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COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. ROBERT JOSEPH BEASLEY AND LONGBOAT GLOBAL FUNDS MANAGEMENT, LLC; Defendants.

No. C 05-2142 PJH

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

2005 U.S. Dist. Ct. Motions 94642; 2005 U.S. Dist. Ct. Motions LEXIS 46424

June 29, 2005

Motion to Appoint

VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court: Motion(s); Pleading(s)

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TITLE: DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR STATUTORY RESTRAINING ORDER PRELIMINARY INJUNCTION AND OTHER EQUITABLE RELIEF

TEXT: I. INTRODUCTION

The Commodity Futures Trading Commission ("CFTC") seeks preliminary injunctive and other ancillary relief against Defendants Robert Beasley ("Beasley") and Longboat Global Funds Management, LLC ("Longboat") on the grounds that they committed commodity pool fraud in connection with Piranha Capital, L.P. (the "Fund") a commodity pool administered by them, in violation of Section 4o(1) of the Commodity Exchange Act (the "Act"), *7 U.S.C. ß 6o(1)*. The alleged impropriety concerns the Fund's investment in certain promissory notes with entities controlled by Beasley. The CFTC has failed, however, to make the evidentiary showing required of it to obtain a preliminary injunction, [*2] namely, that (1) Longboat or Beasley engaged in illegal conduct in violation of the Act and (2) there is a reasonable likelihood of future violation.

As for the first element, that a violation occurred, the CFTC has failed to put forward sufficient evidence demonstrating that either Longboat or Beasley made misrepresentations or omissions of material fact or that they possessed the requisite intent to defraud the Fund. In fact, Longboat and Beasley provided all the Fund's investors with numerous risk disclosures related to the promissory notes Beasley purchased for the Fund sufficient to put them on notice of facts that the CFTC contends were never disclosed. Further, Longboat and Beasley made other disclosures and representations regarding the notes to the Fund's investors throughout the life of the Fund that, when considered in the total mix of information available to the Fund's investors, overcome the narrow and isolated statements the CFTC asserts misled the Fund's investors.

As for the second element, that a violation may reoccur, the CFTC has utterly failed to address it in its Memorandum in Support. The CFTC asserts simply, and incorrectly, that the alleged fraud by Longboat [*3] and Beasley is "ongoing." As set forth herein, however, the alleged misstatements or omissions last occurred more than a year ago and the CFTC does not contend that there has been any further misrepresentation or omission perpetrated against the Fund's investors by Longboat or Beasley since that time. Rather, Longboat and Beasley have cooperated fully with the CFTC, as well as the National Futures Association. Further, Beasley and/or entities he controls repaid a substantial portion of the notes before the CFTC ever became involved and expect to repay the balance within a matter of weeks if not days. Under these circumstances, there is no basis for finding that Longboat or Beasley are likely to violate the Act again and the request for a preliminary injunction should be denied.

The CFTC also asks the Court to freeze Longboat and Beasley's assets and to appoint a receiver to take over the administration of the Fund to secure the Fund's assets. Given the lack of any evidence that Longboat or Beasley are dissipating the assets of the Fund or of Beasley himself and the failure of the CFTC to establish any basis for injunctive relief; their complete cooperation with regulators and Beasley's [*4] ongoing and successful efforts to payoff the promissory notes he purchased for the Fund, there is no basis to impose either an asset freeze or to appoint a receiver. Defendants respectfully request, therefore, that the Court deny the CFTC's Motion in its entirety.

II. FACTUAL BACKGROUND

The CFTC does not allege that any oral misrepresentations were made to the Fund's investors when they were solicited to invest. The CFTC instead relies upon isolated written communications disseminated to the Fund's investors after most of the Fund's investors had already invested to support its claim that Longboat and Beasley misled the Fund. Even if the CFTC's allegations are assumed to be true, however, as explained more fully below Longboat and Beasley provided abundant risk disclosure and other information to investors, prior to and after they invested, that truthfully disclosed the nature of the Fund's investments.

A. Offering Documents

1. The Private Placement Memorandum

The Private Placement Memorandum ("PPM") (Exhibit 1), dated January 12, 2001, sets forth in detail the risks of investing in the Fund and was provided to all prospective investors. The PPM clearly articulates [*5] that the interests are speculative and offered only to "qualified eligible participants" as defined by CFTC Regulations. Exhibit 1, cover page. The limited partnership interests in the Fund were being offered only to "financially sophisticated high net worth individuals and institutions who satisfied" the investor suitability requirements set forth in the Subscription Agreement, *i.e.,* more than $ 2 Million in assets if an individual and more than $ 5 Million in assets for an institution. *See* Exhibit 1, PPM page 2 "Investor Eligibility;" Exhibit 2, page 8 (Subscription Agreement). So as to restrict investments in the Fund to "qualified eligible participants," each investor was also provided a Subscription Agreement, which was attached as an exhibit to the PPM, requiring them to give detailed information establishing their suitability for the Fund and acknowledging receipt and agreement to the terms of the PPM and the Agreement of Limited Partnership ("Partnership Agreement") Exhibit 2, page 1.

These broad risk disclosures underpin more specific disclosures contained in the PPM with respect to the promissory note investments of the Fund including:

. The authority of [*6] the General Partner to engage in related party transactions;

. The General Partner's discretion to invest in illiquid securities; and

. The illiquid nature of the investment in the Fund.

a. Authority of the General Partner to Engage in Related Party Transactions

As the PPM discloses, the General Partner has broad powers and rights to engage in related party transactions and self-dealing.

Partnership Agreement. The Partnership Agreement grants broad rights and protections to the General Partner and its affiliates. For example, ... **the General Partner has discretion to hire its affiliates to provide services to the Fund and to engage in principal transactions with the Fund**...

Exhibit 1, PPM page 5, ß 2 (emphasis added).

b. Authority of the General Partner to Investment in Illiquid Securities and the Illiquid Nature of the Investment in the Fund

Section 2 of the PPM explains that the General Partner has wide latitude to invest in any instruments and to alter its investment strategies.

> Lack of Investment Guidelines. The Partnership Agreement imposes no restrictions on the General Partner's investing for the Fund. The [*7] General Partner is free to invest in any instruments and to use any degree of leverage, and to alter its investment strategies (although the General Partner intends to invest in the manner summarized herein).

