified advertising, *Zale Corp.*, 473 F.2d at 1320; and evidence which ‘reveals that no real distinction existed between the Corporate Defendants,’ *Jordan Ashley*, 1994-1 Trade Cases (CCH) ¶ 70,570 at 72095.” *FTC v. Wolf*, 1997-1 Trade Cases (CCH) ¶ 71,713 (S.D. Fla. Jan. 30, 1996). As a common enterprise, defendants are jointly and severally liable for the acts of the common scheme. *Id. See also CFTC v. Noble Wealth Data Information Services, Inc.*, 90 F.

Supp. 2d 676, 691 (D. Md. 2000) (concluding that when two firms were formed as successors to original corporation, and the successors were operated by the same individuals and used the same marketing materials as one another, all three firms were jointly and severally liable for violations of the Act).

It is clear from the facts that Prestige is merely Federated operating under a new name. Their principals are the same, their addresses are the same, their employees are the same, and their customers are the same. Although Federated and Prestige were registered with Panama and Texas, respectively, as separate entities, there is no meaningful distinction between the two corporations. Therefore, Federated and Prestige are engaged in a common enterprise and are jointly and severally liable for violations of Sections 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii) (2006); Sections 4b(a)(2)(A)-(C) of the Act as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(2)(A)-(C); Sections 4k(2), 4m(1), and 4o(1) of the Act, 7 U.S.C. §§ 4k(2), 6m(1), and 6o(1) (2006) of the Act; and Regulations 4.20 and 4.21.

F. Lee Is Liable for the Acts of the Prestige Enterprise, Pursuant to Section 13(b) of the Act

As a controlling person, Lee is liable for Federated and Prestige's violations of the Act and Regulations pursuant to Section 13(b) of the Act. "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." *In re JCC, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,576 (CFTC May 12, 1994) (finding principals of company liable because they were officers of a corporation who were involved in monitoring sales activities),

aff'd, 63 F.3d 1557 (11th Cir. 1995).

Pursuant to Section 13(b) of the Act, a controlling person is liable for the violations of the person under his control. To establish liability as a controlling person pursuant to Section 13(b), the Commission must show that the person possesses the requisite degree of control and either: (1) knowingly induced, directly or indirectly, the acts constituting the violation; or (2) failed to act in good faith. *In re Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,251 at 34,766 (CFTC Mar. 11, 1992). To establish the “knowing inducement” element of the controlling person violation, 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.” *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103 at 34,767 (CFTC Jan. 12, 1998).

Here Lee is liable as a controlling person because he knowingly induced the acts constituting the violations. Lee held himself out as the principal of Federated and Prestige and, in various documents and in oral solicitations, he was described as the lead trader, president, director, chairman, beneficial owner and/or principal portfolio manager of Federated and Prestige. He exercised control over the day-to-day business operations of Federated and Prestige, controlled the trading and bank accounts opened and maintained in the name of Federated or Prestige, and was responsible for the content of the Prestige account statements distributed to pool participants.

Lee had the requisite control of the Prestige Enterprise and Yang. Lee also committed the violative acts himself and knew of the on-going acts of Yang and allowed them to continue. Lee, therefore, is also liable for the Prestige Enterprise and Yang’s violations of the Act and

Regulations pursuant to Section 13(b) of the Act.

G. Summary Judgment Is Proper As to the Relief Defendants

Relief or nominal defendants are persons not accused of wrongdoing who (1) have received ill-gotten funds; and (2) do not have a legitimate claim to those funds. *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998), citing *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998). A relief or nominal defendant is joined to aid in full relief without asserting separate subject matter jurisdiction over the person or entity. *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d 187, 191 (4th Cir. 2002); *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (nominal defendant is joined as a means of facilitating collection, no subject matter jurisdiction needs to be asserted as the relief defendant has no ownership interest, but merely possession of the funds that are at the center of the controversy); *Collelo*, 139 F.3d at 677 (in order to effect full relief in recovering assets that are the fruit of the underlying fraud, plaintiff could name a non-party depository as a relief defendant). A “claimed ownership interest must not only be recognized in law; it must also be valid in fact. Otherwise, individuals and institutions holding funds on behalf of wrongdoers would be able to avoid disgorgement (and keep the funds for themselves) simply by stating a claim of ownership, however specious.” *Kimberlynn Creek*, 276 F.3d at 192.

