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JAMES H. HOLL, III, DC BAR NO. 453473
ERIN E. VESPE, CT BAR NO. 407295
COMMODITY FUTURES TRADING COMMISSION
1155 21st Street, NW
Washington, DC 20581
Telephone (202) 418-5000
Facsimile (202) 418-5523

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Attorneys for Plaintiff
Commodity Futures Trading Commission

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

COMMODITY FUTURES TRADING)
COMMISSION,)

Plaintiff,)

vs.)

WHITE PINE TRUST CORPORATION, a)
California corporation, and RICHARD)
MATTHEWS, an individual, STEPHAN)
BAERE, an individual)

Defendants,)

LUCIA MATTHEWS, an individual,)

Relief Defendant.)

Case No. 04-CV-2093 ✓

MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION,
STATUTORY RESTRAINING ORDER,
AND OTHER ANCILLARY RELIEF
AGAINST STEPHAN BAERE

Hearing Date: 1/10/05
Time:
Honorable Judge Jones

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1 JAMES H. HOLL, III, DC BAR NO. 453473
2 ERIN E. VESPE, CT BAR NO. 407295
3 COMMODITY FUTURES TRADING COMMISSION
4 1155 21st Street, NW
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8 Attorneys for Plaintiff
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12 COMMODITY FUTURES TRADING)
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14 Plaintiff,)

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16 WHITE PINE TRUST CORPORATION, a)
17 California corporation, and RICHARD)
18 MATTHEWS, an individual, STEPHAN)
19 BAERE, an individual)

20 Defendants,)

21 LUCIA MATTHEWS, an individual,)

22 Relief Defendant.)
23)

Case No. 04-CV-2093 J

MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION FOR A
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STATUTORY RESTRAINING ORDER,
AND OTHER ANCILLARY RELIEF
AGAINST STEPHAN BAERE

Hearing Date:

Time:

Honorable Judge Jones

24 I.

25 PRELIMINARY STATEMENT

26 On October 21, 2004, this Court issued a Statutory Restraining Order against defendants
27 White Pine Trust Corporation and Richard Matthews, which included a freeze of defendants'
28

1 assets, appointment of a receiver, and other ancillary relief, and included an order to show cause
2 why a preliminary injunction should not issue. On October 28, 2004, this Court held a hearing on
3 the matter of a Preliminary Injunction against White Pine Trust Corporation. Plaintiff had served
4 the registered agent for service of process for White Pine Trust Corporation, but has not served
5 Richard Matthews personally. No counsel appeared for the corporate entity, White Pine Trust
6 Corporation, and the Court entered an Order of Preliminary Injunction against the corporate entity.
7

8 Based upon additional information gathered after the filing of plaintiff's initial complaint
9 and motions, the U.S. Commodity Futures Trading Commission ("CFTC" or "Commission") filed
10 contemporaneously herewith a first amended complaint, adding Stephan Baere as a named
11 defendant, and Lucia Matthews, wife of defendant Richard Matthews, as a relief defendant.
12

13 Since at least August, 2000, defendants White Pine Trust Corporation ("White Pine"),
14 Richard Matthews ("Matthews"), and Stephan Baere ("Baere") (collectively "defendants") have
15 been illegally operating a foreign currency trading firm out of San Diego, California. Through
16 direct solicitations and a website, defendants have solicited retail customers to trade purported
17 foreign currency contracts and foreign currency options contracts. According to preliminary
18 evidence gathered by the CFTC and Court-appointed receiver, since the inception of White Pine,
19 defendants have solicited approximately \$30 million in customer funds from approximately 300
20 customers.
21

22 To lure customers to trade with White Pine, defendants fraudulently misrepresented how
23 customers' money would be handled and protected, claiming all customer funds would be held in
24 a segregated account and not in White Pine's operating accounts, when in fact White Pine
25 commingled customer money with other monies in at least two corporate operating accounts.
26 Stephan Baere falsely touted the vast expertise and sophistication of White Pine in trading
27 foreign currency when, in fact virtually everyone at White Pine had little or no experience trading
28

1 in the foreign currency markets, and blatantly posted a false winning trading record for White
2 Pine going back to 1995 even though, by Matthews' own admission, White Pine was created no
3 earlier than 2000.

4 Baere is identified variously in White Pine's promotional materials as the Director of
5 Business Development or the Director of Client Development of White Pine. A former
6 employee of White Pine, Brad Meeuwsen, attested that Matthews and Baere were the two
7 persons responsible for running White Pine. Specifically, Mr. Meeuwsen's testimony establishes
8 that Baere was clearly the number two in command at White Pine, and that Baere was primarily
9 responsible for directing the efforts of the sales force.
10

11 Numerous White Pine customers have come forward and identified Stephan Baere as
12 their primary contact at White Pine. According to customer statements, Baere solicited
13 customers at trade shows nationwide and set up less formal, more intimate sales presentations for
14 small groups of interested investors. Baere gave potential customers White Pine's promotional
15 materials and represented, among other things, that customer funds would be segregated from
16 White Pine's operating accounts. Baere also touted a false performance record for White Pine's
17 fund. Baere told at least one White Pine customer at a September 2002 trade show that White
18 Pine's fund had approximately 20-30% return on investment. Based in part upon these profit
19 representations made by Baere, this customer invested over \$300,000 in White Pine.
20

21 Baere also routinely communicated with customers about the status of their investments,
22 handled customer inquiries about their accounts, and even offered tax advice. Bank records
23 show that Baere received substantial compensation from White Pine's operating accounts,
24 virtually all from one account in which Matthews had deposited allegedly segregated investor
25 money. The Commission has found no evidence that these payments were based upon
26 commissions earned due to profits trading. Moreover, it appears that less than \$4 million of the
27
28

1 total \$30 million taken in was actually sent to trade in the markets.