Exhibit 1, PPM page 5, ß 2.

Section 2 also advises potential investors that the Fund may also invest in illiquid securities.

> Lack of Liquidity in Markets. Despite the heavy volume of trading in securities, the markets for some securities have limited liquidity and depth. This lack of depth could be a disadvantage to the Fund, both in the realization of the prices, which are quoted, and in the execution of orders at desired prices.

Exhibit 1, PPM page 6, ß 2.

Further, the PPM advises investors, in a section entitled "Possible Illiquidity of Investment in the Fund," that "you should consider an investment in the Fund to be illiquid and long-term." *Id.*

Lastly, the PPM makes clear that it does not attempt to identify each risk of investment and that investors should contact the General Partner if they wish to obtain more information. *Id.,* ß 2, page 7.

2. The Partnership Agreement

The Partnership Agreement reaffirms the disclosures [*8] in the PPM regarding the General Partner's authority to engage in related-party transactions with the Fund. *See* Exhibit 3 (Partnership Agreement). Specifically, under the terms of the Partnership Agreement each investor agreed that the General Partner had the authority to act as an owner, officer or member of, or to serve as an operator of or adviser to, any entity in which the Fund invests and to receive a share of the profits or fees from such entity:

> ß 7.2 Activities of General Partner and Affiliates; Interested Partners
>
> (a) **...[N]othing in this Section shall preclude the General Partner or any Affiliate thereof from: (i) acting consistent with the foregoing, as a director, stockholder, officer, or employee of any corporation, a trustee of any trust, a partner of any other partnership, a member or manager of any limited liability company, or an administrative official of any other business or governmental entity, regardless of whether the Fund invests in or has dealings with the entity;** (ii) receiving compensation for services rendered thereto, or participating in profits derived from investments in, any such entity; or (iii) from investing in any Financial [*9] Instruments, or other property for his account.

Exhibit 3, Partnership Agreement, page 13, ß 7.2 (emphasis added). The Partnership Agreement also explains that the investor's initial investment is subject to a nine month lock-up period. *See id.,* page 11, ß 6.2.

B. Other Representations to Investors

In addition to the written disclosures provided to investors, Longboat also discussed its real estate investment strategy with prospective investors and that it would be part of the Fund's "global, total-return strategy." *See* Exhibit 1, page 1, ß 1 ("Investment Strategy and Objective"). During voluntary testimony Beasley provided the CFTC in its investigation of this matter, Beasley stated that it was his practice to tell prospective investors about the Fund's investment strategy to purchase real estate notes:

> Q: Did you ever at any time inform the partners or investors that real estate notes would be a vehicle or an instrument or a strategy that you would be using or that the fund would be using?
>
> A: Yes.
>
> Q: And when did you first inform them of that?
>
> A: Periodically in conversations with potential investors we would talk about some of the [*10] underlying assets of the fund, some of the potential strategies. So initially in some conversations with investors we would talk about, you know, what was in the fund and where we intended to go.
>
> Q: Prior to actually investing in the real estate notes, did you ever speak with people who had either invested or potential investors indicating that real estate notes were going to become a vehicle or strategy that the fund was going to use?
>
> A: In some cases, yes.
>
> Q: When you say "in some cases," can you put a percentage on that? I know it would be difficult, but -
>
> A: You know, maybe a third to half would be a best estimate.

Exhibit 4, Beasley Interview pp. 34 ln. 7 -- 35 ln. 6. Beasley further testified that other Longboat salesman, who also spoke with investors, were aware of the Fund's real estate note investment strategy. *Id.,* pp. 35 ln. 11 -- 36 ln. 7.

C. The Promissory Notes

1. The 2001 Longboat Note

On March 16, 2001, Longboat Global Advisors, LLC ("Longboat Advisors") - a related entity operated by Beasley - executed a promissory note (the "2001 Longboat Note") reflecting a line of credit established in favor of Longboat Advisors upon [*11] which it could draw up to an amount of $ 2 Million at an interest rate of 12% per annum with a maturity date of June 30, 2002. *See* Exhibit 5(A) (March 16, 2001 Longboat Note). On April 1, 2002, the maturity date for the 2001 Longboat Note was extended until June 30, 2003. *Id.* Beasley testified that the proceeds from this note were used to acquire another entity and its real estate assets, Diamond B, LLC (which owned an 80 acre property and equestrian facility in Montana), and to contribute toward the purchase of other real estate assets for Lewis & Clark, LLC. Exhibit 4, Beasley Interview at pp. 85 ln. 20 -- 86 ln. 13. These acquisitions took place between 2001 and 2002, after the Longboat Note was executed. The Complaint correctly states that the Longboat Note "lists no real property that is security for the note." Complaint, P 28. The Complaint fails to state, however, that neither Longboat nor any related entity had purchased any real property at the time the 2001 Longboat Note was executed. Instead, Beasley executed a personal guaranty on the Longboat Note. Exhibit 4, Beasley Interview pp. 83-84. As the CFTC admits in its Complaint, both "the existence of the March 16, 2001 Longboat [*12] Note, and the fact that it was personally guaranteed by Beasley, was disclosed to Piranha Participants in its 2001 annual report." Complaint, P 29.

Indeed, the Fund's 2001 Annual Report, dated March 25, 2002, not only disclosed the existence and amount of the 2001 Longboat Note and Beasley's personal guarantee, but also disclosed that the entity to which the 2001 Longboat

Note had been issued was a related party and specifically excepted the 2001 Longboat Note from a list of other promissory notes. *See* Exhibit 6, Notes 5 and 6 at pp. 8 - 9 (emphasis added). The 2001 Annual Report thus gave investors notice that: (1) as of at least March 25, 2002, Beasley had caused the Fund to invest $ 2 Million in a promissory note (the "Longboat Note"), (2) it was issued to a related party, (3) Beasley had personally guaranteed that Note, and (4) it was NOT secured against any real estate.

