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7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT CALIFORNIA

9 _____)
10 COMMODITY FUTURES)
11 TRADING COMMISSION)

Case No: 3:19-cv-07284-EMC

11 Plaintiff,

) [PROPOSED] ORDER FOR
) PRELIMINARY INJUNCTION,
) APPOINTMENT OF A
) TEMPORARY RECEIVER AND
) OTHER ANCILLARY RELIEF
) AGAINST DEFENDANTS

12 vs.

13 DENARI CAPITAL LLC, TRAVIS)
14 CAPSON, ARNAB SARKAR)

15 Defendants.)
16)

17 On November 5, 2019, Plaintiff Commodity Futures Trading Commission (“CFTC” or
18 “Commission”) filed a Complaint against the Defendants, Travis Capson (“Capson”), Arnab Sarkar
19 (“Sarkar”) and Denari Capital, LLC (“Denari”) (collectively “Defendants”), seeking injunctive and other
20 equitable relief for violations of the Commodity Exchange Act, as amended (“Act”), 7 U.S.C. §§ 1-26
21 (2012).
22

23 **I. FINDINGS BY THE COURT**

24 This matter comes before this Court on the Motion for Preliminary Injunction filed by the CFTC.
25 The Court having considered the pleadings, declarations, exhibits, and the incorporated memorandum of
26 law filed in support of the CFTC’s Motions, and the record from the hearing held on December 19,
27 2019, which is incorporated by reference, and the Court being fully advised in the premises,
28

1 **THE COURT FINDS:**

2 1. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (2012) (federal
3 question jurisdiction) and 28 U.S.C. § 1345 (2012) (district courts have original jurisdiction over civil
4 actions commenced by the United States or by any agency expressly authorized to sue by Act of
5 Congress). This Court has jurisdiction over the subject matter of this action and Defendants hereto
6 pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1(a) (2012), which authorizes the CFTC to seek
7 injunctive relief against any person whenever it shall appear that such person has engaged, is engaging
8 or is about to engage in any act or practice constituting a violation of any provision of the Act or any
9 rule, regulation or order thereunder.
10

11 2. Venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1,
12 in that Defendants are found in, inhabit, or transact business in this district, and the actions and practices
13 in violation of the Act have occurred, are occurring, or are about to occur within this district, among
14 other places.
15

16 **Definitions**

17 **For Purposes of this Order, the following definitions apply:**

18 3. The term “funds, assets, or other property” means any legal or equitable interest in, right
19 to, or claim to, any real or personal property, whether individually or jointly, directly or indirectly
20 controlled, and wherever located, including but not limited to: chattels, goods, instruments, equipment,
21 fixtures, general intangibles, effects, leaseholds mail or other deliveries, inventory, checks, notes,
22 accounts (including, but not limited to, bank accounts and accounts at other financial institutions),
23 credits, receivables, lines of credit, contracts (including spot, futures, options, or swaps contracts),
24 insurance policies, and all cash, wherever located, whether in the United States or outside the United
25 States.
26

27 4. The term “document” and “electronically stored information” are synonymous in
28 meaning and equal in scope to the usage of the term in Fed. R. Civ. P. 34(a), and includes, but is not

1 limited to, all writings , graphs, charts, photographs, sound recordings, images, and other data or other
2 data compilations—stored in any medium from which information can be obtained or translated, if
3 necessary, into reasonable usable form. The terms “document” and “electronically stored information”
4 also refer to each and every such item in Defendants’ actual or constructive possession, including but
5 not limited to: (i) all such items within the custody or control of any agents, employers, employees, or
6 partners of the Defendants; and (ii) all items which Defendants have a legal or equitable right to obtain
7 from another person. A draft or non-identical copy is a separate item within the meaning of the term. A
8 document also includes the file and folder tabs associated with each original and copy.
9

10 **A. The Parties**

11 5. Plaintiff Commodity Futures Trading Commission is an independent federal regulatory
12 agency that is charged by Congress with the responsibility for enforcing the provisions of the Act, 7
13 U.S.C. §§ 1-26 (2012), and the Regulations promulgated thereunder, 17 C.F.R. Pts. 1-190 (2018).
14

15 6. Defendant **Denari Capital, LLC** is a California limited liability company. Denari’s
16 business address is 3100 Oak Road, Suite 380, Walnut Creek, California. Denari’s articles of
17 organization were filed with the State of California on August 14, 2012. Denari became registered with
18 the CFTC as a CPO and a Commodity Trading Advisor (“CTA”), and with NFA as a forex firm, on May
19 1, 2019. NFA filed a member responsibility action (“MRA”) against Denari and Associate
20 Responsibility Action (“ARA”) (together “MRA/ARA”) against Denari principal Capson, on August 6,
21 2019, suspending them from NFA membership; prohibiting them and anyone acting on their behalf from
22 soliciting or accepting any funds for any investment in Denari; prohibiting them from disbursing or
23 transferring any funds from accounts in the name of Denari or over which Denari or Capson have
24 control without prior approval of NFA; prohibiting them from placing any commodity interest trades,
25 including forex; requiring Denari to hire a qualified third party to calculate the amount owed to each
26 joint venture investor and each promissory noteholder and to notify each investor of their respective
27 valuation; and requiring Denari and Capson to provide copies of the MRA/ARA to all joint venture
28

1 investors and promissory noteholders, all NFA members that have an investment over which Denari or
2 Capson exercise control, and any banks or financial institutions that maintain accounts in the name of
3 Denari or Capson or over which they exercise control. NFA 19MRA0001 (Aug. 6, 2019).

