

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**COMMODITY FUTURES
TRADING COMMISSION,**

Plaintiff,

v.

**RENE LARRALDE, JUAN PABLO
VALCARCE, BRIAN EARLY,
ALISHA ANN KINGREY, and
FUNDSZ.**

Defendants.

Case No:

**PLAINTIFF'S EMERGENCY MOTION FOR AN *EX PARTE* STATUTORY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND
MEMORANDUM IN SUPPORT THEREOF**

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Plaintiff U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”) seeks an emergency statutory restraining order (“SRO”) and preliminary injunction against defendants Rene Larralde, Juan Pablo Valcarce, Brian Early, Alisha Ann Kingrey, and Funds (collectively, “Defendants”) for violating core anti-fraud provisions of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 1 *et seq.*, including making material misrepresentations and omissions to induce participants to contribute large amounts of money to their investment scheme.¹

Specifically, the CFTC requests this Court to enter an *Ex Parte* Statutory Restraining Order without notice preventing Defendants from: (1) withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property; (2) destroying, altering, mutilating, or disposing of any books, records, or other documents; and (3) refusing to permit authorized representatives of the CFTC to inspect, when and as requested, any books, records, or other documents. The Commission also requests the appointment of a temporary receiver.

Contemporaneous with this Motion for *Ex Parte* Statutory Restraining Order and Preliminary Injunction (“Motion”), the CFTC filed: (1) a Complaint for Injunctive and Other Equitable Relief and Penalties Under the Commodity

¹ Section 6c of the Act, 7 U.S.C. § 13a-1, authorizes the CFTC to seek injunctive relief whenever it appears that a person or entity has engaged, is engaging, or is about to engage in any act or practice that violates the Act or CFTC Regulations

Exchange Act (“Complaint”); (2) a Motion for Expedited Discovery; (3) a motion for leave to file this case under seal; and (4) a motion for leave to exceed the page limitations.

I. INTRODUCTION

The Commission seeks an SRO and emergency injunctive relief against Defendants for violating core anti-fraud provisions of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 1 *et seq.* The Commission also requests the appointment of a temporary receiver.

Between October 2020 and the present (the “Relevant Period”), Defendants solicited and accepted funds from over 14,000 members of the general public. Defendants purported to trade these funds in cryptocurrencies and precious metals, misrepresenting, among other things, that they obtained returns of over 3% *per week* profitably trading cryptocurrency and precious metals for seven years. In reality, Defendants operated a fraudulent scheme in which they now admit that they did not actually trade participants’ funds. Instead, they appear to have simply made up high weekly returns out of thin air in order to induce participants to keep their money in the scheme and to induce prospective participants to contribute. And after Defendants received subpoenas that made them aware of the CFTC’s investigation, they halted participant withdrawals and engaged in a campaign to scrub mentions of FundsZ off of YouTube and social media.

Pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, the CFTC hereby moves the Court to enter an SRO which preserves the status quo by: (1) freezing Defendants' assets by prohibiting them from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property, (2) prohibiting Defendants from destroying any records, and (3) permitting the CFTC to inspect Defendants' records, including through authorizing the copying of the records to allow inspection to occur and requiring Defendants to provide information necessary to locate and access those records. Additionally, pursuant to 7 U.S.C. § 13a-1(a), the CFTC seeks appointment of a temporary Receiver. The CFTC also seeks an Order of Preliminary Injunction to continue this relief, to restrain Defendant from committing further violations of the Act, and to provide for other equitable relief this Court deems necessary or appropriate.²

II. THE PARTIES

Plaintiff **Commodity Futures Trading Commission** is an independent federal regulatory agency charged by Congress with administering and enforcing the Act and CFTC Regulations ("Regulations"), 17 C.F.R. pts. 1-190 (2022).

Defendant **Rene Larralde** resides in West Melbourne, Florida. Larralde has never been registered with the CFTC in any capacity. Larralde has served as a

² In further support of its Emergency Motion for *Ex Parte* SRO and its Motion for Preliminary Injunction, the CFTC submits with this Memorandum the Declaration of Matthew Edelstein, Senior Investigator for the CFTC and the exhibits attached thereto.

member of the Fundsz Advisory Board throughout the Relevant Period. (Edelstein Decl. ¶ 6.)

Defendant **Juan Pablo Valcarce** resides in Melbourne, Florida. Valcarce has never been registered with the CFTC in any capacity. Valcarce has served as the Chairman of the Fundsz Advisory Board throughout the Relevant Period. (*Id.* ¶ 7.)

Defendant **Brian Early** resides in New Orleans, Louisiana. Early has never been registered with the CFTC in any capacity. Early has served as a member of the Fundsz Advisory Board throughout the Relevant Period. (*Id.* ¶ 8.)

Defendant **Alisha Ann Kingrey** resides in Franklin, Arkansas. Kingrey has never been registered with the CFTC in any capacity. Kingrey has served as a member of the Fundsz Advisory Board throughout the Relevant Period. (*Id.* ¶ 9.)

Defendant **Fundsz** is an unincorporated entity that began operation in or about May 2020. Fundsz has never been registered with the CFTC in any capacity. (*Id.* ¶ 10.)