2 White Pine has opened and conducted business through at least six separate bank
3 accounts during its existence. Four of these bank accounts show total deposits of over \$33
4 million from 2001 through 2004, and substantial funds flowing out of these accounts to pay for
5 personal and business expenses. Many cash withdrawals were made by Matthews, and it is
6 possible that Baere received some of those funds.
7

8 Through the conduct described above, defendant Baere has engaged in the fraudulent
9 solicitation of customer funds and, consequently, violated Section 4c(b) of the Act, 7 U.S.C. §
10 6c(b) (2002), and Commission Regulations 1.1, 32.9(a) and (c), 17 C.F.R. §§ 1.1, 32.9(a) and (c)
11 (2004).
12

13 Because the foreign currency options transactions White Pine purports to offer are not
14 conducted on or subject to the rules of a designated contract market or foreign board of trade,
15 Stephan Baere is engaged in soliciting, or accepting any order for, or otherwise dealing in, illegal
16 off-exchange options contracts in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002),
17 and Commission Regulation 32.11(a), 17 C.F.R. § 32.11(a) (2004).
18

19 Unless restrained and enjoined by this Court, Baere is likely to continue to engage in the
20 acts and practices alleged in the Complaint and in similar acts and practices, as more fully
21 described below. Accordingly, pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (2001),
22 the Commission brings this action to enjoin such acts and practices, prevent the dissipation of
23 assets, and compel compliance with the provisions of the Act.

24 To preserve any investor funds still in possession of the defendants and the records of the
25 defendants' activities, the Commission seeks a statutory restraining order prohibiting Stephan
26 Baere, or any other person or entity acting in the capacity of their agents or in active concert or
27 participation with them, who receive actual notice of such order, from: (1) withdrawing,
28

1 transferring, removing, dissipating or disposing of his funds, assets or other property; and
2 (2) destroying, altering or disposing of, or denying authorized representatives of the Commission
3 immediate access to the defendants' and relief defendants' books, records or documents.

4 In addition, the Commission seeks a preliminary injunction to restrain Baere from
5 conduct that would violate the Commodity Exchange Act, as set forth below in greater detail.

6 Accordingly, the Commission submits this memorandum in support of its motion for a
7 statutory restraining order and preliminary injunction against defendant Stephan Baere, pursuant to
8 Section 6c of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 13a-1(a) (2002).
9

10 II.

11 PARTIES

12 A. Plaintiff

13 The Commodity Futures Trading Commission is an independent federal regulatory agency
14 that is charged with the administration and enforcement of the Act, 7.U.S.C. §§ 1 *et seq.* (2002),
15 and the regulations promulgated thereunder. The Commission maintains its principal office at
16 Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581.
17

18 B. Defendants

19 White Pine Trust Corporation was incorporated on July 25, 2000 in the state of
20 California. White Pine's operating address and address on state corporate records is 343 4th
21 Ave., Suite 201, San Diego, CA 92101. White Pine has never registered with the Commission in
22 any capacity.
23

24 Richard Matthews is self identified as the Founder and Managing Director of White Pine,
25 and is a signatory on defendant White Pine's operating accounts. Matthews maintains an address
26 in San Diego, California. From December 1994 through December 1997, Matthews was
27 registered with the Commission as an Introducing Broker of Global Trading Group, a company
28

1 founded by Matthews that solicited retail customers to invest in futures contracts. Ex. 12.
2 Matthews is not registered at this time with the Commission in any capacity.

3 Stephan Baere is identified variously as the Director of Business Development or the
4 Director of Client Development of White Pine. Baere maintains an address in Encinitas,
5 California. Baere has never been registered with the Commission in any capacity.

6
7 C. Relief Defendant

8 Lucia Matthews is a Mexican citizen and Richard Matthews' wife. Upon
9 information and belief, Lucia Matthews received ill-gotten gains from White Pine. Lucia
10 Matthews has never been registered with the Commission in any capacity.

11 III.

12 STATEMENT OF ISSUES

13
14 A. Whether pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, this Court should
15 issue statutory restraining order freezing assets owned or controlled by defendant Stephan Baere,
16 preserve and protect all records owned or controlled by Baere based upon the evidence presented
17 herein that Baere defrauded retail customers in connection with foreign currency options and
18 offered and/or sold illegal foreign currency options to retail customers in violation of Section
19 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulations §§ 1.1, 32.9 and 32.11,
20 17 C.F.R. §§1.1, 32.9 and 32.11 (2004)?