2. The Other Promissory Notes

On April 1, 2002, Beasley executed another promissory note representing a line of credit for Longboat Advisors of $ 2 Million due and payable by March 30, 2003 (the "2002 Longboat Note"). Exhibit 5(B). The proceeds of this note were used to complete the purchase of, [*13] and to make improvements upon, BW Ranchland for Lewis & Clark, LLC. *See* Exhibit 4, Beasley Interview pp. 88 ln. 2 -- 89 ln. 8. The 2002 Longboat Note was also personally guaranteed by Beasley. *See* Exhibit 5(B). Although the face value of the 2001 and 2002 Longboat Notes (collectively the "Longboat Notes") totaled $ 4 Million, Longboat Advisors only drew down approximately $ 3.875 Million against the two lines of credit. *See* Exhibit 4, Beasley Interview pp. 101 ln. 22 -- 105 ln. 7.

Late in 2002, the Longboat Notes were converted into three new notes in order to clarify the total amounts due to the Fund under each note, to align the notes with the entities that had received the loan proceeds, to extend certain of the repayment dates and to reflect the current values of the properties underlying the Longboat Notes. *See* Exhibit 4, Beasley Interview pp. 87 ln. 2 -- 88 ln. 1, 96 ln. 5 -- 100 ln. 19. One note was issued by Diamond B Quarterhorse Ranch, LLC - a Beasley related entity - for $ 1.2 Million (the "Diamond B Note") at 12% interest due June 2004 but pre-dated to March 16, 2001 because the funds had already been drawn against the 2001 Longboat Note. *Id.; see also* [*14] Exhibit 7 (Diamond B Note). The other two notes were issued by Lewis & Clark LLC (the "Lewis & Clark Notes") - another Beasley related entity - the terms of which varied depending upon whether they related to the 2001 or 2002 Longboat Notes. Exhibit 8(A) and (B). Thus, the Fund received an $ 800,000 Lewis & Clark Note at 12% interest due June 30, 2004 pre-dated to March 16, 2001 to correspond with the 2001 Longboat Note. Exhibit 8(A). The Fund also received a $ 1,875,000 note at 10% due March 30, 2003, dated 2002 to correspond with the April 2002 Longboat Note. Exhibit 8(B). Hereinafter, the Diamond B and Lewis & Clark Notes are collectively referred to as the "Montana Notes."

D. Subsequent Disclosures Concerning the Montana Notes

The CFTC acknowledges in its Memorandum in Support of its Motion (cited as "Pl. Mem. at ") that Longboat and Beasley disclosed to the Funds' investors detailed information regarding the Fund's investment in the Montana Notes in July 2004. *Cf.* Pl. Mem. Part III.D; *with* Part III.F. There were, however, intervening disclosures in the Fund's 2002 and 2003 Annual Reports that were not as detailed as the 2001 Annual Report. To the extent [*15] these reports caused any confusion, that confusion was resolved by the 2004 disclosures.

On July 2, 2004, Longboat sent a detailed letter and Quarterly Report signed by Beasley to investors to address disclosure and valuation issues with respect to the Fund raised by the National Futures Association ("NFA"), the self-regulatory organization of the Futures Industry. The letter, which was approved by the NFA beforehand, described the status of all the "real estate linked notes" and reiterated disclosures made in the 2001 Annual Report, including:

(1) The existence of related party transactions with entities owned and controlled by Beasley;

(2) That none of the notes had yet been repaid;

(3) That almost none of the notes had a perfected security interest;

(4) That the calculation of the Fund's Net Asset Value ("NAV") included the outstanding principal and interest due on the notes; and

(5) That Longboat's incentive and management fees were based on the Fund's NAV.

See Exhibit 9.

To the extent there were any misunderstandings relating to the 2002 and 2003 Annual Reports, the July 2, 2004 letter corrected them. The July 2 letter notified the Fund's [*16] investors of any details from the 2002 and 2003 Annual

Reports, especially with regard to related-party transactions. The CFTC has not alleged, or even suggested, that Longboat or Beasley misled investors in any way after the July 2, 2004 letter. *See* Pl. Mem. at 11.

E. Regulatory Action and Defendants' Cooperation

As a result of a routine audit of Longboat, the NFA raised concerns for the first time regarding Longboat's disclosures and valuation of the notes in early 2004. Longboat and Beasley cooperated fully with the NFA. At the request of the NFA, Longboat agreed to send the July 2 letter to provide investors with more detailed information regarding the promissory note investments. Longboat cooperated with NFA in other ways as well including retaining independent, real estate counsel to evaluate whether the various promissory notes were secured and, if necessary, to perfect security interests for each of the promissory notes. The expert concluded that the promissory notes were unsecured and virtually impossible to value. This information was shared with the NFA.

F. Repayment of the Promissory Notes

In connection with a Member Responsibility Action ("MRA") filed [*17] by the NFA on September 20, 2004, which Longboat and Beasley have not yet challenged, Beasley and Longboat were constrained from:

> 1. Soliciting or accepting any funds or other things of value from any prospective or existing customer or participant in any pool that Longboat and/or Beasley operate;
>
> 2. Disbursing any funds from any pool trading account and other accounts holding pool funds, without prior approval from NFA; and
>
> 3. Making any loans of pools funds, or investing any promissory notes or other debt instruments or in any real estate related investment, without prior approval from the NFA.

Exhibit 10, page 1. Further, Longboat and Beasley were required to give notice to all investors regarding the MRA. Although Beasley and Longboat have cooperated - and continue to cooperate with NFA - the CFTC asserts that additional and immediate injunctive relief must be imposed against Longboat and Beasley because "[s]ince the NFA took their action in September 2004, the Defendants have failed to pay the unpaid notes, or at the very least, secure the pool's promissory notes." Pl. Mem. At 12. The CFTC's allegations are disingenuous.

Indeed, as the CFTC conceded [*18] in its Complaint, the Diamond B Note has now been fully repaid. Complaint, P 38. More, the CFTC omits to advise the Court of the circumstances culminating in the repayment of the Diamond B Note. Specifically, between August 2004 (before the MRA) and January 2005 (before the CFTC Action) Beasley paid down almost $ 1,800,000 on the $ 1,200,000 Diamond B Note - inclusive of both principal and all interest accrued through January 2005. The Fund's investors, therefore, received the entire benefit of the bargain on the Diamond B Note. With respect to the Lewis & Clark Notes, as the CFTC well knows, Beasley, through counsel, has been working toward finalizing security interests (beyond Beasley's personal guarantee) that would protect the Fund. Regardless, it is anticipated that the Lewis & Clark Notes will be repaid in full in the next few weeks from the proceeds of the BW Ranchland property that is expected to close within the next few weeks if not days.