III. JURISDICTION AND VENUE

This Court has jurisdiction over this action under 28 U.S.C. § 1331 (codifying federal question jurisdiction) and 28 U.S.C. § 1345 (providing that U.S. district courts have original jurisdiction over civil actions commenced by the United States or by any agency expressly authorized to sue by Act of Congress).

In addition, Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a), provides that U.S. district courts have jurisdiction to hear actions brought by the Commission for injunctive and other relief or to enforce compliance with the Act whenever it shall appear to the Commission that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order thereunder.

Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), because Defendants transacted business in this District, Defendants Larralde and Valcarce reside in this district, and certain of the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this District, among other places.

IV. FACTS

In October 2020, Fundsz began operation using the website fundsz.com. On the website, Fundsz is described as a platform that “utilizes revolutionary blockchain technology that empowers individuals, charities and organizations to raise recurring, unrestricted and sustainable income.” (Edelstein Decl. ¶¶ 11, 12). The website states that Fundsz is “Trusted by 14,092,” implying that Fundsz has over 14,000 participants. (*Id.* ¶ 12). Posts on the Fundsz Telegram account confirm that this number reflects the number of “active members” in the Fundsz scheme. (*Id.* ¶ 36).

Beginning in or around October 2020, Defendants solicited members of the general public to contribute money to be managed by Fundsz. (*Id.* ¶ 11). The fundsz.com website contains a presentation that users can download, with slides showing promotional materials about Fundsz. (*Id.* ¶ 14). The Individual Defendants also conducted live webinars for participants and potential participants, and made the recordings of those videos public on websites such as YouTube. (*E.g., id.* ¶¶ 17-32). In the marketing materials, Defendants described how participants could make “passive income” through Fundsz in a process called staking. (*Id.* ¶¶ 18, 23). Defendants advertised that participants could receive returns of 3% per week (12% per month) on the money that they contributed to Fundsz. (*Id.* ¶¶ 20, 22). Defendants explained that participants didn’t have to do anything—other than turn their money over to Fundsz—to achieve these returns. (*Id.* ¶ 18). Rather, Defendants promised that “WE Do The Work, YOU Get Paid A Share of The Profits” and that this passive income required “ZERO Effort On Your Part.” (*Id.* ¶ 18). And Defendants reported that Fundsz had actually achieved returns over 3% per week, claiming remarkably consistent returns between about 2.90% and 3.55% each and every week. (*Id.* ¶ 20).

Defendants purported to earn this 3% per week through trading cryptocurrency and precious metals. (*Id.* ¶¶ 24, 26, 30). Over a period of years, Defendants repeatedly told participants and potential participants that they would

trade participant funds entrusted to them. For example, in a video publicly posted to YouTube entitled “ANSWER TO YOUR QUESTION – HOW DO WE MAKE OUR MONEY,” Defendant Early stated:

So the pool is actually being traded. And so there is a variety of different methods that are employed in that trading. And so it's a proprietary algorithm that is put together. And so its actually not just trading, its arbitrage, its forex, its long term, its short term, its a lot of different characteristics are put into this proprietary algorithm. And so a lot of people want to know the secret to the sauce. And folks, on this video I'm letting you know right now that that's just not something we're going to give up. The secret to our sauce. Its one of the reasons we have been able to be sustainable for six plus years.

(*Id.* ¶ 26).

Other Defendants made similar statements that Fundsz was trading. For instance, on June 24, 2023 in the Fundsz Telegram group—which is essentially an online message board that serves as the primary method for Fundsz to communicate with participants—Defendant Kingrey stated:

- Fundsz never uses more than 20% of the liquidity pool which allows consistency
- Fundsz does not rely solely on the cryptocurrency market due to its volatility
- Fundsz has developed a proprietary algorithm to participate in the crypto industry
- Fundsz also buys precious metals that generate income
- Fundsz has multiple healthy and sustainable sources of income

(*Id.* ¶ 35).

And on or about March 30, 2022, Defendant Valcarce stated on a video publicly posted to YouTube: “We come to stake, right? Stake is that we do the trading for you when you bring your crypto assets, number 1, right?” (*Id.* ¶ 30).

Based on the supposed 3% weekly returns, the Defendants calculated the enormous profits participants would supposedly receive if they put their money in Fundsz. (*Id.* ¶¶ 28, 31). Defendant Early told prospective participants that a \$2,500 stake could be expected to grow to \$1 million within 48 months without any additional deposits. (*Id.* ¶ 28). On or about July 26, 2022, Defendant Kingrey used an online interest calculator to show potential participants that \$589 contributed to Fundsz would become over \$300,000 in four years, and that a \$10,000 contribution would increase in value to more than \$5 million within four years. (*Id.* ¶¶ 31,32). Defendant Valcarce, who also appeared in the webinar, then assured potential participants that “this is all 100% real,” and explained that historically Fundsz has achieved these returns. (*Id.* ¶ 32). Valcarce recommended that participants “not withdraw[] anything” or “minimize withdrawals” in order to “maximize their earnings.” (*Id.*). Through this marketing, Defendants claim to have successfully attracted more than 14,000 participants. (*Id.* ¶ 12).