21
22 B. Whether this Court should issue a preliminary injunction order against the
23 defendant Stephan Baere based upon the evidence set forth herein demonstrating that the
24 Commission has a probable success on the merits, *i.e.*, showing that the defendant Stephan Baere
25 violated Section 4c(b) of the Act and Commission Regulations 1.1, 32.9 and 32.11, and is
26 entitled to a presumption of irreparable injury?
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IV.

STATEMENT OF THE FACTS

A. Defendants Cheat And Defraud Retail Customers

White Pine is a foreign currency trading firm operating in the San Diego area.

White Pine's website, at least until recently, along with other advertising and solicitation materials provided to potential customers, purport to offer customers the opportunity to speculate in the value of purported foreign currency and foreign currency options. Ex. 7,8. Defendants offer to open and manage customer foreign currency accounts, and promise customers steady returns on their investments while downplaying the risk of loss. Ex. 7. Through the website and other solicitation materials, defendants encourage potential customers to invest with White Pine by creating a false image of trust, legitimacy, longevity, safety and experience. Indeed, defendants quote from Oliver Wendell Holmes, "Put not your trust in money, but put your money in trust." Ex. 9, p. 104.

As set forth below, Stephen Baere was the person primarily responsible for White Pine's "business development," and in performing this function, he created a feeling of trust on the part of prospective and actual customers, based upon a series of mistruths. Moreover, in a blatant, yet futile effort to cover the fraud and misappropriation, Baere's "partner," defendant Matthews, lied to the Commission.

Stephen Baere solicited potential customers to invest in White Pine's Pinnacle Capital Fund, through his attendance at trade shows nationwide, his less formal sales solicitations to smaller numbers of potential investors, and through its former website. Ex. 2-7, 13. Baere also referred customers to the website to obtain information concerning their accounts, including obtaining specific account information. Baere replicated the promotional materials given to customers on White Pine's website. Ex. 7,8.

1 On White Pine's website, for the Pinnacle Capital Fund, defendants boast an eight-year
2 cumulative performance record of 610% stemming back to 1995. Ex. 7, p. 87. In the
3 promotional materials given to customers, for the same period of time defendants purport to have
4 a cumulative performance record of 591%. Ex. 8, p. 98. On both the website and in the
5 promotional materials, defendants guarantee that 75% of its customers' investments are protected
6 from loss each month. Ex. 7,8 p. 111.
7

8 White Pine's website also touts the defendants' expertise in managing foreign currency
9 accounts, promising that "your account manager [is] at least on the same educational plateau as
10 corporate treasures (sic) and international bankers." Ex. 7, p. 31. White Pine's website further
11 provides that Stephen Baere has been the Director of Business Development since 1999. Ex. 7,
12 p. 31. The web page featuring Baere states that he was responsible for overseeing the "account
13 management" staff and the development of their training. Ex. 7, p. 31. Baere's responsibilities,
14 also according to the corporate literature, extended to the development of the White Pine website
15 into a client resource. Ex. 7, p. 31.
16

17 Virtually all of the representations made regarding Stephan Baere, White Pine, and the
18 Pinnacle Capital Fund were false and/or misleading. There is no evidence to indicate that the
19 account representatives underwent "rigorous Association Cambiste Institute (ACI) Training," as
20 alleged on the White Pine website. Ex. 1, 7, p. 31. Moreover, the website's information, and the
21 prospectuses distributed with the same information were fictitious.
22

23 In sworn testimony taken on January 29, 2004, before the Division of Enforcement for the
24 Commodity Futures Trading Commission, Matthews unequivocally admitted that the
25 performance record of White Pine's Pinnacle Capital Fund 19 was fictitious: "Q. These are just
26 fictitious numbers? A. Yes. The chronology and everything." Ex. 10, p.161. In fact,
27 Matthews stated at least five times during this testimony that White Pine was a fictitious
28

1 company: "Q. So again, this is all fictitious – A. Yes. Absolutely." Ex. 10, p.167. Matthews
2 further testified that, contrary to defendants' highly proclaimed expertise in trading foreign
3 currency options, he knew "little about" foreign currency. Ex. 10, p.144.

4 Matthews also unequivocally stated under oath that White Pine did not have any
5 customers. Ex. 11, p 176. In fact, according to evidence gathered by the CFTC and the Court-
6 appointed receiver, White Pine has as many as 300 customers who may have invested up to \$30
7 million with White Pine. In soliciting these customers and other potential customers purportedly
8 to trade foreign currency and foreign currency options on their behalf, through direct solicitation
9 materials and the website, Stephan Baere, who was allegedly responsible for its development,
10 made the following misrepresentations of material facts:
11

- 12
- 13 a. All funds are separated and maintained in a "client funds account" and are
14 not commingled with White Pine's operating accounts; Ex. 7, p. 73;
 - 15 b. All customer accounts are held outside White Pine at regulated broker
16 dealers; Ex. 7, p. 73;
 - 17 c. White Pine has been in the business for eight years with a cumulative
18 performance record of 591%, covering the time period of 1995 to 2004;
19 and Ex. 8, *supra*;
 - 20 d. White Pine account managers have specialized expertise in trading foreign
21 currency options. Ex. 7, *supra*.