4 7. Defendant **Travis G. Capson** is a principal and co-owner of Denari. Capson is a resident
5 of Kanab, Utah. Capson became registered with the CFTC as an AP and was listed as a principal of
6 Denari on May 1, 2019. As explained above, his registration has been suspended by NFA's MRA/ARA
7 effective August 6, 2019.
8

9 8. Defendant **Arnab Sarkar** is a resident of El Cerrito, California. He is a principal and co-
10 owner of Denari along with Capson. Sarkar has been listed as a principal of Denari with NFA since July
11 10, 2019. Sarkar has never been registered with the CFTC in any capacity.

12 **B. The Denari Pool**

13 9. There is good cause to believe that Capson and Sarkar formed Denari in August of 2012
14 in California for the purpose of investing in various products including forex, real estate and other
15 business interests. Capson and Sarkar each hold a 50% ownership interest in Denari. Capson and
16 Sarkar began illegally operating Denari in 2012 while they were working for an investment firm
17 registered with the Financial Institution Regulatory Authority ("FINRA"), including opening a bank
18 account in Denari's name and soliciting two customers of the FINRA registered firm where they
19 worked. Capson and Sarkar settled a subsequent FINRA proceeding regarding this conduct in June
20 2014 based on their failure to disclose outside business activities and engaging in private securities
21 transactions without providing prior written notice to the FINRA member firm where they worked.
22 Neither Capson nor Sarkar disclosed the FINRA settlement to certain Denari participants and only
23 disclosed it to participants who confronted them about it after learning about the settlement themselves,
24 or who requested an explanation as to why Capson and Sarkar left their prior investment firm.
25 Specifically, one participant confronted Capson about the settlement after finding it on the internet and
26 Capson's response and explanation to the participant was misleading as he inaccurately informed the
27
28

1 participant that “we didn’t have to pay the fine or serve any suspension,” and “we don’t have a single
2 client, past or present, that has lost money,” among other things.

3 10. There is good cause to believe that between 2012 and the present, Capson and Sarkar
4 solicited at least twenty-eight relatives, friends, business associates, and others by various means,
5 including in-person communication, phone, email, and word-of-mouth. Capson and Sarkar solicited
6 participants for various investments, including forex trading, real estate, and investment in a gold mining
7 company, among other investments.
8

9 11. There is good cause to believe that Denari provided participants with promotional
10 brochures it created in 2012, 2018 and 2019. In the 2018 and 2019 brochures, Denari claimed that “over
11 the past 10 years we have developed a disciplined investment strategy that has earned positive returns in
12 36 of the past 40 quarters.” Denari also represented in its 2012, 2018 and 2019 brochures that it
13 “charges no management fees. We will pay all expenses associated with the fund management,
14 performance reporting and market research. By not passing any of these expenses on to our clients
15 through traditional quarterly fees we are compensated through performance, not assets under
16 management.” Denari’s promotional materials included claimed annual rates of return for 2017 of
17 50.22% and for 2018 of 36.33%, and portrayed Denari as never having a losing year.
18

19 12. There is good cause to believe that, actual trading in Denari’s forex trading account for
20 2017 and 2018 did not support the claimed rates of return. The forex trading account experienced a
21 negative return of more than 49% in 2017 and a positive return of 19% in 2018, which, while positive,
22 was based upon a relatively low amount of assets and just half of what Denari’s promotional materials
23 claimed. Denari’s promotional material also contained monthly “trading results” for January through
24 July 2018 that are inconsistent with the actual monthly trading results realized in its trading account.
25 Specifically, Denari’s promotional material states rates of return of 3.79%, 3.55%, 3.43%. 3.09%,
26 3.53%, 0.94% and 2.47% for January through July 2018 respectively, while its actual monthly trading
27 results are -7.42%, -2.82%, -6.09%, 6.92%, 17.29%, 0.01% and 4.69% for the same time period.
28

1 Consequently, Denari's promotional materials are false. Additionally, Denari did not provide any
2 prospective or existing participants in the Denari pool with the disclosure documents required by CFTC
3 Regulations nor did Denari register with the CFTC as a CPO or file or claim any exemption from
4 registration with the CFTC as required by the Act.

5 13. There is good cause to believe that Denari used both "Joint Venture Agreements" and
6 "Promissory Notes" in their solicitation of prospective and actual participants. Since September of
7 2012, at least nine participants signed "Joint Venture Agreements" with Denari. Capson also signed
8 these agreements as managing partner of Denari. These agreements state that, "the Joint Venturers have
9 agreed to make contributions to a common fund for the purpose of investing under the direction of
10 Denari Capital, LLC." The agreements also state that Denari could acquire "any assets, which may
11 include but are not limited to real estate, foreign currency," or other business interests, in connection
12 with the venture. The Denari Joint Venture Agreements provide that "Denari Capital, LLC will be
13 solely responsible for all investment decisions and will receive a portion of the investment earnings
14 equal to the percentage agreed upon by each of the Joint Venturers." Denari received at least
15 \$3,700,000 from participants who signed the Joint Venture Agreements.
16

17
18 14. There is good cause to believe that at least sixteen participants signed Promissory
19 Notes with Denari, pursuant to which Denari received at least \$3,200,000. Capson signed the
20 Promissory notes as managing partner of Denari. The Promissory Notes state that Denari agrees to
21 repay the loans, usually with 10% to 12% interest annually. Most of the loans had a one-year term with
22 an option to renew at the lender's choice. For example, one of the Promissory Notes involved a \$50,000
23 loan made by an individual on May 15, 2018 to Denari. The note had a one-year term, with a promise
24 for the principle to be repaid upon demand at the end of any month after June 2019. The note also
25 provided for monthly interest payments at a rate of 10% annually on the outstanding principle balance.
26

27 15. There is good cause to believe that Denari deposited and commingled participant funds
28 received pursuant to the Joint Venture Agreements and Promissory Notes into one or more bank

1 accounts in Denari's name and subsequently transferred some of these funds into forex trading accounts
2 for the purpose of trading forex. Of the at least \$8,300,000 that Denari solicited and accepted, at least
3 \$3,200,000 was received from participants who signed promissory notes, at least \$3,700,000 was
4 received from participants who signed Joint Venture Agreements, and at least \$1,450,000 was received
5 from participants for the purpose of other investments.