But recent marketing materials posted to the Fundsz Telegram group state “[w]e do not trade.” (*Id.* ¶ 37). On June 12, 2023, the Commission subpoenaed the four individual Defendants and two other Fundsz board members, for, among

other things, information about Fundsız accounts at banks, digital asset exchanges or other financial institutions that hold Fundsız assets. (*Id.* ¶ 39). Subpoena responses sent by Defendant Valcarce confirm that Fundsız did not trade. In response to a request for “[a]ll daily, monthly, or quarterly trading activity statements from trading accounts held by You or Fundsız, or under Your or Fundsız’s control,” Valcarce responded “None.” (*Id.* ¶ 44). Valcarce also claims that there are no documents relating to digital asset exchange used to hold funds belonging to Fundsız or Fundsız customers. (*Id.*).

Defendants made other materially false claims to participants in their marketing materials. In a presentation available on the Fundsız.com website, Defendants claim that Fundsız is “Celebrating 7 Years of on time and accurate payments.” (*Id.* ¶ 16). But Fundsız first came into existence in 2020. (*Id.* ¶ 10). Defendants also used marketing materials that provided false historical rates of returns for certain digital assets. In a marketing presentation, Defendants stated “Bitcoin increased 700% past 12 months!;” “Ethereum increased 400% past 12 months!;” and “Tron increased 1,600% past 12 months!” (*Id.* ¶ 25). But in fact, the prices of bitcoin, ethereum, and tron had actually decreased by 66%, 64%, and 37%, respectively, over the past 12 months at the time the presentation was given. (*Id.*).

On June 23, 2023, after Defendants had learned of the Commission’s investigation, they halted all withdrawals from Fundsz. (*Id.* ¶ 40). An announcement in the Fundsz Telegram group stated “effective immediately all withdrawals have been placed on hold until we are able to address our compliance obligation.” (*Id.*). Subsequently, on July 10, 2023, Defendant Early announced on Telegram that Fundsz would re-institute withdrawals on July 15, 2023, but that participants would be able to withdraw only 10% of their staking wallet per week. (*Id.* ¶ 43). On July 20, 2023, Defendant Early explained that Defendants had halted withdrawals because if the withdrawals were allowed to proceed Fundsz would have been bankrupted:

We’ve gone up to 3,000 pending withdrawals that are currently in the system. All right? So what that means folks is that if all the withdrawals were being paid out, there wouldn’t be any money left for the people that are not making withdrawals, not trying to run away from the platform. And so that’s why we stopped withdrawals in the first place, to be able to protect everybody’s money.

(*Id.* ¶ 52.) This stunning admission demonstrates that Fundsz is insolvent and does not have enough assets on hand to pay out the fake, inflated returns they have been reporting to participants.

Defendants also began removing Fundsz social media and videos after receiving the CFTC’s subpoena (which included a document retention request). On June 23, 2023, Defendant Kingrey instructed Fundsz members to take down all social media posts or videos about Fundsz, saying “[i]f you find a Fundsz video

and you know the person who owns it, contact them and tell them to unlist it.” (*Id.* ¶ 41). She reemphasized this demand an hour later, stating in all caps, “ALL FACEBOOK POSTS WITH THE FUNDSZ LOGO HAVE TO BE DELETED IMMEDIATELY.” (*Id.* ¶ 42). And on July 10, 2023, Defendant Early announced that “[e]ffective immediately we ae DEACTIVATING the [FundsZ Facebook] group.” (*Id.* ¶ 43).

Defendants appear to have personally benefitted from participants’ contributions to FundsZ. For example, between approximately September 14, 2021 and October 5, 2022, Defendant Larralde made 35 deposits of digital asset commodities valued at \$90,254 from certain digital asset wallets associated with FundsZ into an account in Larralde’s name at Digital Asset Exchange A. (*Id.* ¶ 50). Subsequently, Larralde made 34 withdrawals of U.S. dollars from that same account at Digital Asset Exchange A, sending \$79,865 in fiat currency to his personal account at Bank B. (*Id.*). In a webinar from on or around February 14, 2022, Defendant Kingrey stated that Defendant Larralde had been the founder of FundsZ, and that “Rene [Larralde] is the one that is in control of our money.” (*Id.* ¶ 21).

V. ARGUMENT

A. Defendants Committed Fraud With Respect to Digital Assets in Violation of Section 6(c)(1) of the Act and Regulation 180.1(a)(1)-(3).

Section 6(c)(1) of the Act makes it unlawful for any person, directly or indirectly, in connection with any swap or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, intentionally or recklessly to: (1) use or employ or attempt to use or employ, manipulative devices, schemes, or artifices to defraud; (2) make, or attempt to make, untrue or misleading statements of a material fact or omit to state material facts necessary in order to make the statements made or not untrue or misleading; or (3) engage, or attempt to engage, in acts, practices, or courses of business, which operate or would have operated as a fraud or deceit upon clients or prospective clients.

Regulation 180.1(a) provides, in relevant part, that it shall be unlawful for any person, directly or indirectly, in connection with any contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly: (1) use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud; (2) make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading; or (3) engage, or attempt to engage, in

any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person.