22 These representations create the impression that White Pine is a legitimate, experienced
23 and successful foreign exchange trading firm. However, these statements are false, in that:

- 24 a. Customer funds are neither separated nor maintained in the clients' name;
25 rather, funds are deposited into operating accounts in White Pine's name
26 or otherwise commingled with other funds, where some funds are
27 misappropriated and used for business and personal expenses; *see*
28 *Plaintiff's Initial Exhibits Filed 10/20/2004*.
- b. As demonstrated above, White Pine was not in existence in 1995-1999,
since it was incorporated in July 2000; Ex. 10, p. 137; and
- c. As demonstrated above, Matthews has little knowledge of trading foreign
currency options. Ex. 10, p. 144.

1
2 d. As evidenced by the testimony of Brad Meeuwsen, the salesmen of White
3 Pine did not possess extensive training in the trading of foreign currency
4 options. Ex. 1.

5 Stephan Baere' participation in the fraud that was White Pine is evident. Baere is
6 identified variously in White Pine's promotional materials as the Director of Business
7 Development or the Director of Client Development of White Pine. Ex. 1-7, 13. Brad
8 Meeuwsen, a former employee of White Pine, testifies that Matthews and Baere were the two
9 persons responsible for running White Pine, but that Baere was always around the office, while
10 Matthews was not. Ex. 1. Specifically, Mr. Meeuwsen states that Baere was clearly the number
11 two in command at White Pine, and that Baere was frequently consulted by the sales staff on
12 issues of office policy and procedure. Ex. 1. Meeuwsen also stated that Baere was primarily
13 responsible for directing the efforts of the sales force. Ex. 1. Baere also interviewed and hired
14 Meeuwsen, knowing that Meeuwsen had absolutely no experience trading foreign currency, or
15 any other commodities-related products. Ex. 1.

16
17 White Pine customers have come forward and identified Stephan Baere as their primary
18 contact at White Pine. Ex. 2-6. According to customer statements, Baere solicited customers at
19 trade shows nationwide and set up less formal, more intimate sales presentations for small groups
20 of interested investors. Ex. 2,3. Baere gave potential customers White Pine's promotional
21 materials and represented, among other things, a promise that customer funds would be
22 segregated from White Pine's operating accounts; also touting a false performance record for
23 White Pine's fund. Ex. 7,8. Baere told at least one White Pine customer at a September 2002
24 trade show that White Pine's fund had approximately 20-30% return on investment. Ex. 6.
25 Based in part upon these profit representations made by Baere, this customer invested over
26 \$300,000 in White Pine. Ex. 6.
27

28 Baere also routinely communicated with customers about the status of their investments,

1 and handled customer inquiries about their accounts. Ex. 13. Baere even provided customers
2 with tax advice relating to accounting for foreign exchange trading profits. Ex. 13. Bank records
3 show that Baere received substantial compensation, approximately \$400,000.00, from White
4 Pine's operating accounts -- virtually all from one account in which Matthews had deposited
5 investor money. Ex. 14.
6

7 The Commission issued a subpoena to White Pine on October 24, 2003 requesting,
8 among other things, defendants' promotional materials and business records. White Pine's bank
9 records show a withdrawal of \$1.4 million in cash from a White Pine operating account in
10 November, 2003, shortly after defendants received the Commission's subpoena. Moreover the
11 large cash flow through defendants' operating funds is suggestive that defendants were paying
12 earlier customers with later customer funds in a manner akin to a Ponzi scheme. In addition, as
13 evidenced by the Receiver's preliminary report, defendants systematically destroyed documents
14 and computer databases in an effort to hide their fraud.
15

16 **B. Some Of The Purported Foreign Currency Transactions Defendants**
17 **Offer Are Illegal Off-Exchange Foreign Currency Options**

18 Since at least February 2003, White Pine has engaged in an elaborate scheme to defraud
19 retail customers. White Pine's promotional materials and account opening documents describe
20 an investment opportunity to profit based upon the fluctuations in the relative values of foreign
21 currencies. Exs. 7-9. During the relevant period, through written materials provided to
22 customers and prospective customers, White Pine affirmatively stated that "We also trade in FX
23 options." Ex. 7. The same promotional materials expand upon this statement and explain how
24 White Pine uses options as a hedging strategy purportedly to minimize the investment risk faced
25 by prospective investors. Ex. 7, 8. Additional e-mail communications by White Pine to its
26 customers identifies the alleged trading of foreign currency options. Ex. 12.
27

28 White Pine customers sent money directly to White Pine. Customers either wired money

1 directly into White Pine's operating accounts, or wrote personal checks made out to White Pine
2 Trust Corporation, which were then deposited into White Pine's operating accounts.
3 Defendants gave customers promotional materials and referred them to White Pine's website so
4 customers could track their accounts. Ex. 2-6. Customers also received monthly account
5 statements on White Pine's Pinnacle Capital Fund letterhead. Ex. 9. The customer account
6 statements did not indicate the specific trading executed, where the purported trading occurred,
7 or where White Pine had deposited the customer funds. *Id.*

9 The foreign currency options contracts offered by White Pine have not been conducted or
10 executed on or subject to the rules of a contract market, or a foreign board of trade. White Pine
11 is not an appropriate counter-party under the Act for the alleged transactions herein, and certain
12 customers solicited by White Pine were not eligible contract participants.