Sheila, David, and Darren Lee are proper relief defendants. Plaintiffs do not accuse the Relief Defendants of wrongdoing. As Plaintiffs describe above, Lee and the Prestige Enterprise diverted approximately \$2 million in the proceeds from Defendants’ fraud to Relief Defendants in the forms of cash, gifts, goods, and expenses. In return for those funds, Relief Defendants did not provide any legitimate services to the Prestige Enterprise or its pool participants. Relief

Defendants admit that the cash and funds to pay for the houses, cars, boats, and personal expenses came directly from the Prestige Enterprise bank accounts. However, they assert that those funds from the Prestige Enterprise bank accounts were their “own personal funds.” (Darren Lee Answer ¶ 33; David Lee Resp. Req. Admis. ¶¶ 4, 6, 8, 10, 12, 14; Sheila Lee Answer ¶33.) This is untenable. Records for the Prestige Enterprise bank accounts during the relevant period show that Relief Defendants deposited a total of \$45,638 into the Prestige Enterprise bank accounts. Relief Defendants have not provided a single piece of evidence to dispute this fact or to support the trading “gains” alleged. Accordingly, this Court should grant summary judgment against the Relief Defendants in this action.

H. Defendants Offered and Sold Unregistered Securities in Violation of Section 1-301 of the OUSA

Section 1-301 of the OUSA makes it unlawful for a person to offer or sell a security in and/or from Oklahoma unless: “1. The security is a federal covered security; 2. The security, transaction, or offer is exempted from registration under [Sections 1-201 through 1-203 of the OUSA]; or 3. The security is registered under [the OUSA].” Defendants violated Section 1-301 of the OUSA.

(1) The Investments Offered and Sold By Defendants Are Securities under the OUSA

To determine that the investments offered and sold by Defendants are securities under Oklahoma law, the undisputed facts in this case must be analyzed in light of the statutory definition of the term “security” and various court decisions, including decisions of the Oklahoma Supreme Court and the United States Supreme Court. Section 1-102(32) of the OUSA defines a “security” to include, *inter alia*, an investment contract. Section 1-102(32)(d)

of the OUSA specifically “includes as an ‘investment contract’ an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor[.]” This definition codifies the four-pronged test set forth by the United States Supreme Court in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), and adopted by the Oklahoma Supreme Court in *State ex rel. Day v. Petco Oil and Gas, Inc.*, 558 P.2d 1163 (Okla. 1977). The four prongs of the *Howey* test, as restated in *Petco* and now codified in the OUSA, are: (1) the investment of money (2) in a common enterprise (3) with the expectation of profits (4) through the efforts of others.

The United States Supreme Court stated that the definition of a security adopted by it in *Howey* “embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.” *Howey*, 328 U.S. at 299. The Oklahoma Supreme court in *Petco* also adopted the flexible definition of investment contract in Oklahoma. 558 P.2d at 1167.

The investments offered and/or sold by Defendants satisfy all prongs of the *Howey* test. First, it is undisputed that persons invested money in the Prestige Enterprise. Second, the investment involved a “common enterprise.” Section 1-102(32)(d) of the OUSA provides that a “‘common enterprise’ means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors[.]” The monies invested by the pool participants were commingled in bank accounts of the Prestige Enterprise under the control of Lee. Lee disbursed a portion of the funds in the Prestige Enterprise bank accounts to trading accounts of the Prestige Enterprise, under the control of Lee,

at Futures Commission Merchants and other brokerage firms thereby further intertwining the funds of investors. As such, the pool participants invested in a common enterprise.

Third, the pool participants expected to make a profit from their investments. Defendants represented to prospective pool participants that the Prestige Enterprise was successful in its trading and had made only positive annual returns for at least sixteen years. In addition, Defendants provided monthly statements to the pool participants indicating that they were making significant returns on their investments. Once the pool participants started receiving the monthly statements showing consistent profits, pool participants decided to invest more money with Defendants.