6 **C. Denari's Forex Trading Accounts**

7
8 16. Denari first opened a forex trading account in its own name in August 2012 with a
9 futures commission merchant ("FCM A"), at the time a retail foreign exchange dealer ("RFED")
10 registered with the CFTC. Capson was the sole authorized trader on the account. Denari's account
11 opening application with FCM A falsely claimed that it was only investing proprietary funds, and not
12 funds of third parties. Denari funded its FCM A account with a deposit of \$270,000 from a pool
13 participant who was also a purported co-founder and former part owner of the company in August 2012.

14
15 17. In February 2017, Denari transferred its trading account held at FCM A to a different
16 RFED, "FCM B." Capson is the sole authorized trader on the account at FCM B. In addition to the
17 nearly \$9,000 opening transfer balance in February 2017, Denari made seven additional deposits to the
18 FCM B account through July 2019. The deposits ranged in amounts from \$20,000 to \$700,000 and
19 totaled \$1,662,000. The FCM B account experienced overall trading losses of \$228,000.

20 **D. Denari Does Not Have Sufficient Funds to Cover its Obligations to Customers**

21
22 18. Capson and Sarkar are signatories on the Denari bank accounts, into which participant
23 funds were deposited. Between October 2017 and July 2019, Capson and Sarkar transferred
24 approximately \$1,085,000 from Denari's forex trading account at FCM B to a Denari bank account.
25 Denari's bank records also show deposits from a least five pool participants to a Denari bank account
26 since January 1, 2017 totaling more than \$1,000,000. Denari and Capson distributed funds from one or
27 more Denari bank accounts to participants as purported profit and interest payments and Capson and
28 Sarkar withdrew and, on information and belief, misappropriated funds from one or more Denari bank

1 accounts for their personal use, including to purchase items on Amazon, to pay for meals at restaurants,
2 to purchase gas and to pay for gym memberships, among other things.

3 19. As of June 30, 2019, Denari's forex trading account at FCM B had a net liquidating
4 value ("NLV") of approximately \$1,000,000. However, according to a June 30, 2019 Denari financial
5 statement, the value of Denari's forex pool participants' interest was approximately \$1,600,000. In
6 addition to the NLV of approximately \$1,000,000 in Denari's forex trading account as of June 30, 2019,
7 Denari's only other liquid asset consisted of a bank account that had a balance of approximately
8 \$200,000 as of June 30, 2019. Therefore, as of June 30, 2019, Denari did not have sufficient liquid
9 assets to cover its forex pool participants' interests in the Pool.
10

11 20. In July 2019, Capson and Sarkar withdrew \$74,423.81 from the Denari forex trading
12 account and transferred the funds to a Denari bank account. As of July 31, 2019, the NLV of Denari's
13 account at FCM B declined to approximately \$530,000. Meanwhile, Denari's bank account balance
14 totaled approximately \$300,000 as of July 22, 2019, for combined liquid assets of approximately
15 \$830,000. Combining all of Denari's liquid assets and even attributing them all to the Denari forex
16 pool, the Denari forex pool had a shortfall of at least \$400,000 as of June 30, 2019.
17

18 21. Additionally, Denari's June 30, 2019 balance sheet indicates that the firm owes more
19 than \$5,200,000 in "business loans," which, according to Proposed Defendants, represents the firm's
20 obligation to the forex pool participants, promissory note holders and others.¹ Excluding the
21 approximately \$1,600,000 that Denari and Capson have represented is owed to forex pool participants as
22 of June 30, 2019, Denari, Capson and Sarkar appear to owe more than \$3,600,000 to the promissory
23 noteholders and others whose funds were commingled with the pool participants' funds. On information
24 and belief, Proposed Defendants misappropriated some or all of these funds. Denari does not have
25 sufficient liquid assets to meet its current liabilities to its participants nor, on information and belief,
26

27
28

¹ Proposed Defendants represented that its actual liability on these obligations exceeds \$5,300,000.

1 does it have sufficient assets liquid or non-liquid to satisfy its current obligations to its participants.
2 Prior to issuance of NFA's MRA/ARA on August 6, 2019, Proposed Defendants did not disclose to
3 participants that Denari did not have sufficient funds or assets to meet its obligations to them.

4 22. Denari's June 30, 2019 balance sheet also included other assets purportedly valued at
5 more than \$6,100,000. These assets consist of stock in three mining-related companies and a real estate
6 holding in Nevada. However, Denari has not been able to substantiate its ownership of these assets nor
7 the value Denari assigns to them. Additionally, Denari, Capson and Sarkar hold ownership interests in
8 or have roles with the mining entities listed as Denari's assets. These assets include penny stock in one
9 company that is insolvent; stock in a privately-held company of which Denari and Sarkar are majority
10 shareholders; and stock in a third company in which Denari and Capson regularly engage in buying and
11 selling the stock by privately arranging transactions in the stock. The real estate holding in Nevada is
12 not in Denari's name, and Denari also included on its balance sheet Capson's and Sarkar's personal
13 shares in the mining-related companies, which had the effect of improperly increasing the assets listed
14 on the firm's balance sheet.
15

16
17 23. NFA confronted Capson and Sarkar, on July 30, 2019 about the difference between the
18 firm's liquid assets and its financial obligations to its participants. Capson and Sarkar were uncertain
19 whether they could immediately repay these obligations and said they would liquidate the stock they
20 own to make everyone whole. They also agreed to place the Denari trading account on liquidation only
21 status and to not withdraw funds from the Denari bank account. However, to date, the Proposed
22 Defendants have not liquidated the stock or reimbursed participants.
23