14 V.

15 JURISDICTION

16 The Commission is an independent federal regulatory agency charged with responsibility
17 for administering and enforcing the provisions of the Commodity Exchange Act ("Act" or
18 "CEA"), as amended, 7 U.S.C. §§ 1 *et seq.* (2000) and the regulations promulgated thereunder,
19 17 C.F.R. §§ 1 *et seq.* (2002). The basis for subject matter jurisdiction in the United States
20 District Court for the Southern District of California is Section 6c of the Commodity Exchange
21 Act ("Act" or "CEA"), 7 U.S.C. § 13a-1. Section 6c of the Act authorizes the Commission to
22 bring an action in the proper United States district court against any person whenever it shall
23 appear that such person has engaged, is engaging, or is about to engage in any act or practice
24 constituting a violation of any provision of the Act or any rule, regulation or order thereunder.
25

26 The Act and Commission Regulations prohibits fraud in connection with any order to
27 make, or the making of, any contract of sale for any commodity option transaction. 7 U.S.C.
28

1 § 6c(b)(2002), 17 C.F.R. § 32.9 (2004). The Act also provides that the Commission has
2 jurisdiction over certain retail transactions in “off exchange” foreign currency futures and
3 options contracts entered into between retail customers and ineligible counterparties. 7 U.S.C.
4 § 2(c)(2)(A), (B) and (C).
5

6 .VI.

7 ARGUMENT

8 A. Stephan Baere Cheated And Defrauded Investors
9 By Misrepresenting Defendants’ Performance Record And Trading Expertise

10 Section 4c(b) of the Act, read together with Commission Regulation 32.9(a) and (c),
11 prohibits cheating and defrauding or attempting to cheat or to defraud or willfully deceiving or
12 attempting to deceive other persons in connection with an offer to enter into, the entry into, the
13 confirmation of the execution of, or the maintenance of, commodity option transactions. 7 U.S.C. §
14 6c(b)(2002), 17 C.F.R. § 32.9(a) and (c)(2004). Commission Regulation 1.1, 17 C.F.R. § 1.1
15 (2004), similarly prohibits such conduct in connection with foreign currency contracts.
16

17 In order to establish fraud, the Commission must prove that (1) a misrepresentation,
18 misleading statement, or a deceptive omission was made; (2) by the defendant whose conduct
19 involves “highly unreasonable omissions or misrepresentations ...that present a danger of
20 misleading [customers] which is either known to the [d]efendant, or so obvious that [d]efendant
21 must have been aware of it”, or, in other words, scienter; and (3) that the misrepresentation was
22 material. *Commodity Futures Trading Commission v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d
23 1321, 1328-29 (11th Cir. 2002) (internal citations omitted).
24

25 Scienter may be established by showing that: (1) the defendants knew their
26 misrepresentations were false and calculated to cause harm; or (2) the defendants made the
27 representations with a reckless disregard for their truth or falsity. The scienter element is
28 established when a person’s acts are performed “with knowledge of their nature and character.”

1 *Wasnick v. Refco, Inc.*, 911 F.2d. 345, 348 (9th Cir. 1990). The Commission must demonstrate
2 only that the defendants' actions were "intentional as opposed to accidental." *Lawrence v.*
3 *Commodity Futures Trading Commission*, 759 F. 2d 767, 773 (9th Cir. 1985); *Hammond v. Smith*
4 *Barney, Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617
5 at 36,657-36,659 (CFTC March 1, 1990) (scienter is a necessary element to establish fraud).

7 A statement is material if "it is substantially likely that a reasonable customer would
8 consider the matter important in making an investment decision." *Sudol v. Shearson Loeb*
9 *Rhoades, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 at 31,119
10 (CFTC Sept. 30, 1985) (citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

11 False representations regarding profit potential are material. *See, e.g., Miller v. Commodity*
12 *Futures Trading Commission*, 197 F.3d. 1227, 1229, 1233 (9th Cir. 1999), *aff'g in part, rev'g in*
13 *part, In Re Miller Commodity Futures Trading Commission v. U.S. Metals Depository Co.*, 468
14 F. Supp. 1149, 1160 (S.D. N.Y. 1979). "When the language of a solicitation obscures the
15 important distinction between the possibility of substantial profit and the probability it will be
16 earned, it is likely to be materially misleading to customers." *In re JCC Corp.*, [1992-1994
17 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,576 n. 23 (CFTC May 12, 1994).