Fourth, any profits made by a pool participant would have been derived through the efforts of a person other than the pool participant. Section 1-102(32)(d) relaxed this prong of the *Howey* test by providing that the profits are to be derived “primarily” from the efforts of others. Here, pool participants were primarily, if not entirely, dependent on Lee for any profit they would receive on their investments. The profit was to be made through the trading of commodities futures, foreign currency, and securities by Lee on behalf of the Prestige Enterprise and the investors therein.

Clearly, the pool participants made an investment of money in a common enterprise with the expectation of profits through the efforts of someone other than themselves. The investments offered and/or sold by Defendants are investment contracts, and therefore, securities under the OUSA.

(2) Defendants Offered and Sold Securities in Oklahoma

Section 1-610 of the OUSA specifies when securities are offered or sold in Oklahoma for purposes of Section 1-301 of the OUSA. Section 1-610(A) states that Section 1-301 does not apply “to a person that sells or offers to sell a security unless the offer to sell or the sale is made in [Oklahoma] or the offer to purchase or the purchase is made and accepted in [Oklahoma].” Further, Section 1-610(C) states that “an offer to sell or to purchase a security is made in [Oklahoma], whether or not either party is then present in [Oklahoma], if the offer: 1. Originates from within [Oklahoma]; or 2. Is directed by the offeror to a place in [Oklahoma] and received at the place to which it is directed.”

Here, Defendants offered and sold securities to numerous persons living in Oklahoma and outside of Oklahoma. At times, the offers were originated by Yang, on behalf of the Prestige Enterprise, from within Oklahoma. At other times, the offers were directed by Lee, on behalf of the Prestige Enterprise, to persons located and residing in Oklahoma; such offers were received in Oklahoma.

(3) The Securities Offered and Sold in Oklahoma should have been Registered under the OUSA

The securities offered and sold in Oklahoma by Defendants should have been registered under the OUSA pursuant to Section 1-301 unless the securities were federal covered securities⁸ or the securities, the transactions, or the offers, were exempt from registration under Sections 1-

⁸ Section 1-102(8) of the OUSA defines the term “federal covered security” to mean “a security that is, or upon completion of a transaction will be, a covered security under Section 18(b) of the Securities Act of 1933 (15 U.S.C. Section 77r(b)) or rules or regulations adopted pursuant to that provision[.]” For purposes of Sections 1-301 and 1-503 of the OUSA, federal covered securities are preempted from registration under the OUSA.

201 through 1-203 of the OUSA.

The securities offered and sold by Defendants have not been registered under the OUSA. Pursuant to Section 1-503 of the OUSA, the burden of proving an exemption, exception, preemption, or exclusion from registration is on the person claiming the exemption, exception, preemption, or exclusion. However, Defendants have not raised the affirmative defense of the availability of an exemption, exception, preemption, or exclusion from registration for the offer and/or sale of the unregistered securities, and in fact, none of them apply to these transactions. Failure to plead an affirmative defense is a waiver of that defense. *RST Service Mfg., Inc. v. Musselwhite*, 628 P.2d 366, 368 (Okla. 1981); *Bentley v. Cleveland County Bd. of County Com'rs*, 41 F.3d 600, 604 (10th Cir. 1994); *Renfro v. City of Emporia*, 948 F.2d 1529, 1539 (10th Cir. 1991). Accordingly, summary judgment on the cause of action under Section 1-301 of the OUSA is appropriate.

I. Lee and Yang Failed to Register as Agents and Prestige and Federated Employed or Associated with Unregistered Agents, in Violation of Section 1-402 of the OUSA

Section 1-402(A) of the OUSA makes it unlawful “for an individual to transact business in [Oklahoma] as an agent⁹ unless the individual is registered under [the OUSA] as an agent or is exempt from registration as an agent under subsection B of [Section 1-402].” Pursuant to Section 1-402(D), it is also illegal for “an issuer¹⁰ engaged in offering, selling, or purchasing securities in [Oklahoma], to employ or associate with an agent who transacts business in

⁹ Pursuant to Section 1-102(2) of the OUSA, an “agent” is “an individual, other than a broker-dealer, who represents . . . an issuer in effecting or attempting to effect purchases or sales of the issuer’s securities.”

¹⁰ Section 1-102(19) of the OUSA states that the term “issuer” means “a person that issues or proposes to issue a security[.]”