24 **E. Denari Issued False or Misleading Account Statements to Participants**

25 24. During the Relevant Time, Defendants mailed or emailed quarterly account statements
26 to participants that misrepresented the value of their respective investments and interests in the Pool, and
27 exaggerated returns. In particular, the account statements Defendants issued to participants depicted
28 false returns, and misrepresented the value of the participants' respective accounts. The statements

1 reflected that Denari participants' funds were earning consistent profits with no losses. For example, on
2 March 22, 2018, Capson sent participant B.O, an email with a 2018 first quarter statement attached
3 stating, "February was another consistent month for us with 3.55% fund performance. After March, we
4 will readjust the trade sizes based on the new account value." However, Denari's forex trading account
5 at FCM B had a return of -2.82% in February 2018 and a return of -7.42% in January 2018 and -6.09%
6 in March 2018 resulting in losses each month during the first quarter of 2018.
7

8 25. Denari improperly calculated the Pool's net asset value ("NAV"). Denari failed to
9 factor in the impact of unrealized losses in its forex trading account and, therefore, inflated its
10 performance results. Moreover, Denari regularly closed out profitable positions to recognize gains,
11 while continuously rolling forward losing positions. At least eleven participants received quarterly
12 statements reflecting consistent profits with no losses. Further, Capson and Sarkar did not trade all of
13 the funds that participants invested in Denari for the purpose of forex trading. Instead, on information
14 and belief, Capson and Sarkar misappropriated a portion of the funds that participants invested for
15 personal and other uses.
16

17 **F. NFA's July 2019 Examination of Denari**

18 26. furtherance of its official duties under the Act, NFA conducts periodic audits and
19 examinations of NFA members as a means of monitoring and assuring compliance with NFA rules, the
20 Act, and the Regulations. In July 2019, NFA began an examination of Denari. On July 15, 2019, NFA
21 sent Capson a document request and spoke to him by telephone. During that phone call, Capson told
22 NFA representatives that Denari has been trading forex with its own, proprietary funds since 2015, and
23 that Denari did not trade forex for third party investors until after Denari became registered as a CPO in
24 2019. Capson's representations are false. Denari has been operating a forex pool and trading third party
25 funds since at least 2012.
26

27 **G. VIOLATIONS OF THE COMMODITY EXCHANGE ACT AND** 28 **REGULATIONS**

1 27. As alleged in Count One of the Complaint, the Court finds that the Plaintiff has made a
2 showing of a reasonable likelihood of success on the merits that Defendants have knowingly or
3 recklessly: cheated or defrauded or attempted to cheat or defraud pool participants and deceived or
4 attempted to deceive pool participants by, among other things, fraudulently soliciting pool participants
5 by making material misrepresentations and omissions regarding their trading profits, trading
6 performance track record, and value of their interest in the Pool, issuing false statements to participants,
7 and on information and belief, misappropriating their funds
8
9 in violation of 7 U.S.C. § 6b(a)(2)(A)-(C) and 17 C.F.R. § 5.2(b)(1)-(3).

10 28. As alleged in Count Two of the Complaint, the Court finds that Plaintiff has made a
11 showing of a reasonable likelihood of success on the merits that Defendant Denari acted as a CPO in
12 that it engaged in a business that is of the nature of an investment trust, syndicate or similar form of
13 enterprise operated for the purpose of trading in commodity interests or commodity futures, and in
14 connection therewith, solicited, accepted and received funds from others for the purpose of trading in
15 commodity interests and commodity futures.
16

17 29. As alleged in Count Two of the Complaint, the Court finds that Plaintiff has made a
18 showing of a reasonable likelihood of success on the merits that Defendants Capson and Sarkar acted as
19 APs of Denari by soliciting funds for the pool and handling participant funds while being associated
20 with Denari as partners, officers, employees, consultants, or agents. Defendants Capson and Sarkar,
21 while acting as APs of a CPO, and Defendant Denari, while acting as a CPO, defrauded and deceived
22 participants of the Denari Pool by using the mails or any other means of interstate commerce in violation
23 of 7 U.S.C. § 6o(1) by, among other things:
24

- 25 (a) on information and belief, misappropriating participant funds;
- 26 (b) fraudulently soliciting participants and prospective participants by making
27 material misrepresentations and omitting material facts regarding Defendants
28

1 trading profits, trading performance track record, and the value of participants'
2 interest in the Pool; and

3 (c) causing false account statements to be issued to participants in the Pool that
4 reflected consistent profits with no losses.

5 30. As alleged in Count Three of the Complaint, the Court finds that Plaintiff has made a
6 showing of a reasonable likelihood of success on the merits that during the Relevant Time, Defendant
7 Denari engaged in activities as a retail forex CPO, with participants who are not eligible contract
8 participants ("ECPs"), without being registered as such, and in connection therewith used the mails or
9 other means or instrumentalities of interstate commerce, in violation of 7 U.S.C. § 6m(1) (2012) and
10 17 C.F.R. § 5.3(a)(2)(i) and 17 C.F.R. § 2(c)(2)(C)(iii)(I)(cc).
11

12 31. As alleged in Count Four of the Complaint, the Court finds that Plaintiff has made a
13 showing of a reasonable likelihood of success on the merits that during the Relevant Period, Defendants
14 Capson and Sarkar were associated with a CPO as a partner, officer, employee or consultant, or agent in
15 a capacity that involved the solicitation of funds, securities, or property for participation in a commodity
16 pool or the supervision of any person or persons so engaged. Therefore, Defendants Capson and Sarkar
17 were APs of a CPO as defined by 17 C.F.R. § 1.3.
18