19 Baere violated Section 4c(b) of the Act and Regulation 32.9 in that he solicited customers
20 by falsely touting a cumulative eight-year record from 1995-2003 of 610% on their website for
21 White Pine's Pinnacle Capital Fund, when, by Matthews own admission, White Pine did not
22 exist prior to 2000 and Matthews testified that the numbers used were completely fictitious. In
23 the solicitation materials sent to customers, defendants claimed that this same fund achieved a
24 591% rate of return over the same time period. Additionally, although the solicitation materials
25 given to customers tout defendants' expertise in trading foreign currency, Matthews testified
26 under oath that he knew "little about" foreign currency. And while there is no evidence to
27
28

1 indicate that Stephan Baere had any knowledge or expertise in trading foreign currency options,
2 testimony from Brad Meeuwssen, a former employee of White Pine, provides that only Matthews
3 was involved in the trading.

4 Such misrepresentations concerning White Pine's trading record, expertise, and the
5 segregation of customer accounts described in the preceding section are material and constitute
6 fraud in violation of Sections 4c(b) the Act and Regulation 32.9(a) and (c), 7 U.S.C.
7 § 6c(b)(2002), 17 C.F.R. § 32.9(a) and (c)(2004). *See, e.g., Commodity Futures Trading*
8 *Commission v. Commonwealth Financial Group, Inc.*, 874 F. Supp. 1345, 1353-54 (S.D. Fla.
9 1994) (misrepresentations regarding the trading record and experience of a firm or broker are
10 fraudulent because past success and experience are material factors to reasonable customers);
11 *Commodity Futures Trading Commission v. Crown Colony Commodity Options, Ltd.*, 434 F.
12 Supp. 911, 919 (S.D.N.Y. 1977) (misrepresentations concerning profit potential); *Commodity*
13 *Futures Trading Commission v. J.S. Love & Associates Options, Ltd.*, 422 F. Supp 652, 655
14 (S.D.N.Y. 1976) (misrepresentations concerning profit potential and the trading experience of
15 account executives); *Commodity Futures Trading Commission v. U.S. Metals Depository Co.*,
16 468 F. Supp. 1149, 1160 (S.D.N.Y. 1979) (misrepresentations regarding profitability of
17 investment).

18 Baere made these false solicitation claims with scienter. Matthews, Baere's "partner" at
19 White Pine, admitted under oath that defendants' cumulative performance record and touted
20 expertise was "fictitious." Considering Baere's extensive involvement in the management of
21 White Pine and his primary responsibility for hiring salespeople and soliciting customers, his
22 solicitations of potential customers constitute "highly unreasonable omissions or
23 misrepresentations that involve not merely simple or inexcusable negligence, but an extreme
24 departure from the standards of ordinary care, and that present a danger of misleading
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27
28

1 [customers] which is either known to the defendant or is so obvious that the defendant must have
2 been aware of it.” *Messer v. E.F. Hutton & Co*, 847 F.2d at 678. Accordingly, Baere has
3 violated Sections 4c(b) the Act and Regulation 32.9(a) and (c), 7 U.S.C. § 6c(b)(2002), 17 C.F.R.
4 § 32.9(a) and (c)(2004).

5
6 Under Section 2(a)(1)(B) of the Act the “act, omission, or failure of any official, agent, or
7 other person acting for any individual, association, partnership, corporation, or trust within the
8 scope of his employment or office shall be deemed the act, omission, or failure of such
9 individual, association, partnership, corporation, or trust, as well as of such official agent or other
10 person.” *See* 7 U.S.C. § 2(a)(1)(B) (2002). Because Baere engaged in the solicitation fraud
11 while acting as White Pine’s agent, White Pine is vicariously liable for violations of Section
12 4c(b) of the Act and Commission Regulations pursuant to Section 2(a)(1)(B) of the Act.
13

14 For the same reasons outlined above, Baere’s repeated misrepresentations to customers
15 and their misappropriation of funds also violate the antifraud provision of Commission
16 Regulation 1.1, 17 C.F.R. § 1.1 (2004).

17 B. Baere Offered To Enter Into Illegal Off-Exchange Foreign Currency
18 Options Contracts In Violation Of Section 4c(b) Of The Act And Regulation
19 32.11

20 Section 4c(b) of the Act, 7 U.S.C. § 6c(b), read together with Regulation 32.11(a), 17
21 C.F.R. § 32.11(a)(2004), makes it unlawful to solicit and/or accept orders for, and/or accepted
22 money, securities or property in connection with the purchase and sale of commodity options
23 when such transactions have not been conducted or executed on or subject to the rules of a
24 contract market, or a foreign board of trade.¹

25
26 ¹ Section 2(c)(2)(B)(i) of the Commodity Futures Modernization Act (“CFMA”), Appendix E,
27 to Public L. No. 106-554, 114 Stat. 2763 (2000), provides that the Commission shall have
28 jurisdiction over options contracts on foreign currency, so long as the option is “offered to, or
entered into with, a person that is not an eligible contract participant” and the counterparty to the
option, or the person offering to be the counterparty, is not a regulated entity, as defined in the