With this background in mind, and as set forth below, the CFTC cannot sustain its burden of proof to establish that the entry of a preliminary injunction or other relief against defendants is appropriate in this case.

III. ARGUMENT [*19]

A. Standards for Preliminary Injunction and Other Relief

The CFTC seeks a preliminary injunction pursuant to Section 6c(a) of the Commodity Exchange Act, *7 U.S.C. ß 13a-1*, which authorizes the CFTC to seek injunctive relief "[w]henever it shall appear to the Commission that any registered entity or other person has engaged, is engaging, or is about the engage in any act or practice constituting a violation of any provision of this Act...." To obtain injunctive relief, the CFTC must establish (1) a prima facie case that that defendants engaged in illegal conduct in violation of the Act and (2) a reasonable likelihood of future violations of the Act. *See CFTC v. British American Commodity Options Corp., 560 F.2d 135, 141-142 (2d Cir. 1977).*

A "prima facie" showing that a defendant has engaged in illegal conduct is equivalent to demonstrating a "likelihood of success on the merits" as typically required for a preliminary injunction. *See SEC v. Unifund SAL, 910 F.2d 1028, 1037 (2d Cir. 1990); also U.S. v. Nutri-Cology, Inc., 982 F.2d 394, 397-98 (9th Cir. 1992).* The courts have recognized, however, that [*20] a heightened standard of proof applies where, as here, the Commission seeks to obtain "mandatory" injunctive relief prohibiting future violations of the securities laws. In *Unifund SAL,* the Second Circuit observed that:

> even when applying the traditional standard of "likelihood of success," a district court, exercising its equitable discretion, should bear in mind the nature of the preliminary relief the Commission is seeking, and **should require a more substantial showing of likelihood of success, both as to violation and risk of recurrence,** whenever the relief sought is more than preservation of the status quo. Like any litigant, the Commission should be obliged to make a more persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks.

910 F.2d at 1039 (emphasis added). When confronted, therefore, with a motion for preliminary injunction by a governmental agency, such as the CFTC, the Court must first consider the nature of the injunctive relief being sought to determine the appropriate evidentiary standard for assessing the sufficiency of the evidence proffered. *Id. at 1040* [*21] ("the test of sufficiency varies with the nature of the relief sought . . . .").

Here, the CFTC seeks a statutory restraining order and preliminary injunction against defendants:

> (1) prohibiting any future violations of Section 4o(1)(A) and (B) of the Act;
>
> (2) freezing the funds, assets and other property of Defendants;
>
> (3) prohibiting the destruction of records or denying Commission officials access thereto; and
>
> (4) preventing further customer harm by appointing a receiver to protect pool assets.

Pl. Mem. at 13.

1. A Prohibition Against Future Violations of the Act Requires a Substantial Showing of Likelihood of Success As to the Existence of a Current Violation and the Risk of Future Violation.

The first and third categories of relief sought by the CFTC, and especially prohibiting future violations under the Act, have "grave consequences," as the Second Circuit held in *Unifund SAL,* in that it subjects the defendant to contempt sanctions if its subsequent activity is deemed unlawful and also has serious collateral effects. *Unifund SAL, 910 F.2d at 1040.* Courts have considered as "collateral effects" the impact to professional [*22] reputation and economic harm suffered by defendants in the financial services industry "especially on charges of fraud" in that they "stand to lose considerable business and respect in their communities if even a preliminary injunction is entered." *See SEC v. Gonzalez de Castilla, 145 F. Supp. 2d 402, 415 (S.D.N.Y. 2001).* Here, as in *Unifund SAL,* the CFTC seeks to prohibit future violations. Thus, that the injunctive relief it seeks is properly characterized as "mandatory" in that it would accomplish significantly more than the preservation of the status quo. Accordingly, the CFTC must make a "substantial showing of a likelihood of success as to the existence of a current violation and the risk of repetition." *Unifund SAL, 910 F.2d at 1040.* The CFTC must also make this showing with respect to each defendant individually. *See CFTC v. Incomco, Inc., 580 F. Supp. 1486, 1489-90 (S.D.N.Y. 1984).*

2. An Asset Freeze and The Appointment of a Receiver Requires Careful Consideration Before Such Relief is Justified.

The second and fourth categories of relief sought by the CFTC, *i.e.,* an asset freeze and the appointment of a receiver, [*23] are in the nature of ancillary relief. *See CFTC v. Co Petro Mktg. Group., Inc., 680 F.2d 573, 582-83 (9th Cir. 1982).* In granting ancillary relief, however, the Court should consider whether such relief is justified as a means of preventing the likelihood of future harm. *See id.*

While the primary purpose for an asset freeze is to facilitate compensation of defrauded investors in the event a violation is established, "the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief." *SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972).* Thus, an asset freeze requires careful consideration, especially where the "disruption of defendants' business affairs" could destroy the defendant. *Id.*

Likewise, before appointing a receiver, the Court must weigh the disadvantages of the appointment of the receiver against the considerations indicating the need for such relief, including, for example, the need "to prevent diversion or waste" of assets and "to investigate and 'ascertain the true state of affairs.'" *See CFTC v. Morgan, Harris & Scott, Ltd., 484 F. Supp. 669, 677-78 (S.D.N.Y. 1979)* [*24] (citation omitted).

B. The CFTC Has Failed to Make A Substantial Showing that Defendants Have Violated the Act.

The CFTC alleges that Longboat and Beasley committed fraud against the Fund in violation of Sections 4o(1)(A) and (B) of the Act, *7 U.S.C. ßß 6o(1)(A)* and (B), based upon selected misrepresentations and/or omissions, which purportedly misled investors about the condition and security of Piranha's assets. Pl. Mem. 17-18. Based on the substantial disclosures provided to investors before they invested, however, the CFTC cannot sustain its high burden of proof and make a substantial showing that Longboat and Beasley violated the Act.