Defendants intentionally made false and misleading representations to participants, including that the funds contributed would be used to trade cryptocurrency and precious metals, and that they actually traded profitably, receiving returns of more than 3% per week (365% per year). In reality, and according to recent announcements on the Fundsz official Telegram page, Fundsz does not trade at all. With no trading, there is no plausible explanation for how Defendants are supposedly making 3% per week in profits on participants' money, and it is clear that the supposed "returns" are simply made up and not backed by assets controlled by Fundsz. Yet Defendants continue to report to current participants that they have obtained returns of 3% per week, and to solicit potential participants by promising that rate of return. Further, a steady return of 3% per week (365% per year) is unbelievable and is evidence of fraud on its face. Moreover, their remarkable admission on July 20 that Fundsz was bankrupt is compelling evidence that Defendants have not been obtaining these incredible returns. And Defendants' actions after receiving subpoenas—halting withdrawals and taking down social media posts—is yet more evidence that they knew they were breaking the law.

Defendants also misrepresented that FundsZ has been in existence for over seven years, when in fact it has existed for less than three years. And Defendants misrepresented the returns of popular cryptocurrencies such as bitcoin and ethereum, likely in order to convince participants that 3% weekly returns were plausible.

1. Defendants’ Misrepresentations and Omissions Were Material

A misrepresentation or omission is “material” if “a reasonable investor would consider it important in deciding whether to make an investment.” *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328-29 (11th Cir. 2002).

“Misrepresentations concerning profit and risk go to the heart of a customer’s investment decision and are therefore material as a matter of law.” *CFTC v. McDonnell*, 332 F. Supp. 3d 641, 720 (E.D.N.Y. 2018) (quoting *CFTC v. Int’l Fin. Servs., Inc.*, 323 F. Supp. 2d 482, 500-01 (S.D.N.Y. 2004)).

Defendants’ misrepresentations and omissions are material because a reasonable investor would have viewed them as important in deciding whether to invest with them. Defendants’ misrepresented participants’ expected profitability, and reasonable investors would want to know what is happening with their money. And whether investments are actually appreciating by 3% per week (365% per year) or are actually being dissipated is obviously important information to any reasonable investor. *CFTC v. Allied Markets LLC*, No. 3:15-cv-5, 2019 WL

4921125, at *6 (M.D. Fla. June 28, 2019) (reasonable pool participant would want to know that only a small portion of the pool was used for trading and that the pool had suffered net losses).

2. Defendants Acted with Scienter

The scienter element is established when an individual's acts are performed "with knowledge of their nature and character." *Wasnick v. Refco, Inc.*, 911 F.2d 345, 348 (9th Cir. 1990) (internal quotation marks and citation omitted). The CFTC need not prove evil motive or intent to injure a client, or that a defendant wanted to cheat or defraud prospective clients. *Cange v. Stotler & Co. Inc.*, 826 F.2d 581, 589 (7th Cir. 1987). In order to meet the scienter requirement, the CFTC must demonstrate that a defendant committed the alleged wrongful acts intentionally or with reckless disregard for his duties under the Act. *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988) (finding that recklessness is sufficient to satisfy scienter requirement); *McCarthy v. PaineWebber, Inc.*, 618 F. Supp. 933, 940 (N.D. Ill. 1985).

To prove that conduct is intentional, the Commission need only show that a defendant's actions were "intentional as opposed to accidental." *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985). To prove that conduct is reckless, the CFTC must show that it "departs so far from the standards of ordinary care that it

is very difficult to believe the [actor] was not aware of what he was doing.”

McDonnell, 332 F. Supp. 3d at 721 (alteration in original).

Defendants acted with the requisite scienter because their material misrepresentations, omissions and false statements were not accidental. They knew that they were not trading cryptocurrency and precious metals on behalf of participants, and they also knew that they were not achieving returns on investment of 3% per week from that (apparently non-existent) trading and that they could not reliably achieve those returns in the future. They knew that Fundsz had not been in operation for 7 years, and they knew or should have known (through a cursory Google search) that the prices of bitcoin, ethereum, and tron were decreasing, not increasing, during the period in question. Their conduct was not accidental but intentional, and thus satisfies the element.

B. Principal-Agent and Controlling Person Liability

1. Principal-Agent

Section 2(a)(1)(B) of the Act, 7 U.S.C. 2(a)(1)(B), and Regulation 1.2, 17 C.F.R. § 1.2 (2022), provide that the “act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.”

In determining liability under Section 2(a)(1)(B) of the Act and Regulation 1.2, the Court of Appeals for the Eleventh Circuit applies a common law test for actual agency, either implied or express, which requires: (1) consent to the agency by both principal and agent; and (2) the control of the agent by the principal. *CFTC v. Gibraltar*, 575 F. 3d 1180, 1189 (11th Cir. 2009).

Here, the violative conduct of Larralde, Valcarce, Early, and Kingrey and other employees and agents acting on behalf of Fundsz, occurred within the scope of their employment and/or agency with Fundsz. Therefore, Fundsz is liable for the acts of Larralde, Valcarce, Early, and Kingrey pursuant to Section 2(a)(1)(B) and Regulation 1.2.