1 In his solicitations and on customer account statements, Stephan Baere did not disclose
2 the name of any counterparty or third party through or with whom White Pine/ the investor will
3 be trading. Exs. 7-9. Instead, the defendants accepted funds in the name of White Pine and
4 deposited these funds into White Pine accounts. Defendants issue account statements in the
5 name of White Pine, which ostensibly show realized trading gains, but do not identify any entity
6 as a possible counterparty, except White Pine.
7

8 Accordingly, the evidence establishes that White Pine is acting as the counterparty to any
9 purported transactions with customers. Because White Pine is not a proper counterparty² to offer
10 foreign currency options contracts to retail customers under the Act, and the purported
11 transactions are not conducted or executed on or subject to the rules of a contract market or a
12 foreign board of trade, White Pine is operating in violation of Section 4c(b) of the Act and
13 Commission Regulation 32.11(a), 7 U.S.C. § 6c(b), and Regulation 32.11(a), 17 C.F.R.
14 § 32.11(a) (2004).
15

16 C. Asset Freeze and Document Retention

17 The records obtained from White Pine's bank and payroll records indicate that Baere
18 received at least \$400,000.00 in compensation for his effective, fraudulent solicitation of White
19 Pine customers. Ex. 14. Additionally, it is unclear what happened to the millions of dollars
20

21 CFMA. The customers in this case are not eligible contract participants and White Pine is not a
22 appropriate counterparty pursuant to Section 2(c)(2)(B) of the Act. See 7 U.S.C. § 2(c)(2)(B).

23 ² Section 2(c)(2)(B)(ii) defines a counterparty as: (I) a financial institution; (II) a broker or
24 dealer registered under section 15(b) or 15 (C) of the Securities Exchange Act of 1934 (15 U.S.C.
25 § 78o(b)) or a futures commission merchant registered under this Act; (III) an associated person
26 of a broker dealer registered under section 15(b) or 15C of the Securities Exchange Act of 1934,
27 or an affiliated person of a futures commission merchant registered under this Act; (IV) an
28 insurance company described in section 1a(12)(A)(ii) of this Act, or a regulated subsidiary or
affiliate of such an insurance company; (V) a financial holding company (as defined in section 2
of the Bank Holding Company Act of 1956); or (VI) an investment bank holding company (as
defined in section 17(i) of the Securities Exchange Act 1934). 7 U.S.C. § 2(c)(2)(B)(ii)(2002).

1 Matthews took out of the White Pine accounts in cash. As Baere was clearly Matthew's "number
2 two" person in control at White Pine, it is incumbent upon the Commission to seek a freeze of
3 Baere's assets and examine his finances, in order to preserve any customer funds in his
4 possession and determine the total amount of ill-gotten gains received by Baere from White Pine.
5

6 An asset freeze is appropriate where, as in this case, the Commission seeks disgorgement
7 and restitution.³ See *Commodity Futures Trading Commission v. Trending Cycles for*
8 *Commodities, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,013 at 23,970
9 (S.D. Fla. Mar. 17, 1980). As set forth in the accompanying papers, the Commission seeks an
10 asset freeze for all accounts owned and controlled by Stephan Baere in order to ascertain the
11 receipt of and preserve any improperly converted customer funds.
12

13 An order prohibiting the destruction of records and granting the Commission access to
14 inspect and copy records will allow the Commission to identify the Baere's assets and determine
15 the identity of the victims of the defendants' scheme. The Commission seeks access to those
16 books and records of Baere, wherever they may be located. Given the fact that Matthews and
17 Baere have already destroyed much of White Pine's documentation, Baere's records must be
18 preserved at the very outset of litigation for there to be a meaningful opportunity to locate and
19 recover customer funds and to determine the scope of the wrongs perpetrated by the defendants'
20 fraudulent scheme. See *Clothier*, 788 F. Supp. at 493. Preserving these records also is critical to
21 performing the necessary accounting of defendants' assets and liabilities and ascertaining the
22

23 _____
24 ³ Indeed, in connection with a nationwide crackdown on foreign currency scams, a number of
25 district courts have issued statutory *ex parte* orders in cases like this case which involved
26 entities engaged in fraud, the offering of illegal foreign currency futures and options and the
27 misappropriation of customer funds. See e.g. *Commodity Futures Trading Commission v. Rego*
28 *Gainer Financial Inc. et al.*, No. 02-1417 DT(Mcx) (C.D.Ca. *ex parte* order entered February
19, 2002); *Commodity Futures Trading Commission v. Fintrex, et al.*, No. 01-0697 (C.D.Ca.
ex parte order entered August 2001); *Commodity Futures Trading Commission v.*
International Financial Services, Inc., No. 02-CIV-5497-GEL (S.D.N.Y. *ex parte* order entered
July 17, 2002).

1 nature and scope of the defendants' scheme. See *Commodity Futures Trading Commission v. Co*
2 *Petro Marketing Group*, 680 F.2d 573, 583 (9th Cir. 1982). Such relief will "preserve the *status*
3 *quo* while an investigation is conducted to clarify the sources of various funds." *Commodity*
4 *Futures Trading Commission v. Morgan, Harris & Scott*, 484 F. Supp. at 678. Moreover, a
5 freeze also maintains the court's jurisdiction over the assets when disgorgement or restitution is
6 ordered. See *Commodity Futures Trading Commission v. American Metal Exchange Corp.*, 693
7 F. Supp. 168, 196 (D.N.J. 1988).