[Oklahoma] on behalf of broker-dealers or issuers unless the agent is registered under [Section 1-402(A)] or is exempt from registration under [Section 1-402(B)].” Defendants violated Section 1-402 of the OUSA.

(1) Lee and Yang are Unregistered Agents

By virtue of their efforts and activities in effecting or attempting to effect purchases or sales of the securities issued by the Prestige Enterprise, Lee and Yang are agents of the Prestige Enterprise. Lee and Yang have transacted business in Oklahoma as agents of the Prestige Enterprise. However, Lee and Yang have not been registered as agents, or in any other capacity, under the OUSA.

Pursuant to Section 1-503 of the Act, the burden of proving an exemption from registration is on the person claiming the exemption. Defendants have not raised the affirmative defense of the availability of an exemption from registration for transacting business in securities, and in fact, none apply to these transactions. Failure to plead an affirmative defense is a waiver of that defense. *RST Service Mfg.*, 628 P.2d at 368; *Bentley*, 41 F.3d at 604; *Renfro*, 948 F.2d at 1539. Accordingly, summary judgment on the issue of Lee and Yang acting as unregistered agents in violation of Section 1-402 of the OUSA is appropriate.

(2) The Prestige Enterprise associated with Unregistered Agents

The Prestige Enterprise violated Section 1-402 of the OUSA by associating with and/or employing Lee and Yang while it engaged in offering and selling securities in Oklahoma. Lee and Yang were clearly associated with, and/or employed by, the Prestige Enterprise. Lee was the lead trader, president, director, chairman, beneficial owner and/or principal portfolio manager of the Prestige Enterprise. Yang was an independent contractor of the Prestige

Enterprise and received commissions for soliciting pool participants. Both Lee and Yang used email addresses issued by domains of the Prestige Enterprise to communicate with investors. Accordingly, summary judgment on the issue of the Prestige Enterprise employing or associating with unregistered agents in violation of Section 1-402 of the OUSA is appropriate.

J. Defendant made Untrue Statements of Material Fact and Omissions of Material Fact in Connection with the Offer and Sale of Securities, in Violation of Section 1-501(2) of the OUSA

Section 1-501(2) of the OUSA makes it unlawful for a person, directly or indirectly, “to make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading,” in connection with the offer and/or sale of a security. Plaintiffs do not have to plead or prove culpability or scienter for purposes of Section 1-501(2). *See* Unif. Securities Act 2002, § 501, Official Comments; *Aaron v. SEC*, 446 U.S. 680, 696 (1980); *Trivectra v. Ushijima*, 144 P.3d 1, 15 (Haw. 2006); *Fibro Trust, Inc. v. Brahman Financial, Inc.*, 974 P.2d 288, 294 (Utah 1999).¹¹

For purposes of Section 1-501(2), the standard of materiality set forth by the U.S.

¹¹ In an effort to achieve coordination with federal law and uniformity in state securities regulation, the OUSA was modeled on the Uniform Securities Act of 2002, promulgated by the National Conference of Commissioners on Uniform State Laws (with some distinctions mostly related to oil, gas and other mineral production). Okl.St. Ann. tit. 71, Ch. 1, Refs & Annos. The particular section of the OUSA involved here, Section 1-501, is identical to Section 501 of the Uniform Securities Act. Section 501 of the Uniform Securities Act was modeled on Rule 10b-5 adopted under the federal Securities Exchange Act of 1934 and on Section 17(a) of the federal Securities Act of 1933, although it is not identical to either Rule 10b-5 or Section 17(a). Unif. Securities Act 2002, § 501, Official Comments. The Supreme Court of Oklahoma has used federal cases as instructive to interpret the State’s securities laws that are uniform to the federal securities laws. *See State ex rel. Day v. Southwest Mineral Energy, Inc.*, 617 P.2d 1334 (Okla. 1980).

Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), is applicable.¹² See *Basic Incorporated v. Levinson*, 485 U.S. 224 (1988). “The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.” *TSC Industries*, 426 U.S. at 445. A fact is material if there is a “substantial likelihood” that a reasonable investor would consider it important. See *TSC Industries*, 426 U.S. at 449; *Levinson*, 485 U.S. at 231. Further, an omitted fact is material if there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *TSC Industries*, 426 U.S. at 449.