2. Controlling Person Liability

Section 13(b) of the Act, 7 U.S.C. § 13c(b), provides that a defendant who possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of an entity may be liable as a controlling person of that entity, provided that the defendant either knowingly induces, directly or indirectly, the violative acts or fails to act in good faith. *R.J. Fitzgerald & Co.*, 310 F.3d at 1334; *Monieson v. CFTC*, 996 F.2d 852, 858-860 (7th Cir.1993). “A fundamental purpose of Section 13(b) is to allow the Commission to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the Act directly on such individuals as well as on the corporation

itself.” *R.J. Fitzgerald & Co.*, 310 F.3d at 1334 (quoting *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1567 (11th Cir. 1995)). The statute is “remedial, to be construed liberally, and requir[es] only some indirect means of discipline or influence short of actual direction to hold a control[ling] person liable.” *Monieson*, 996 at 859 (quoting *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 880–881 (7th Cir.1992)).

To establish, controlling person liability under Section 13(b), the Commission must show both: (1) control and (2) lack of good faith or knowing inducement of the acts constituting the violation. *Monieson*, 996 F.2d at 859; *R.J. Fitzgerald & Co.*, 310 F.3d at 1334; *JCC, Inc.*, 63 F.3d at 1568. To establish the first element, control, a defendant must possess specific control, which is “the power or ability to control the specific transaction or activity upon which the primary violation was predicated.” *Monieson*, 996 F.2d at 859 (internal quotation marks and citation omitted). Evidence that a defendant is an officer, founder, principal, or the authorized signatory on the company’s bank accounts indicates the power to control a company. *In re Spiegel*, No. CFTC No. 85-19, 1988 WL 232212, at *8 (Jan. 12, 1988); *see also Apache Trading Corp.*, CFTC No. 87-14, 1992 WL 52596, at *5-6 (Mar. 11, 1992) (finding that an individual who “maintained control over the economic aspects of the operations” and “performed

almost all important managerial or supervisory functions and made all important hiring decisions” was a controlling person).

Knowing inducement requires a showing that “the controlling person had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue.” *R.J. Fitzgerald & Co.*, 310 F.3d at 1334; *JCC, Inc.*, 63 F.3d at 1568. Controlling persons cannot avoid liability by deliberately or recklessly avoiding knowledge about potential wrongdoing. *See Monieson*, 996 at 861. To support a finding of constructive knowledge, the Commission must show that a defendant “lacked actual knowledge only because he consciously avoided it.” *JCC, Inc.*, 63 F.3d at 1569 (alterations omitted).

A controlling person fails to act in good faith if he does not “maintain a reasonably adequate system of internal supervision and control . . . or [does] not enforce with any reasonable diligence such system.” *Monieson*, 996 F.2d at 860. “The controlling person must also act recklessly; negligence alone is not sufficient.” *Id.* (citations omitted).

Here, Larralde exercised direct control over Fundsz. Larralde was the founder of Fundsz, and he “build[t] the program from the ground up.” (Edelstein Decl. ¶ 21). Larralde also controlled the Fundsz money. (*Id.*). By virtue of his control over Fundsz and the money that was contributed to Fundsz, there can be no doubt that he had actual or constructive knowledge of the fraudulent and unlawful

conduct alleged in the Complaint and thus, knowingly induced its violations of the Act and Commission Regulations. Thus, Larralde controlled Fundsz and is liable for its violations of the Act and Regulations to the same extent as Fundsz itself.

VI. RELIEF SOUGHT

A. The Court Has Jurisdiction and Authority To Grant a Statutory Restraining Order

As described above and in the Complaint, Defendants have committed fraud in violation of the Act and Regulations. Defendants claim to have already solicited contributions from over 14,000 participants based on material false statements, and it appears that Defendants are continuing their fraud. The Commission's request for an ex parte statutory restraining order ("SRO") is necessary to preserve the status quo. The proposed ex parte statutory restraining order freezes Defendants' assets, prohibits Defendants from destroying any records, permits the CFTC to inspect and copy Defendants' records, requires Defendants to provide information necessary to locate and access those records, and appoints a temporary receiver. The Commission seeks this relief pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a), and in accordance with Fed. R. Civ. P. 65.

7 U.S.C. § 13a-1(a) authorizes the CFTC to seek injunctive and other relief in a district court against any person whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or

practice constituting a violation of any provision of the Act or any rule, regulation, or order thereunder.

7 U.S.C. § 13a-1(a) further authorizes the Commission to seek, and the Court to grant, certain specific *ex parte* relief, namely—

a restraining order which [1] prohibits any person from destroying, altering, or disposing of, or refusing to permit authorized representatives of the Commission to inspect, when and as requested, any books and records or other documents[,] or [2] which prohibits any person from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property, and [3] . . . an order appointing a temporary receiver to administer such restraining order and to perform such other duties as the court may consider appropriate.