19 32. As alleged in Count Four of the Complaint, the Court finds that Plaintiff has made a
20 showing of a reasonable likelihood of success on the merits that Capson and Sarkar violated 7 U.S.C.
21 § 6k(2) and 17 C.F.R. § 5.3(a)(2)(ii) by acting as APs of Denari without being registered as APs of a
22 CPO.
23

24 33. As alleged in Count Four of the Complaint, the Court finds that Plaintiff has made a
25 showing of a reasonable likelihood of success on the merits that Denari violated 7 U.S.C. § 6k(2) in that,
26 acting as a CPO, it allowed Capson and Sarkar to act as its APs when it knew or should have known that
27 Capson and Sarkar were not registered as APs.
28

1 agent, servant, employee or attorney of Defendants and any person who receives actual notice of this
2 Order by personal service or otherwise insofar as he or she is acting in concert or participation with
3 Defendants, is restrained, enjoined and prohibited, until further order of the Court, from directly or
4 indirectly violating Sections 4b(a)(2)(A)-(C), 4k(2), 4m(1), 4o(1)(A)-(B), and 2(c)(2)(iii)(I)(cc) of the
5 Act, 7 U.S.C. §§ 6b(a)(2)(A)-(C), 6k(2), 6m(1), 6o(1)(A)-(B), 2(c)(2)(iii)(I)(cc) (2012), and Regulations
6 (“Regulations”) 4.20(b)-(c), 4.21, 5.2(b)(1)-(3), and 5.3(a)(2), 17 C.F.R. § 4.20(a)-(c), 4.21, 5.2(b)(1)-
7 (3), 5.3(a)(2) (2019).
8

9 38. Defendants and any person insofar as he or she is acting in the capacity of an officer,
10 agent, servant, employee or attorney of Defendants and any person who receives actual notice of this
11 Order by personal service or otherwise insofar as he or she is acting in concert or participation with
12 Defendants, is further restrained, enjoined and prohibited, until further order of the Court, from directly
13 or indirectly:

- 14 a. trading on or subject to the rules of any registered entity (as that term is defined in
15 Section 1a of the Act, 7 U.S.C. § 1a(4) (2012));
- 16 b. entering into any transactions involving “commodity interests” (as that term is defined in
17 Regulation 1.3(yy), 17 C.F.R. § 1.3(yy) (2019)) for his personal account or for any account
18 in which he has a direct or indirect interest;
- 19 c. (i) having any commodity interests traded on their behalf; (ii) controlling or directing the
20 trading for or on behalf of any other person or entity, whether by power of attorney or
21 otherwise, in any account involving commodity interests; or (iii) soliciting, receiving or
22 accepting any funds from any person for the purpose of purchasing or selling any
23 commodity interests;
- 24 d. applying for registration or claiming exemption from registration with the Commission in
25 any capacity, and engaging in any activity requiring such registration or exemption from
26 registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17
27 C.F.R. § 4.14(a)(9) (2017); and/or
- 28 e. acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a)
(2014)), agent or any other officer or employee of any person (as that term is defined in
Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012)) registered, exempted from
registration or required to be registered with the Commission except as provided for in
Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2017).

IT IS FURTHER ORDERED THAT:

Asset Freeze Order Prohibiting the Transfer, Removal, Dissipation and Disposal of Assets

1
2 39. Until further order of this Court and except as provided otherwise in this Order,
3 Defendants and each firm, corporation, or other person or entity with notice that holds any accounts,
4 funds, assets, or other property of Defendants is prohibited from directly or indirectly withdrawing,
5 transferring, removing, dissipating, concealing, assigning, pledging, encumbering, disbursing,
6 converting, selling, or otherwise disposing of, in any manner, any funds, assets, or other property of
7 Defendants, wherever situated, including, but not limited to, all funds, personal property, money or
8 securities held in safes, safety deposit boxes and all funds on deposit in any financial institution, bank or
9 savings and loan account, including funds or property of customers, wherever located, whether held in
10 the name of Defendants or otherwise.
11

12 40. Notwithstanding the provisions of this Section, at the request of the Temporary Receiver,
13 Defendants and any other person who has possession, custody, or control of any of Defendants' funds,
14 assets or other property shall transfer possession of all assets subject to this Order to the Temporary
15 Receiver in accordance with paragraph 52 of this Order.
16

17 41. The funds, assets or other property affected by this Order shall include existing funds,
18 assets or other property, and funds, assets or other property acquired after the effective date of this
19 Order.
20

**Maintenance of and Access to All Records Which Relate to the Business Activities and
21 Business and Personal Finances**

22 42. Defendants are restrained from directly or indirectly destroying, mutilating, erasing,
23 altering, concealing or disposing of, in any manner any documents that refer or relate in any manner to
24 any transaction or matter described in the Complaint in this case, including the business practices or
25 business or personal finances of any Defendant.
26

27 43. Representatives of the Commission shall be immediately allowed to inspect the records
28 that relate or refer to the business and personal finances of the Defendants, including, but not limited to,

1 both hard-copy and electronically stored information, wherever they may be situated and whether they
2 are in the possession of the Defendants or others. To ensure preservation and facilitate meaningful
3 inspection and review of records, Defendants shall allow representatives of the Commission to make
4 copies of said documents and electronically stored information, and if on-site copying of documents and
5 electronically stored information is not practicable, representatives may make such copies off site. After
6 any such off-site copying, Plaintiff shall promptly return the original documents and devices upon which
7 electronic information is stored.
8

9 44. To further facilitate meaningful inspection and review, Defendants shall, absent a valid
10 assertion of their rights against self-incrimination under the Fifth Amendment, promptly provide
11 Commission staff with:

- 12 a. the location of all records relating or referring to the business activities and business and
13 personal finances of the Defendants; and
- 14 b. all identification numbers and other identifying information for websites, cloud storage
15 services, email and smartphone accounts, and all accounts at any bank, financial institution
16 or brokerage firm (including any introducing broker or futures commission merchant)
17 owned, controlled or operated by Defendants, or to which the Defendants have access; and
- 18 c. all passwords to, and the location, make and model of, all computers and/or mobile
19 electronic devices owned and/or used by Defendants in connection with their business
20 activities and business and personal finances.
21

22 45. When inspecting records that are subject to this Order, including those contained on
23 computer(s) and/or other electronic device(s), the Commission should undertake reasonable measures to
24 prevent review of the Defendants' privileged communications and/or other nonbusiness, nonfinancial
25 materials by the Commission's attorneys and other staff who are part of the litigation team in this matter.
26 Moreover, Defendants (or their counsel) shall promptly contact Plaintiff's counsel to assert any claims
27 of privilege (or other legal objections) relating to the contents of any records that are subject to this
28

1 Order and promptly cooperate with Plaintiff's counsel to develop reasonable protocols to isolate and
2 prevent disclosure of claimed privileged and/or other nonbusiness, nonfinancial materials to the
3 Commission's attorneys and other staff who are part of the litigation team in this matter. However,
4 nothing herein shall excuse Defendants from full and immediate compliance with this Court's Order
5 permitting Plaintiff to inspect the books and records which relate to Defendant's business activities and
6 their business and personal finances.
7

8 **Notice to Financial Institutions and Others that Hold or Control Assets or Records**

9 46. To ensure the effectiveness of the asset freeze and pending further Order of this Court,
10 any financial or brokerage institution, business entity, or person that receives actual notice of this Order
11 and holds, controls, or maintains custody of any account or asset or other property of Defendants' shall
12 not, in active concert or participation with Defendants, permit Defendants or other persons to withdraw,
13 transfer, remove, dissipate, or otherwise dispose of any of Defendants' assets, except as directed by
14 further order of the Court.
15

16 47. Any financial or brokerage institution, business entity, or person that receives notice of
17 this Order by personal service or otherwise shall not, in active concert or participation with any
18 Defendants, directly or indirectly destroy, alter, or dispose of, in any manner, any records relating to the
19 business activities and business and personal finances of any Defendant.

20 48. Furthermore, any such financial or brokerage institution, business entity, or person that
21 receives actual notice of this Order and holds, controls, or maintains custody of any account or asset
22 titled in the name of, held for the benefit of, or otherwise under the control of any Defendant, or has
23 held, controlled, or maintained custody of any such account or asset of any Defendant at any time since
24 October 2013, shall not, in active concert or participation with Defendants deny a request by the
25 Commission to inspect all records pertaining to every account or asset owned, controlled, managed, or
26 held by, on behalf of, or for the benefit of Defendant(s), including, but not limited to, originals or copies
27 of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to
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1 and from the accounts, all other debit and credit instruments or slips, currency transaction reports, 1099
2 forms, and safe deposit box logs. As an alternative to allowing inspection of records, a financial or
3 brokerage institution, business entity or other person may provide copies of records requested by the
4 Commission.

5 49. Furthermore, any such financial or brokerage institution, business entity, or person that
6 receives actual notice of this Order shall:

- 7
- 8 a. Within ten (10) business days of a request by the Temporary Receiver, or such longer
9 period specified by the Temporary Receiver, provide the Temporary Receiver with copies
10 of all records pertaining to any account or asset owned, controlled, managed, or held by, on
11 behalf of, or for the benefit of Defendants, either individually or jointly, including, but not
12 limited to, originals or copies of account applications, account statements, signature cards,
13 checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit
14 instruments or slips, currency transaction reports, 1099 forms, and safe deposit box logs;
15 and
16
- 17 b. Cooperate with all reasonable requests of the Temporary Receiver relating to
18 implementation of this Order, including transferring Defendants' funds at the Temporary
19 Receiver's direction, and producing records related to business activities or business or
20 personal finances of Defendants' to the Temporary Receiver.

21 **Order Appointing A Temporary Receiver**

22 **IT IS FURTHER ORDERED THAT:**

23

24 50. _____ is appointed as Temporary Receiver, until further order of the Court, with
25 the full powers of an equity receiver, for Defendants, and their affiliates and subsidiaries owned or
26 controlled by Defendants (hereinafter referred to as the "Receivership Defendants"), and of all the funds,
27 properties, premises, accounts, income, now or hereafter due or owing to the Receivership Defendants,
28 and other assets directly or indirectly owned, beneficially or otherwise, by the Receivership Defendants

1 (hereinafter, the “Receivership Estate”). The Temporary Receiver shall be the agent of this Court in
2 acting as Temporary Receiver under this Order.

3 51. The Temporary Receiver is directed and authorized to accomplish the following:

- 4 a. Assume full control of the Receivership Defendants by removing Defendants and any
5 officer, independent contractor, employee, or agent of the Receivership Defendants,
6 from control and management of the affairs of the Receivership Defendants as the
7 Temporary Receiver deems appropriate;
- 8 b. Take exclusive custody, control, and possession of the Receivership Estate, which
9 includes but is not limited to complete authority to sue for, collect, receive and take
10 possession of all goods, chattels, rights, credits, moneys, effects, land, leases, books,
11 records, work papers, and records of accounts, including computer-maintained
12 information, contracts, financial records, funds on hand in banks and other financial
13 institutions, and other papers and records of the Receivership Defendants and
14 customers or clients of any of Receivership Defendants’ business activities whose
15 interests are now held by or under the direction, possession, custody or control of the
16 Receivership Defendants;
- 17 c. Take all steps necessary to secure the business and other premises under the control
18 of the Receivership Defendants, including but not limited to premises located in
19 Walnut Creek, California and Kanab, Utah;
- 20 d. Perform all acts necessary, including the suspension of operations, to conserve, hold,
21 manage, and preserve the value of the Receivership Estate in order to prevent an
22 irreparable loss, damage, or injury to any customers or clients of any of Receivership
23 Defendants’ business activities;
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- 1 e. Prevent the withdrawal or misapplication of funds entrusted to the Receivership
2 Defendants, and otherwise protect the interests of any customers or clients of any of
3 Receivership Defendants' business activities;
- 4 f. Manage and administer the Receivership Defendants and the Receivership Estate by
5 performing all acts incidental thereto that the Temporary Receiver deems appropriate,
6 including hiring or dismissing any and all personnel, suspending operations, and/or
7 entering into agreements, including but not limited to: (1) the retention and
8 employment of investigators, attorneys or accountants, appraisers, and other
9 independent contractors and technical specialists of the Temporary Receiver's choice,
10 including without limitation members and employees of the Temporary Receiver
11 firm, to assist, advise, and represent the Temporary Receiver; and (2) the movement
12 and storage of any equipment, furniture, records, files or other physical property of
13 the Receivership Defendants;
- 14 g. Collect all money owed to the Receivership Defendants;
- 15 h. Initiate, defend, compromise, adjust, intervene in, dispose of, or become a party to
16 any actions or proceedings in state, federal or foreign court that the Temporary
17 Receiver deems necessary and advisable to preserve or increase the value of the
18 Receivership Estate or that the Temporary Receiver deems necessary and advisable to
19 carry out the Temporary Receiver's mandate under this Order;
- 20 i. Issue subpoenas to obtain documents and records pertaining to the Receivership and
21 conduct discovery in this action on behalf of the Receivership Estate;
- 22 j. Open one or more bank accounts and deposit all funds of the Receivership Estate in
23 such designated accounts and make all payments and disbursements from the
24 Receivership Estate from such accounts;
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1 k. Make payments and disbursements from the Receivership Estate that are necessary or
2 advisable for carrying out the directions of, or exercising the authority granted by,
3 this Order, provided that the Temporary Receiver shall apply to the Court for prior
4 approval of any payment of any debt or obligation incurred by the Receivership
5 Defendants prior to the date of entry of this Order, except for payments that the
6 Temporary Receiver deems necessary or advisable to secure the Receivership Estate
7 from immediate and irreparable loss; and

8
9 l. Maintain written accounts itemizing receipts and expenditures, describing properties
10 held or managed, and naming the depositories holding funds or other assets of the
11 Receivership Estate; make such written accounts and supporting documentation
12 available to the Commission for inspection; and, within sixty (60) days of being
13 appointed and periodically thereafter, as directed by the Court, file with the Court and
14 serve on the parties a report summarizing efforts to marshal and collect assets,
15 administer the Receivership Estate, and otherwise perform the duties mandated by
16 this Order.
17

18 **Accounting and Transfer of Funds and Records to the Receiver**

19 52. Absent a valid assertion by Defendants of their rights against self-incrimination under the
20 fifth Amendment, each Defendant shall, within five (5) business days following the service of this
21 Order:

22 a. Provide the Temporary Receiver with a full detailed accounting of all funds, records,
23 and assets, including the assets inside and outside of the United States that are held by
24 each and every Defendant, for their benefit, or under their direct or indirect control,
25 whether jointly or singly.
26

27 b. Transfer to the territory of the United States and deliver to possession, custody, and
28 control of the Temporary Receiver, all records, funds, and assets (other than real

1 property) located outside of the United States that are held by each and every
2 Defendant, for their benefit, or under their direct or indirect control, whether jointly
3 or singly. Provide the Temporary Receiver access to all records of accounts or assets
4 of the Defendants held by financial or

5 53. Absent a valid assertion by Defendants of their rights against self-incrimination under the
6 Fifth Amendment, Defendants shall, within 24 hours of the issuance of this Order, cause to be prepared
7 and delivered to the Temporary Receiver, a detailed and complete schedule of all passwords and
8 identification (ID) numbers for all websites, cloud storage services, email and smartphone accounts, and
9 all accounts at any bank, financial institution or brokerage firm (including any introducing broker or
10 futures commission merchant) controlled or operated by or to which any of the Defendants has access in
11 connection with their business activities and business and personal finances.
12

13 54. Absent a valid assertion by Defendants of their rights against self-incrimination under the
14 Fifth Amendment, Defendants shall, within 24 hours of the issuance of this Order, cause to be prepared
15 and delivered to the Temporary Receiver, a detailed and complete schedule of all passwords to, and the
16 location, make and model of, all computers and mobile electronic devices owned and/or used by
17 Defendants in connection with their business activities and business and personal finances. The
18 schedules required by this section shall include at a minimum the make, model and description of each,
19 along with the location, the name of the person primarily assigned to use the computer and/or mobile
20 device, and all passwords necessary to access and use the software contained on the computer and/or
21 mobile device.
22

23
24 **Turning Over Property to the Temporary Receiver**

25 55. Immediately upon service of this Order, and absent a valid assertion by Defendants of
26 their rights against self-incrimination under the Fifth Amendment, Defendants and any other person or
27 entity served with a copy of this Order, shall immediately or within such time as permitted by the
28 Temporary Receiver in writing, deliver over to the Temporary Receiver:

- 1 A. Possession and custody of all funds, assets, property, and all other assets, owned
2 beneficially or otherwise, wherever situated, of the Receivership Defendants;
- 3 B. Possession and custody of records of the Receivership Defendants in connection with
4 their business activities and business and personal finances, including but not limited
5 to, all books and records of accounts, all financial and accounting records, balance
6 sheets, income statements, bank records (including monthly statements, canceled
7 checks, records of wire transfers, and check registers), client lists, title documents and
8 other records of the Receivership Defendants;
- 9 C. Possession and custody of all funds and other assets belonging to members of the
10 public now held by the Receivership Defendants;
- 11 D. All keys, computer passwords, entry codes, and combinations to locks necessary to
12 gain or to secure access to any of the assets or records of the Receivership
13 Defendants, including, but not limited to, access to the Receivership Defendants'
14 business premises, means of communication, accounts, computer systems, mobile
15 electronic devices or other property; and
- 16 E. Information identifying the accounts, employees, properties or other assets or
17 obligations of the Receivership Defendants.
- 18
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20 **Directive to Cooperate with Temporary Receiver**