1. Establishing a Claim Pursuant to Sections 4o(1)(A) and (B)

Section 4o(1)(A), prohibiting financial advisers from "employing any device, scheme or artifice to defraud any client," requires proof of: (1) a misrepresentation or omission (2) of a material fact (3) with the intent to deceive. *See 7 U.S.C. ß 6o(1)(A)*; *Messer v. E.F. Hutton & Co., 833 F.2d 909, 919 (11th Cir. 1987).* The language of Section 4o(1)(B) reads slightly differently, prohibiting investment advisers [*25] from "engag[ing] in any transaction, practice or course of business which operates as a fraud or deceit upon any client," which courts have interpreted as not requiring proof of intent because the "operates as" language focuses upon "the effect of the action rather than on the actor's state of mind." *See 7 U.S.C. ß 6o(1)(B)*; *Messer, 833 F.2d at 919.* However, Section 4o(1)(B) still requires proof of a misrepresentation or omission of a material fact that "operated" as a fraud upon the adviser's client. *Messer, 833 F.2d at 919.*

Absent substantial evidence that Longboat and Beasley made misrepresentations or omissions of a material nature, therefore, the CFTC's claims pursuant to Section 4o(1) of the Act must fail. Even assuming, however, that the CFTC could sustain its burden of proof that material misrepresentations and omissions were made to the Fund's investors, it cannot demonstrate that both Longboat and Beasley possessed the requisite intent to deceive the Fund to sustain a claim for fraud under Section 4o(1)(A) of the Act.

2. The CFTC Has Failed to Establish that Longboat and Beasley Misrepresented and Omitted Material [*26] **Facts to the Investors.**

The CFTC alleges that Longboat and/or Beasley misrepresented and omitted essentially four facts related to the "condition and security" of the Fund's investments:

> (1) The defendants informed pool participants through annual reports, signed by Beasley, that the notes held by the Fund were all secured with security interests in real property;
>
> (2) The defendants failed to inform pool participants that Beasley controlled the entities that the Fund was lending money to and that the only security for these loans was Beasley's personal guarantee;
>
> (3) Beasley failed to inform Piranha pool participants that the entities he controls have not made their interest or principal payments on the notes, that the notes are in default and that he continued to take management and incentive fees based on money his companies owed on the notes but never paid; and
>
> (4) Beasley never disclosed to pool participants that he was not seeking to enforce the terms of these notes and collect monies owed to the pool.

Pl. Mem. at 17-18.

Whether a misrepresentation or omission has been made "depends upon the 'overall message' and the 'common understanding' of [*27] the information conveyed." *See CFTC v. R.J. Fitzgerald, 310 F.3d at 1328 (11th Cir. 2002).* The total mix of information available or provided to investors, here, establishes that neither Longboat nor Beasley purposefully engaged in the alleged misrepresentations or that these facts were material to investors.

a. Defendants Did Not Misrepresent the Security Interests for or Omit to Disclose Beasley's Control of Entities Related to the Notes Guaranteed by Beasley.

In seeking preliminary injunctive relief, the CFTC overreaches, alleging in its Motion and supporting papers that Longboat and Beasley committed a fraud with respect to *all* the promissory notes, not just the Montana Notes (*see* Complaint, PP 51-57). It is axiomatic that the CFTC cannot allege a fraud in support of its motion for preliminary injunction that is not alleged in the Complaint. It is assumed, therefore, for purposes of analysis, that the CFTC's allegations that defendants misrepresented or omitted material information are limited to the Montana Notes.

Considering the "overall message" conveyed by Longboat and Beasley with respect to the Montana Notes and the predecessor notes, they [*28] did not misrepresent or omit facts relating to the security interest for the notes or Beasley's control of related entities. First, the 2001 Annual Report explicitly stated that: (1) the Fund had purchased a note from Longboat Advisors, an entity that Beasley controlled; (2) that Beasley had personally guaranteed that note and (3) that the 2001 Longboat Note was excluded from the list of other promissory notes purportedly secured by real estate. *See* section II.C.1., *supra.* Second, notwithstanding any potentially misleading statements in the 2002 and 2003 Annual Reports, it is undisputed that as of July 2004, only months after the 2003 Annual Report was issued, Longboat and Beasley provided complete details on all the promissory notes, including that Beasley controlled entities to which the Fund had issued notes and that the Fund did not hold perfected security interests in any of the notes, but that Beasley had personally guaranteed certain notes issued to the Fund. *See* section II.D., *supra.*

Combined, the disclosures set forth in the 2001 Annual Report and the corrective statements set forth in the July 2004 letter nullified any potential misunderstanding perpetuated [*29] by the 2002 and 2003 Annual Reports regarding the Montana Notes. Simply put, Longboat and Beasley cannot be accused of misrepresenting or omitting to disclose information that they did in fact disclose to Fund investors.

b. The Total Mix of Information Available to the Fund's Investors Rendered Immaterial Any Misstatements or Omissions.

Assuming, without conceding, that Longboat and Beasley misrepresented or omitted to disclose the individual facts alleged by the CFTC in paragraphs (1) and (2), the CFTC cannot establish that information was "material." At best, those facts were trivial or tangentially related facts. As the CFTC has recognized:

> To be actionable, a misstatement of fact must involve a fact that is material. The function of the materiality requirement is to weed out actions based on trivial or tangentially related representations. "A statement or omitted fact is material if it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." Whether or not the misrepresented or omitted fact is important, such that the reasonable investor would attach significance to the fact as part of his decision, [*30] turns on whether a reasonable investor would regard the fact as significantly altering the total mix of information available.

Sudol v. Shearson Loeb Rhoads Inc., [1984 -- 1986 Transfer Binder], Comm. Fut. L. Rep. (CCH) P 22,748, at 31, 118-119 (CFTC Sept. 30, 1985) (*citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976))* (other citations omitted). The question, therefore, is whether a reasonable investor would have considered the information that the CFTC alleges was misstated or omitted would be important to their investment decision in light of the "total mix" of information in its possession.

The CFTC argues that the alleged misstatements in the 2002 and 2003 Annual Reports regarding the security interests for the Montana Notes related to the "condition and security" of the Fund's investments. The CFTC's argument falters, however, because the timing of those statements renders them at best "tangential" to an investor's decision to invest in the Fund.