An SRO may be sought and entered on an *ex parte* basis against any person who appears to have violated the Act or Regulations (7 U.S.C. § 13a-1(a)) in order to preserve the status quo. *See, e.g., CFTC v. Hunt*, 591 F. 2d 1211, 1219 (7th Cir. 1979); *CFTC v. Rice*, 498 F. App'x 462, 465 (5th Cir. 2012) (*per curiam*) (summary order); *CFTC v. Clothier*, 788 F. Supp. 490, 490-93 (D. Kan. 1992) (Court granted *ex parte* restraining order against broker and partnership upon presentation of colorable claim of violations of the Act). Mindful that notice “may result in the destruction of books and records and the dissipation of customer funds,” Congress authorized courts to issue such relief *ex parte* in order “to prevent possible removal or destruction of potential evidence or other impediments to legitimate law enforcement activities and to prohibit movement or disposal of

funds, assets and other property which may be subject to lawful claims of customers.” H.R. Rep. No. 97-565, at 53–54, 93 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3902–03, 3942.

B. The Commission Has Established that Ex Parte Relief Is Necessary and Appropriate Here

The entry of an ex parte restraining order freezing assets and preventing destruction of records is critical in this case. Ex parte relief is justified when notice to the other party would result in making the restraining order ineffective, for example when funds may be dissipated or documents may be destroyed if notice is given. That situation exists here. After becoming aware of the Commission’s investigation, Defendants have taken down (and are likely destroying) evidence of past statements that they have made. They would likely increase their destruction of evidence if they learned the Commission was charging them with fraud. And the Commission has uncovered evidence that over \$70,000 in cryptocurrency was taken from Fundsz accounts and sent to the bank account of Defendant Larralde. There is good reason to believe that Defendants would misappropriate more participant funds if given notice of the Commission’s complaint and this motion.

Courts in this district have granted this relief. *See CFTC v. Highrise Advantage, et al.*, No. 6:20-cv-1657-Orl-41GJK (M.D. Fla. Sept. 16, 2020) (ECF #45) (restraining order freezing defendants’ assets, restraining defendants from destroying records and requiring them to allow the CFTC to inspect records for a

period of 14 days); *CFTC v. Allied Markets LLC, et al.*, No. 3:15-cv-5-J-34MCR) (M.D. Fla. Jan. 12, 2015) (ECF #9) (ex parte restraining order freezing defendants' assets and restraining the destruction of books and records for 14 days pending a hearing on plaintiff's motion for a preliminary injunction); *CFTC v. Maverick Int'l, Inc., et al.*, No. 3:15-cv-354-J-38MCR (M.D. Fla. Mar. 26, 2015) (ECF #7) (sealed order granting ex parte statutory restraining order freezing existing and after-acquired assets for a period of 14 days pending a hearing on plaintiff's motion for a preliminary injunction).

1. An Asset Freeze is Necessary to Preserve Assets and Maintain the Status Quo

The proposed ex parte SRO freezes Defendants' assets, which is relief that fits squarely within the Court's authority under the plain language of 7 U.S.C. § 13a-1(a). Further, an asset freeze is especially appropriate where, as here, the Commission seeks disgorgement and restitution. *See CFTC v. Levy*, 541 F.3d 1102, 1114 (11th Cir. 2008) (holding in the context of an injunction pending satisfaction of judgment that "a district court may freeze a defendant's assets to ensure the adequacy of a disgorgement remedy"); *CFTC v. Muller*, 570 F.2d 1296, 1301 (5th Cir. 1978) (similar in granting a preliminary injunction); *SEC v. Abdallah*, No. 1:14-cv-1155, 2014 WL 12597836, at *2 (N.D. Ohio May 30, 2014) (similar in the context of a temporary restraining order); *F.T.C. v. Health Formulas, LLC*, No. 2:14-CV-01649-RFB, 2015 WL 4623126, at *2 (D. Nev. Aug.

3, 2015) (“As it stated in its Temporary Restraining Order . . . the Court has found that the asset freeze is necessary to preserve the possibility of future relief.”). As another district court explained, “[m]oreover, an order imposing a temporary freeze of assets is often necessary simply to preserve the status quo while an investigation is conducted to clarify the sources of various funds.” *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 678 (S.D.N.Y. 1979) (context of a preliminary injunction); *see also CFTC v. Steele*, No. 05-c-3130, 2005 WL 3723267, at *1 (N.D. Ill. May 26, 2005) (ex parte restraining order freezing assets necessary to preserve the status quo).

To obtain an asset freeze, the CFTC need only “show either a likelihood of success on the merits, or that an inference can be drawn that the party has violated” the Act. *Smith v. SEC*, 653 F.3d 121, 128 (2d Cir. 2011); *see also SEC v. Heden*, 51 F. Supp. 2d 296, 298 (S.D.N.Y. 1999) (“Unlike a preliminary injunction enjoining a violation of the securities laws, which requires the SEC to make a substantial showing of likelihood of success as to both a current violation and the risk of repetition, an asset freeze requires a lesser showing.”). Here, the Commission has presented ample evidence both that it will succeed on the merits and that the Defendants have violated the Act.