1. Defendants made untrue statements of material fact in connection with the offer and sale of securities

In soliciting prospective investors and existing investors, Defendants misrepresented, *inter alia*, that: 1) for approximately sixteen years, Lee had been consistently profitable and never suffered losses in his trading on behalf of the Prestige Enterprise, 2) Prestige Enterprise and its agents were members of the NFA and registered with the Commission, 3) in December 2003, Federated had up to \$379 million in assets under management, 4) pool participants could withdraw money from their accounts at any time, and 5) Yang was merely a Prestige Enterprise investor.

There is a substantial likelihood that a reasonable investor would consider these untrue statements of fact to be important in making his investment decision. They would certainly alter the total mix of information available. As such, summary judgment on the cause of action of

¹² See *supra* note 11

untrue statements of material fact in violation of Section 1-501(2) is appropriate.

2. Defendants omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in connection with the offer and sale of securities

In connection with the offer and sale of securities, Defendants, directly and/or indirectly, omitted to tell investors: a) In 1995, Lee pled guilty to the felony offenses of bank fraud, securing execution of a document by deception, and theft over \$750, b) Lee was incarcerated from 1996 to 2001, c) In 1996, a civil judgment awarding private plaintiffs over \$3,000,000 was entered against Federated and Lee for defrauding the plaintiffs of substantial sums of money, d) Lee would use the investors' funds that were deposited into Prestige Enterprise bank accounts for the benefit of himself and his family even if his trading was unsuccessful, and e) the positive returns purportedly being credited to pool participants' accounts exceeded the returns being earned by trading.

The facts omitted by Defendants in their solicitations of prospective and existing pool participants were clearly necessary in order to make the statements made by Defendants not misleading. The omitted facts were also material. The total mix of information would have been significantly altered by the disclosure that Lee committed felonies and served prison time during part of the time period in which Defendants claimed Lee and Prestige Enterprise achieved great returns on trading, and that Lee has a multi-million dollar judgment against him for defrauding other persons of substantial sums of money. The total mix of information would have also been significantly altered by the disclosure that the profitable returns being reflected on the monthly account statements of the pool participants were false and exceeded the actual

returns being earned by the Prestige Enterprise. All of this information would have shed light on the actual trading record and legitimacy of Lee and the Prestige Enterprise. Accordingly, summary judgment on the cause of action for material omissions in violation of Section 1-501(2) is appropriate.

K. Defendants Employed a Device, Scheme, or Artifice to Defraud, in Violation of Section 1- 501(1) of the OUSA

Under Section 1-501(1) of the OUSA, it is unlawful for a person, directly or indirectly, “to employ a device, scheme, or artifice to defraud,” in connection with the offer or sale of a security. The Official Comments to the Uniform Securities Act of 2002 indicate that Plaintiffs are not required to plead or prove culpability for a cause of action under Section 1-501(1); however, federal case law and state court decisions interpreting the state securities laws similar to the OUSA, suggest that Defendants must have acted with scienter to have violated Section 1-501(1). *See Aaron*, 446 U.S. at 696; *Fibro Trust, Inc. v. Brahman Financial, Inc.*, 974 P.2d 288, 294 (Utah 1999); *Trivectra v. Ushijima*, 144 P.3d 1, 15 (Haw. 2006).

Scienter is the “intent to deceive, manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S.Ct. 1375, 1381, 47 L.Ed.2d 668 (1976). If proof of scienter is required, a finding of recklessness should be sufficient. *See Trivectra*, 144 P.3d at 14; *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996). Recklessness is “conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.” *Anixter*, 77 F.3d at 1232 (citing *Hackbart v. Holmes*, 675 F.2d 1114, 1117 (10th Cir. 1982)).

Here, Defendants employed a scheme in which they enticed pool participants to invest in the Prestige Enterprise by making untrue statements of material fact and omissions of material fact that led the pool participants to believe that the Prestige Enterprise was a successful trading company that consistently achieved positive returns. Lee clearly acted with intent to deceive, manipulate, and defraud. Lee, as the person operating the Prestige Enterprise, soliciting customers and handling customer funds, knew that his trading was not successful and that pool participant funds were being misappropriated for personal use and to pay purported profits to investors. Lee likewise knew that: 1) the Legacy Trading System was a fiction; 2) the account statements and balances provided to pool participants falsely represented that pool participants' investments were earning profits as a result of the Defendants' trading; and 3) he had been convicted of fraud and had an outstanding civil judgment of almost \$3 million against him. Without a doubt, Lee employed a scheme to defraud with scienter.