The 2002 Annual Report was not issued until March 20, 2003. *See* Exhibit 11, page 1 (2002 Annual Report). Thus, the alleged misstatement in the 2002 Annual Report that [*31] all the promissory notes, including the Montana Notes, were secured against real estate, was not circulated to investors until at least the end of March 2003. By that time, however, approximately 85% of the Fund's investors had already invested their funds. *See* Exhibit 12 (Table of Investment and Capital Return Dates detailing the dates of investment by each Fund investor). Thus, a substantial majority of the Fund's investors did so without regard to whether Beasley had also secured those notes against real estate and did so on notice of the accurate facts contained in the 2001 Annual Report. At best, the statements in the 2002 Annual Report could only be "material" to the investors who did not receive the 2001 Annual Report - *i.e.,* new investors after March 2003.

Yet anyone investing after March 2003 would also have been subject to the Fund's nine-month lockup period (*see* section II.A.2., *supra*). Thus, even assuming those new investors reviewed the 2002 Annual Report (and did not see the 2001 Annual Report) and invested on the basis of its information, the lock-up period precluded them from altering their investment decision - such as to redeem their investments [*32] - until 2004 regardless of whether Beasley or Longboat advised investors of facts contrary to the 2002 Annual Report. Although the 2003 Annual Report - which wasn't issued until March 2004 - repeated the statements contained in the 2002 Annual Report, shortly afterwards Longboat and Beasley issued the July 2004 letter, which fully disclosed the information the CFTC asserts was previously withheld from investors.

Because the statements in the 2002 and 2003 Annual Reports were not issued until after most of the Fund's investors had already decided to invest, the representations regarding the promissory notes in those reports were "tangential" at best and not instrumental to one's decision to invest in the Fund.

Similarly unavailing is the allegation that Beasley failed to inform pool participants about his control of entities that borrowed from the Fund or that his personal guaranty was the only security for the notes. Assuming, without conceding, that Beasley could have disclosed some additional information on these issues not already contained in the PPM, the Partnership Agreement, the 2001 Annual Report or the July 2004 letter (as discussed above), the materiality of that information [*33] would be substantially diluted by the total mix of information already disclosed, namely that: (1) Longboat was authorized to engage in related party transactions; (2) Longboat did engage in related party transactions with entities controlled by Beasley and (3) the notes personally guaranteed by Beasley were not secured by real estate. Thus, the hypothetical omission of some other kernel of information regarding Beasley's control of entities borrowing from the Fund or his personal guaranty would only have been duplicative and not material to one's investment decision in light of the information already disclosed.

c. The Factual Bases for the Remaining "Omissions" Are Without Merit

The CFTC also argues that Longboat and Beasley failed to advise investors regarding the default on the Montana Notes, receipt of management and incentive fees on notes that had not been paid and his alleged intention not to enforce the terms of the notes and collect monies owed to the Fund. Pl. Mem. at 17-18. These allegations are baseless and contradicted by the Complaint itself.

First, the PPM and Partnership Agreement provide that management and incentive fees will be paid based on unrealized [*34] as well as realized profits. *See* Exhibit 1, PPM ß 2 page 5 ("Because the [incentive] allocation is based on unrealized as well as realized gains, the General Partner could earn an incentive allocation based on positions that were unprofitable when eventually liquidated."); *also* PPM ß 6 page 9 ("the [management] fee is paid regardless of whether the Fund is profitable."). Further, the July 2004 Letter disclosed that at that time "none of the notes had been repaid." Exhibit 9 (July 2004 letter). As the CFTC now concedes, since that time, the Diamond B Note has been fully repaid thus belying the notion that Beasley possessed an intention not to repay the notes. *See* Complaint, P 38. And because the Diamond B Note has now been paid - and the Lewis & Clark Notes soon will be - the Fund is receiving the full benefit of its investment in those notes. Thus, there was nothing illicit about the incentive and management fees earned by Longboat on those notes for Beasley to disclose. Moreover, in light of Beasley's repayment on the Diamond B Note and the impending sale of property to repay the Lewis & Clark Notes, it is beyond doubt that Beasley has, and had, every intention to [*35] enforce the terms of the notes and to collect monies owed to the Fund. Again, it is impossible for Beasley to have omitted to disclose facts regarding an intent he did not possess.

3. The CFTC Has Failed to Establish that Longboat and Beasley Possessed the Requisite Intent to Defraud the Fund.

Intent to commit fraud is met when "Defendant's conduct involves highly unreasonable omissions or misrepresentations . . . that present a danger of misleading [customers] which is either known to the Defendant or so obvious that Defendant must have been aware of it." *R.J. Fitzgerald, 310 F.3d at 1328.* Here, the CFTC alleges that Longboat and Beasley "knowingly made" the material misrepresentations and omissions discussed in section III.B. above. Pl. Mem. at 17. But the CFTC has failed to make a "substantial showing" that Longboat or Beasley "knowingly," or even recklessly, made the misrepresentations or omissions complained of to demonstrate their intent to defraud the Fund's investors.

The evidence adduced to date, including the written disclosure provided to investors combined with Beasley's Interview, fails to establish that Beasley and Longboat "knowingly" misrepresented [*36] the security for the promissory notes guaranteed by Beasley or that they sought to conceal related party transactions from investors. To the contrary, the disclosures in the 2001 Annual Report establish that Longboat and Beasley had no intention to defraud but rather sought to inform investors that the Longboat Notes were not secured by real estate but rather were backed only by Beasley's personal guarantee. *See* section II.C. 1., *supra.* That same report also made clear that Longboat had engaged in related party transactions with entities controlled by Beasley. *Id.*

Importantly, there is no evidence that Beasley was even aware of the change in disclosure from the 2001 Annual Report to the 2002 Annual Report. When questioned by the CFTC about the differences in disclosures between the 2001 and subsequent Annual Reports, Beasley testified that he did not know why the disclosures were omitted from the 2002 and 2003 Annual Reports and that the auditor was responsible for the disclosures. *See* Exhibit 4, Beasley Interview p. 132 lns. 11-19. Absent evidence that Beasley was substantially involved in the preparation of the 2002 and 2003 Annual Reports, the CFTC cannot show that [*37] Beasley knew of and intended to mislead investors with the representations in those reports. *Cf. CFTC v. American Metal Exchange Corp., 693 F. Supp. 168, 194 (D.N.J. 1988)* (finding defendant knowingly made false and misleading statements in a promotional brochure sent to investors, which he had been closely involved in preparing and reviewing).