2. An SRO is Necessary to Preserve Books and Records

The proposed ex parte SRO also requires Defendants to preserve certain records and allow Commission representatives to inspect and copy such records.³ Preservation and inspection will allow the Commission to identify assets, the identity of other victims of Defendants' fraud, and the scope of Defendants' wrongdoing, as well as ensure that Defendants do not destroy evidence of their fraud. The Commission also requests authority to copy the records (with the records being returned to Defendants afterwards) as part of the order requiring preservation and allowing inspection of the records.

Although 7 U.S.C. § 13a-1(a) does not expressly provide for copying of records, such authority is necessary to give practical meaning to the Commission's right to inspect. "The law has long recognized that the "authorization of an act also authorizes a necessary predicate act." *Luis v. United States*, 578 U.S. 5, 26

³ The Commission recognizes the possibility that there could be potentially privileged information or documents commingled amongst other relevant, non-privileged materials in the possession of Defendants—particularly in electronically stored information, where files are typically stored in a digital format on computer hard drives in a non-contiguous manner. To account for this possibility, the proposed ex parte SRO provides that the Commission should undertake reasonable measures to prevent review of the Defendant's privileged communications by the Commission's attorneys and other staff who are part of the litigation team in this matter. It further provides that Defendants shall promptly contact Plaintiff's counsel to assert any claims of privilege relating to the contents of any records that are subject to this Order and promptly cooperate with Plaintiff's counsel to develop reasonable protocols to isolate and prevent disclosure of claimed privileged materials to the Commission's attorneys and other staff who are part of the litigation team in this matter. However, the proposed SRO specifically states that none of the above-described provisions excuse the Defendants from full and immediate compliance with the SRO permitting Plaintiff to inspect the books and records.

(2016) (Thomas, J., concurring in the judgment) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 192 (2012) (discussing the “predicate-act canon”)); *see also id.* (“[W]henver a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied”) (quoting 1 J. Kent, *Commentaries on American Law* 464 (13th ed. 1884)); *cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 409-10 (1819) (“The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means”). A provision authorizing the Commission to copy records is a necessary predicate to the Commission’s ability to inspect that will ensure important records related to Defendants’ relevant conduct and customer funds are not destroyed and allow Commission representatives to have a real and meaningful opportunity to inspect, review, and carefully analyze all such records. Such relief is consistent with the strong policy enunciated by Congress, “to prevent any possible destruction of evidence and conversion of assets.” H.R. Rep. No. 97-565, at 53–54. This relief is particularly appropriate here given that Defendants are not registered with the Commission, are under no regulatory obligation to maintain records that may be material to determining the full extent of the violative conduct, and already appear to have removed or destroyed evidence after receiving the CFTC’s subpoenas. Numerous courts have previously authorized copying of

records in similar ex parte circumstances. *See, e.g., CFTC v. Maverick Int'l, Inc., et al.*, No. 3:15-cv-354-J-38MCR (M.D. Fla. Mar. 26, 2015) (ECF #7) at 7; *CFTC v. Khara*, No. 15 cv 03497, 2015 WL 10849125, at *4 (S.D.N.Y. May 5, 2016); *CFTC v. RFF GF, LLC*, No. 4:13-cv-382, 2013 WL 4083748, at *4 (E.D. Tex. Jul. 9, 2013); *CFTC v. Vishnevetsky*, No. 1:12-cv-03234, 2012 WL 2930302, at *3 (N.D. Ill. May 1, 2012).⁴

3. The Court Should Appoint a Temporary Receiver

Whether a receiver shall be appointed is a matter within the sound discretion of the court. *E.g., CFTC v. Am. Commodity Grp. Corp.*, 753 F.2d 862, 866 n. 6 (11th Cir. 1984); *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 677 (S.D.N.Y. 1979); *CFTC v. Am. Metals Exch. Corp.*, 693 F. Supp. 168, 172 (D.N.J. 1988) Indeed, courts may exercise their equitable powers to appoint a *temporary* receiver in the absence of service, especially where the giving of notice would defeat the very purpose of the receivership. *See Arkansas Louisiana Gas Co. v. Kroeger*, 303 F.2d 129, 132 (5th Cir. 1962) (“[A] court of equity does have the power and authority to make an *ex parte* appointment of a receiver.”) (citations omitted).

⁴ The proposed ex parte restraining order also contains various provisions related to ensuring the effectiveness of the asset freeze and inspection and preservation of records, such as ones requiring defendants to identify the location of, and necessary passwords to access, the records, one giving notice to financial institutions about the asset freeze, and one allowing a designated law enforcement official to assist the CFTC staff with service of process and maintain lawful order.

Good cause exists for the appointment of a Temporary Receiver, in a capacity as the agent of this Court, to take control of all assets owned, controlled, managed or held by, or on behalf of, or for the benefit of Defendants in order to preserve assets, investigate and determine clients' claims, determine unlawful proceeds retained by Defendants and amounts due to clients as a result of Defendants' alleged violations, and, eventually, distribute remaining funds under the Court's supervision.⁵ E.g., *CFTC v. Co. Petro Mktg. Corp.*, 680 F.2d 573, 582-83 (9th Cir. 1982). The CFTC seeks these forms of relief in its Motion for an *ex parte* Statutory Restraining Order Notice.