Likewise, Yang acted with scienter in Defendants' scheme to defraud. Yang engaged in conduct that is an extreme departure from the standards of ordinary care, and which presented a danger of misleading pool participants that was so obvious that Yang must have been aware of it. When Yang first learned of the Prestige Enterprise, he knew that it was most likely a Ponzi scheme. Yet, Yang never asked to see the trading records of the Prestige Enterprise. Instead, Yang started soliciting on behalf of the Prestige Enterprise. Yang told prospective pool participants that Prestige is a successful trading company and that Lee is an honest man. Yang even assisted in the preparation and distribution of marketing materials and other documents for the Prestige Enterprise. Some of those documents that Yang provided to pool participants represented that the Prestige Enterprise achieves great returns through the use of the Legacy

Trading System, but Yang knew that Yang made up the term “Legacy Trading System” to convince prospective pool participants that the Prestige Enterprise had a trading record. Yang has admitted that he did not do any independent research to determine whether certain other statements made in the materials he provided to pool participants were correct. Regardless of his lack of independent research, Yang spent many hours helping pool participants with their investments in the Prestige Enterprise. Yang’s conduct is an extreme departure from the standards of ordinary care and presented a danger of misleading pool participants that was so obvious that Yang must have been aware of it.

For those reasons, summary judgment on the cause of action under Section 1-501(1) is appropriate.

L. Defendants Engaged in an Act, Practice, and Course of Business which operated or would operate as a Fraud or Deceit upon any Person, in Violation of Section 1-501(3) of the OUSA

Under Section 1-501(3) of the OUSA, it is unlawful for a person, directly or indirectly, “to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person,” in connection with the offer and/or sale of a security. The language of Section 1-501(3) “focuses upon the effect of particular conduct on members of the investing public, rather than upon the culpability of the person responsible.” *Aaron*, 446 U.S. at 697; *See also* Unif. Securities Act 2002, § 501, Official Comments.

Here, Defendants misled pool participants into believing that the Prestige Enterprise is a successful trading company. Defendants created and distributed to prospective pool participants, marketing materials that were full of false and misleading statements including, but not limited to, representations that the Prestige Enterprise had achieved consistently high returns

from January 1987 through April 2003 without a single losing month. Defendants did not disclose in these marketing materials, or otherwise, the fact that the trader and President of the Prestige Enterprise, Lee, was in prison during some of that time period.

Defendants also created and distributed monthly account statements and reports reflecting the purported returns the Prestige Enterprise had generated as a result of trading with the Legacy Trading System. Both the monthly accounts statements and the reports reflected only positive returns. In actuality, the Prestige Enterprise sustained net losses of over \$4.3 million trading commodity futures, foreign currency, and securities.

Defendants clearly engaged in acts, practices, and a course of business that operated and would operate as a fraud or deceit upon investors, in connection with the offer and sale of securities.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that summary judgment be entered as to liability against Defendants Prestige, Federated, Lee and Yang and Relief Defendants Sheila Lee, David Lee, and Darren Lee.

Dated: September 1, 2010

Respectfully submitted,

/s/ James H. Holl, III

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OKLAHOMA DEPARTMENT OF SECURITIES

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2010, I caused the above motion to be served by U.S. mail on the following, who are not registered participants of the ECF System:

Simon Yang
1912 NW 176th Terrace
Edmond, OK 73012

Kenneth Lee
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Mt. Pleasant, SC 29466

Sheila Lee
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Mt. Pleasant, SC 29466

David Lee
2676 Palmetto Hall Blvd
Mt. Pleasant, SC 29466

Darren Lee
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I hereby certify that on September 1, 2010, I electronically transmitted the above motion to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

James H. Holl, III

Stephen J. Moriarty

Warren F. Bickford, IV

/s/ Terra Shamas Bonnell