Finally, the lack of any motive for the alleged misstatements in the 2002 and 2003 Annual Report derails the CFTC's argument that Longboat and Beasley sought to mislead investors with those reports. First, the 2001 Annual Report had already disclosed the nature of the notes. If, as the CFTC seems to argue, Beasley intentionally omitted information from the 2002 and 2003 Annual Reports regarding the Montana Notes with the intent of benefiting himself or entities he controlled, why then did Beasley also personally guarantee the Montana Notes when he converted them from the Longboat Notes? In other words, there was no reason to omit the previous disclosures in the 2002 and 2003 Annual Reports if Beasley continued to guarantee the Montana Notes personally. Nor is there any evidence that Beasley did not intend to make good on his [*38] personal guarantee of the Montana Notes, as evidenced by Beasley's payoff of the Diamond B Note with $ 1,200,000 from the sale of personal assets.

The CFTC's allegations are insufficient to establish that Beasley was even aware of the changes to the 2002 and 2003 Annual Reports, much less that he or Longboat intended to defraud investors based on them. Accordingly, the CFTC has not shown, and cannot meet, its burden of proof in demonstrating that Longboat and Beasley possessed the requisite intent to defraud investors in support of its claim pursuant to Section 4o(1)(A) of the Act.

4. The CFTC's Other Claims Cannot Establish a Violation of the Act Because They Are Predicated Upon its Deficient Section 4o(1) Claims.

The CFTC also contends that Longboat and Beasley are mutually responsible for the other's violation of Section 4o(1): Longboat vicariously for Beasley's conduct pursuant to Section 2(a)(1)(B) of the Act, *7 U.S.C. ß 2(a)(1)(B)*, and Beasley as a controlling person of Longboat pursuant to Section 13(b) of the Act, *7 U.S.C. ß 13c(b)*. Pl. Mem. at 18-19. Having failed to make the substantial showing necessary to support a violation [*39] of Section 4o(1) of the Act, therefore, the CFTC cannot rely upon either of these other other claims in the alternative for the preliminary injunction.

C. The CFTC Has Failed to Make Any Showing that there is a Risk of Future Violation of the Act By Defendants.

The CFTC makes no attempt to show that there is a risk of recurrence or future violation by Longboat or Beasley. Still, it concedes in order to obtain a preliminary injunction pursuant to Section 6c of the Act, it must demonstrate not only that a violation has occurred, but that there is a likelihood of future violation of the Act. *See* Pl. Mem. at 14 (citing cases); *also British American, 560 F.2d at 141.* The CFTC simply avers, without support, that "defendants' continuing failure to secure any of pool's [sic] notes is evidence that violations of the Act are likely to continue unless enjoined." Pl. Mem. at 20. The CFTC's unsupported statement is insufficient to meet the "substantial showing" of a likelihood of future violation required for a preliminary injunction to issue. *See Unifund SAL, 910 F.2d at 1039.* Absent further proof, the CFTC has utterly failed to demonstrate that [*40] a likelihood of future violation is present here with respect to Longboat and Beasley. On this basis alone its Motion should be denied.

The only basis upon which the CFTC could even arguably attempt to demonstrate a likelihood of future violation is based upon a showing of a past violation - *i.e.,* Longboat and Beasley violated the Act as discussed above. Past unlawful conduct may be considered as part of the totality of the circumstances for determining likelihood of future harm, *see, e.g., CFTC v. Co Petro Mktg. Group, Inc., 502 F. Supp. 806, 818 (C.D. Cal. 1980); CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir. 1979); CFTC v. Incomco, Inc., 580 F. Supp. 1486, 1489 (S.D.N.Y. 1984),* although past wrongs in and of themselves are insufficient for the grant of an injunction. *See FTC v. Evans Products Co., 775 F.2d 1084, 1087 (9th Cir. 1985).* Nevertheless, the CFTC has even failed to demonstrate a past violation of the Act by Longboat and Beasley (as established above) so that it cannot rely on this ground to demonstrate a likelihood of future violation. Other factors courts have considered to determine the likelihood [*41] of future violation include: (1) the isolated or recurrent and systematic nature of the infraction; (2) the degree of scienter involved; and (3) whether defendant will be in a position in which future violations could be possible. *See Co Petro, 502 F. Supp. at 818; Hunt, 591 F.2d at 1220; Incomco, 580 F. Supp. at 1489.* The fundamental question underlying all these considerations is whether it is reasonable to assume that the defendant would continue to violate the Act if not enjoined. *See Co Petro, 502 F. Supp. at 818-19.* Considering the "totality of the circumstances" in this case, there is no reasonable basis upon which to assume that Longboat or Beasley are either violating or would continue to violate the Act.

1. The Fraud Allegedly Committed by Beasley and Longboat Is Not Ongoing.

As alleged in the Complaint, the misrepresentations or omissions alleged to have been committed by Longboat and Beasley are confined to the 2002 and 2003 Annual Reports (last issued in March 2004). *See* Complaint, PP 46-57. Further, the CFTC concedes that in the July 2004 letter to investors, Longboat and Beasley disclosed [*42] the facts regarding the lack of perfected security interests for the notes and Beasley's control of entities that have issued notes to the Fund. *See* Pl. Mem. at 11. More, it is undisputed that Longboat and Beasley have complied with the MRA since it was issued in September 2004 by, for example, seeking the NFA's approval for all disbursements from the Fund, ceasing investment activities on behalf of the Fund and refraining from soliciting any further investors into the Fund. In short, the CFTC has not alleged - because it cannot - that Longboat or Beasley are continuing to commit any ongoing fraud, whether by misrepresentation or otherwise, against the Fund. Thus, the CFTC has failed to demonstrate that Longboat and Beasley's alleged fraud - even if true - was anything more than an isolated occurrence based on two annual reports, the last of which was issued fifteen months ago and before more recent disclosures correcting any previous misstatements.

In analogous circumstances, courts have found that where the alleged violations had ceased, there was no threat of future harm to sustain entry of a preliminary injunction. *See, e.g., Incomco, 580 F. Supp. at 1490* [*43] (finding that evidence did not support finding a reasonable likelihood that defendant would violate act in the future based on three alleged violations of the Act, which last occurred several years before the CFTC brought action against the defendant); *SEC v. Pinez, 989 F. Supp. 325, 335 (D. Mass. 1997)* (same, denying preliminary injunctive relief, even though SEC had established that defendant's insider trading violated the securities laws, where the SEC had failed to present any evidence that defendant would violate the securities laws again in the future).