C. The Court Has Jurisdiction and Authority To Grant a Preliminary Injunction

Once an SRO has been entered, the Court should set a hearing to determine whether a preliminary injunction should be issued at the earliest time possible. Preliminary injunctions are broader than SROs, and include the full range of equitable pre-judgment remedies, including requiring the defendant to cease the illegal conduct pending entry of a final judgment. *See CFTC v. Hunter Wise*

⁵ The CFTC specifically recommends that the Court approve the appointment of Melanie Damian of the firm Damian Valori Culmo as the Temporary Receiver in this matter and submits Damian's Bio to the Court for consideration. Ex. A. Ms. Damian has been appointed Temporary Receiver and/or Receiver in numerous CFTC and SEC matters. E.g., *CFTC v. Patel*, No. 22-80092 (S.D. Fla.); *CFTC v. Fingerhut*, No. 20 CV 21887 (S.D. Fla.); *CFTC v. Atkinson*, No. 18 CV 23992 (S.D. Fla.); *SEC v. Today's Growth Consultant, LLC*, No. 19 CV 8454 (N.D. Ill.); *SEC v. Onix Capital*, No. 16 CV 22678 (S.D. Fla.); *CFTC v. Hunter Wise Commodities*, No. 12 CV 81311 (S.D. Fla.); *CFTC v. Worth Group, Inc.*, No. 13-80796 (S.D. Fla.); *CFTC v. Healy*, No. 09 CV 1331 (M.D. Pa.).

Commodities, LLC, No. 12-81311-CIV, 2013 WL 718503, at *9 (S.D. Fla. Feb. 26, 2013) (“[The] unqualified grant of statutory authority to issue an injunction under § 13a-1 carries with it the full range of equitable remedies.”), *aff’d*, 749 F.3d 967; *see also CFTC v. Aliaga*, No. 10-21074-CIV, 2011 WL 766271, at *1 (S.D. Fla. Feb. 25, 2011) (“[A] district court may issue a permanent or temporary injunction or restraining order to enjoin or restrain violations of the Act.”). In order to obtain a preliminary injunction against illegal conduct the CFTC must show only a “reasonable likelihood” of future violations. *Hunter Wise*, 749 F.3d at 974; *see also, CFTC v. Morgan, Harris & Scott, Ltd*, 484 F. Supp. 669, 676-77 (S.D.N.Y. 1979). The CFTC need not show “irreparable harm or the lack of an adequate remedy at law.” *Morgan*, 484 F. Supp. at 676-77; *see also Smith*, 653 F.3d at 127.

D. Preliminary Injunctive Relief Is Necessary and Appropriate Here

Pursuant to Section 6c(a) and (b) of the Act, 7 U.S.C. § 13a-1, the CFTC also seeks a preliminary injunction continuing the emergency relief in the statutory restraining order and prohibiting, among other things, any future violations of the Act and Regulations under which Defendants have been charged.

The CFTC is entitled to preliminary injunctive relief under Section 6c of the Act, 7 U.S.C. § 13a-1, upon a *prima facie* showing that (1) a violation has occurred, and (2) there is a reasonable likelihood of future violations. *Hunter Wise Commodities*, 749 F.3d at 974. “A court deciding whether to issue a preliminary

injunction under the Act does not employ the familiar preliminary injunction formula, which requires that a plaintiff clearly establish a substantial likelihood of success on the merits and the likelihood of irreparable injury, among other things.” *Id.* “Rather, the standard is lower” and is satisfied by a *prima facie* showing of illegality and a reasonable likelihood of future violations. *Id.* The Court may infer a reasonable likelihood of future violations based on Defendants’ past unlawful conduct. *See CFTC v. Capital Blu Mgmt., LLC*, No. 6:09-CV-508-ORL-28, 2011 WL 2357629, at *4 (M.D. Fla. June 9, 2011) (in analyzing the “reasonable likelihood” part of the test, the district court may infer likelihood of future violations from a defendant’s past violations).

The record before the Court establishes that Defendants have engaged, are engaging in, or are about to engage in acts or practices constituting violations of provisions of the Act and Regulations. Defendants made false or misleading statements about their intent to trade participant funds and about the supposed success of that trading when they were, in fact, not trading participant funds at all. And Defendants misrepresented how long they had been in business and the general price direction of the cryptocurrency markets, among other things. Accordingly, injunctive relief is necessary and appropriate.

VII. CONCLUSION

In light of the strong likelihood of ongoing fraud committed by Defendants and the need to protect participants, the CFTC respectfully requests the Court to enter an ex parte Statutory Restraining Order that prohibits Defendants Larralde, Valcarce, Early, Kingrey, and Fundsz from: (1) withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property; (2) destroying, altering, mutilating, or disposing of any books, records, or other documents; (3) refusing to permit authorized representatives of the CFTC to inspect, when and as requested, any books, records, or other documents; and (4) appointing a temporary receiver. After opportunity for a hearing, the CFTC requests that the Court enter a Preliminary Injunction against Defendants that also preliminarily enjoins them from violating the provisions of the Act and Regulations with which they have been charged.

Dated: July 31, 2023

Respectfully submitted,

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