9 D. The Evidence Meets The Standard For Entry Of A Preliminary Injunction

10 Section 6c(b) of the Act provides in pertinent part that "[u]pon a proper showing, a...
11 temporary injunction... shall be granted without bond." In the Ninth Circuit, the general standard
12 for obtaining a preliminary injunction provides that: "the moving party must show either (1) a
13 combination of probable success on the merits and the possibility of irreparable injury or (2) that
14 serious questions are raised and the balance of hardships tips sharply in its favor." *U.S. v. Nutri-*
15 *Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992). However, unlike private actions for equitable
16 relief, a Commission action for injunctive relief is a creature of statute. "The function of a court
17 in deciding whether to issue an injunction authorized by a statute of the United States to enforce
18 and implement Congressional policy is a different one from that of the court when weighing
19 claims of two private litigants." *U.S. v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174-75
20 (9th Cir. 1987).
21
22

23 In the *Odessa* decision the Ninth Circuit Court reversed the district court's denial of a
24 motion for preliminary injunction in a case where the United States, as the moving party, had
25 presented uncontested evidence that the defendant was in continuing violation of the Food, Drug
26 and Cosmetic Act. The Ninth Circuit held that, in such cases of statutory violations, the
27 government is entitled to a presumption that it would suffer irreparable injury if its motion were
28

1 denied. *Id.* at 175-76.

2 The Ninth Circuit distinguished the *Odessa* decision in *U.S. v. Nutri-Cology*, a case in
3 which the government, in moving for entry of a preliminary injunction, failed to show that it was
4 likely to prevail on the merits. Because the Government had made merely “a colorable showing
5 of a violation,” it was “not entitled to a presumption, rebuttable or otherwise, of irreparable
6 injury.” *Nutri-Cology*, 982 F.2d at 398. In contrast, the Government in *Odessa* had shown an
7 “undisputed statutory violation” and therefore, was entitled a presumption of irreparable injury.
8 *Odessa*, 833 F.2d at 176.
9

10 Similar to the Government in *Odessa*, the Commission has submitted clear evidence of a
11 statutory violation in this case. The law provides that irreparable injury arising out of the
12 defendants’ ongoing fraud and continuing sale of illegal foreign currency options contracts is
13 presumed, and an order of preliminary injunction is, therefore, appropriate.
14

15 E. Expedited Discovery Is Appropriate To Enable
16 The Commission To Fulfill Its Statutory Duties

17 The Commission also moves this Court for an order granting expedited discovery for the
18 purpose of ascertaining Baere’s assets and the identity of White Pine’s customers. Expedited
19 discovery, in advance of that provided by Rule 26 of the Federal Rules of Civil Procedure, is
20 necessary to enable the Commission to fulfill its statutory duties. Specifically, discovery of
21 Baere’s complete assets and White Pine’s customers will enable the Commission to protect
22 White Pine’s customers from further loss and damage by ensuring that the Baere complies fully
23 with the Court’s order.
24

25 In similar cases, courts have granted plaintiff’s request for expedited discovery. *See, e.g.,*
26 *Commodity Futures Trading Commission v. DBS, Inc. et al.*, No. C-031379 – VRW (N.D.Ca.
27 April 3, 2003); *Commodity Futures Trading Commission v. Chilcott et al.*, 2002 WL 1455345
28 (M.D. Fla.) (granting the Commission’s request for expedited discovery in addition to issuing an

1 ex parte restraining order freezing the defendants' assets); *Commodity Futures Trading*
2 *Commission v. Luger*, 2002 WL 1789768 (S.D. Fla.) (same); *Commodity Futures Trading*
3 *Commission v. First Bristol Group, Inc.*, 2002 WL 31357411 (S.D. Fla.) (same).
4

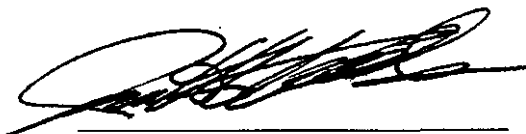
5 VII.

6 STATEMENT OF RELIEF SOUGHT

7 For the reasons set forth in this memorandum, the Commission respectfully requests that
8 this Court enter a statutory restraining order and an order of preliminary injunction freezing
9 Stephan Baere's assets and preserving records and grant leave to conduct expedited discovery.
10

11 November 18, 2004

12 Respectfully submitted,

13 

14 _____
15 James H. Holl, III
16 Erin E. Vespe
17 Attorneys for Plaintiff
18 Commodity Futures Trading Commission
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CERTIFICATE OF SERVICE

I certify that on this 18th day of November, 2004, I caused to be served one copy of the attached document, via U.S. First Class mail, postage prepaid, to the following:

Kent Wilson
711 8th Ave, 2d floor
San Diego, CA 92101
Agent for Service of Process for White Pine Trust Co.

Dirk Metzger
Suite 700
550 West C St.
San Diego, CA 92101
Attorney for Stephan Baere