2. The Alleged Violations - If True - Were Not Willful

Assuming only for purposes of this section that Longboat or Beasley violated Section 4o(1)(B) of the Act, the evidence, as demonstrated in section III.B.3. above, does not establish that Longboat or Beasley acted willfully or possessed an intent to defraud the Fund with respect to the Montana Notes. At best, it appears that the representations in the 2002 and 2003 Annual Reports were inadvertent and, in any event, were corrected by the July 2004 letter to investors. For this additional reason, there is no basis to find a threat of future violation [*44] by Longboat or Beasley. *Cf. Incomco, 580 F. Supp. at 1490* (denying preliminary injunction where defendant did not intentionally or recklessly violate the statute and regulations at issue); *with Hunt, 591 F.2d at 1220* (finding defendant was engaged in systematic, not isolated, wrongdoing where defendants' allegedly improper trading positions were maintained "throughout the enforcement proceedings").

3. Defendants Are Not in a Position to Violate the Act Again

The CFTC asserts that Longboat and Beasley's "continuing failure to secure any of the pool's assets is evidence that violations of the Act are likely to continue unless enjoined." Pl. Mem. at 20. The CFTC contends, that unless removed from the operation and management of Longboat and a receiver appointed, the Fund will be harmed. Yet, there is no evidence to suggest that Beasley's present operation of Longboat is reasonably likely to cause him to violate the Act again. Beasley has already repaid from personal assets the Diamond B Note and has made efforts to collateralize the Lewis & Clark Notes, subject to further input from the CFTC regarding the proposed collateralization agreements. [*45] *See* section II.F., *supra.* There is no evidence that the present lack of security for the remaining Lewis & Clark Notes is attributable solely to Beasley on that he is a threat to the Fund unless enjoined and removed. Further, since the MRA in September 2004, Beasley and Longboat have been effectively enjoined from investing further assets of the Fund, soliciting further investors and disbursing Fund assets without NFA approval - with which Longboat and Beasley have fully complied. There is no evidence, therefore, that Beasley's continued operation and management of the Fund is a threat to investors.

On balance, therefore, the totality of the circumstances precludes finding a likelihood of future violation by either Longboat or Beasley so that the CFTC's Motion for preliminary injunction to restrain a future violation of the Act must fail.

D. The CFTC Cannot Establish the Grounds for the Ancillary Relief It Seeks

In addition to a preliminary injunction, the CFTC also seeks ancillary relief in the form of a receiver for Longboat to secure the books, records and assets of Longboat as well as an asset freeze, against both Longboat and Beasley. Motion at 2-3. As stated [*46] above, however, the appointment of a receiver and the imposition of an asset freeze require careful consideration beforehand. *See* section III.A.2, *supra.* The Court must weigh the disadvantages of appointing a receiver against the considerations indicating the need for such relief including for example the need to "prevent diversion or waste" of assets and to investigate and 'ascertain the true state of affairs.'" *Morgan, Harris & Scott, 484 F. Supp. at 677-78.*

The CFTC argues that the appointment of a receiver is justified in order to protect pool assets. Pl. Mem. at 13. However, the CFTC has not adduced any evidence - nor could it - to suggest that Longboat or Beasley have diverted investor funds. Indeed, it is undisputed that since the MRA, the Fund's assets have been used only in ways approved by the NFA. There appears to be no imperative, therefore, to appoint a receiver to administer Longboat.

Similarly unavailing is the asset freeze sought by the CFTC, both as to Longboat and Beasley. Before entering an asset freeze, the Court must balance the possible deleterious effect of a freeze against the considerations indicating the need for such relief. *Manor Nursing Centers, 458 F.2d at 1106.* [*47] As a predicate matter, an asset freeze against either Longboat or Beasley seems unnecessary in light of the fact that Beasley has proposed and awaits comment from the CFTC to execute multiple collateralization agreements, including one against his personal real estate holdings, that would fully secure the Fund for the balance owed - both principal and interest - on the Lewis & Clark Notes. Further, a freeze of Longboat's assets is unnecessary in light of the prohibitions currently imposed on its use of Fund accounts by the NFA, with which Longboat has fully complied. Finally, Beasley is no longer drawing salary or receiving any compensation from the Fund and needs his few remaining liquid assets to satisfy his living obligations. Considering the paucity of the CFTC's showing in support of its Motion, it would be anomalous, therefore, to reward the CFTC with an asset freeze against Longboat and Beasley in this matter.

IV. CONCLUSION

For the reasons stated herein, therefore, Defendants Robert Joseph Beasley and Longboat Global Funds Management, LLC respectfully request that the Court deny the CFTC's Motion for Statutory Restraining Order, Preliminary Injunction and Other [*48] Equitable Relief.

Dated: June 29, 2005

GARDNER CARTON & DOUGLAS, LLP

/s/ David W. Porteous
Timothy J. Carey
David W. Porteous
Attorney for Defendants
Robert Joseph Beasley
Longboat Global Funds Management, LLC

CERTIFICATE OF SERVICE

I, David Porteous, hereby certify that on June 29, 2005, I caused true and correct copies of Defendants Robert Beasley's and Longboat Global Funds Management, LLC's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Statutory Restraining Order Preliminary Injunction and Other Equitable Relief to be served via Federal Express and email as indicated on counsel of record for Plaintiff Commodity Futures Trading Commission named below:

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/s/ [Signature]
David W. Porteous

[SEE Exhibit 1 IN ORIGINAL]

[SEE Exhibit 2 IN ORIGINAL]

[SEE Exhibit 3 IN ORIGINAL]

[SEE Exhibit 4 IN ORIGINAL]

[SEE Exhibit 5 IN ORIGINAL]

[SEE Exhibit 6 IN ORIGINAL]

[SEE Exhibit 7 IN ORIGINAL]

[SEE Exhibit 8 IN ORIGINAL]

[SEE Exhibit 9 IN ORIGINAL]

[SEE Exhibit [*49]10 IN ORIGINAL]

[SEE Exhibit 11 IN ORIGINAL]

[SEE Exhibit 12 IN ORIGINAL]