21 56. Absent a valid assertion by Defendants of their rights against self-incrimination under the
22 Fifth Amendment, Defendants, and all other persons or entities served with a copy of this order, shall
23 cooperate fully with and assist the Temporary Receiver. This cooperation and assistance shall include,
24 but not be limited to, providing any information to the Temporary Receiver that the Temporary Receiver
25 deems necessary to exercising the authority as provided in this Order; providing any password required
26 to access any computer or electronic files in any medium; and discharging the responsibilities of the
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1 Temporary Receiver under this Order, and advising all persons who owe money to the Receivership
2 Defendants that all debts should be paid directly to the Temporary Receiver.

3 **Stay on Actions Against the Receivership Defendants**

4 57. Except by leave of the Court, during the pendency of the receivership ordered herein, the
5 Defendants and all other persons and entities be and hereby are stayed from taking any action (other
6 than the present action by the Commission) to establish or enforce any claim, right or interest for,
7 against, on behalf of, in, or in the name of, the Receivership Defendants, the Temporary Receiver,
8 receivership assets, or the Temporary Receiver's duly authorized agents acting in their capacities as
9 such, including but not limited to, the following actions:

- 11 A. Petitioning, or assisting in the filing of a petition that would cause the Receivership
12 Defendants to be placed in bankruptcy.
- 13 B. Commencing, prosecuting, litigating or enforcing any suit or proceeding against any
14 of the Receivership Defendants, or any of their subsidiaries or affiliates, except that
15 such actions may be filed to toll any applicable statute of limitations
- 16 C. Commencing, prosecuting, continuing or entering any suit or proceeding in the name
17 or on behalf of any of the Receivership Defendants, or any of their subsidiaries or
18 affiliates;
- 19 D. Accelerating the due date of any obligation or claimed obligation, enforcing any lien
20 upon, or taking or attempting to take possession of, or retaining possession of,
21 property of the Receivership Defendants, or any of their subsidiaries or affiliates, or
22 any property claimed by any of them, or attempting to foreclose, forfeit, alter or
23 terminate any of the Receivership Defendants' interests in property, including
24 without limitation, the establishment, granting, or perfection of any security interest,
25 whether such acts are part of a judicial proceeding or otherwise;
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1 E. Using self-help or executing or issuing, or causing the execution or issuance of, any
2 court attachment, subpoena, replevin, execution or other process for the purpose of
3 impounding or taking possession of or interfering with, or creating or enforcing a lien
4 upon any property, wherever located, owned by or in the possession of the
5 Receivership Defendants, or any of their subsidiaries or affiliates, or the Temporary
6 Receiver, or any agent of the Temporary Receiver; and

7
8 F. Doing any act or thing whatsoever to interfere with the Temporary Receiver taking
9 control, possession or management of the property subject to the receivership, or to in
10 any way interfere with the Temporary Receiver or to harass or interfere with the
11 duties of the Temporary Receiver; or to interfere in any manner with the exclusive
12 jurisdiction of this Court over the property and assets of the Receivership Defendants,
13 or their subsidiaries or affiliates.

14
15 58. Provided, however, that nothing in this section shall prohibit any federal or state law
16 enforcement or regulatory authority from commencing or prosecuting an action against the Receivership
17 Defendants.

18 **Compensation for Temporary Receiver and Personnel Hired by the Temporary Receiver**

19 59. The Temporary Receiver and all personnel hired by the Temporary Receiver as herein
20 authorized, including counsel to the Receiver, are entitled to reasonable compensation for the
21 performance of duties pursuant to this Order and for the cost of actual out-of-pocket expenses incurred
22 by them for those services authorized by this Order that when rendered were (1) reasonably likely to
23 benefit the receivership estate or (2) necessary to the administration of the estate. However, the
24 Receiver and any personnel hired by the Receiver shall not be compensated or reimbursed by, or
25 otherwise be entitled to, any funds from the Court or the CFTC. The Receiver shall file with the Court
26 and serve on the parties periodic requests for the payment of such reasonable compensation, with the
27 first such request filed no more than ninety (90) days after the date of this Order and subsequent requests
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1 filed quarterly thereafter. The requests for compensation shall itemize the time and nature of services
2 rendered by the Receiver and all personnel hired by the Receiver.

3 **Persons Bound By this Order**

4 60. This Order is binding on any person who receives actual notice of this Order by personal
5 service or otherwise and is acting in the capacity of an officer, agent, servant, employee, or attorney of
6 the Defendants, or is in active concert or participation with the Defendants.
7

8 **Bond Not Required of Plaintiff or the Temporary Receiver**

9 61. As Plaintiff Commission has made a proper showing under Section 6c(b) of the Act, 7
10 U.S.C. 13a-1(b) (2012), it is not required to post any bond in connection with this Order. The
11 Temporary Receiver similarly is not required to post bond.

12 **Service of Order and Assistance of U.S. Marshals Service and/or Other Law Enforcement**
13 **Personnel**

14 62. Copies of this Order may be served by any means, including via email or facsimile
15 transmission, upon any financial institution or other entity or person that may have possession, custody,
16 or control of any records or assets of any Defendant, or that may be otherwise subject to any provision
17 of this Order.

18 63. Staff of the Division of Enforcement and representatives of the United States Marshal
19 Service and other law enforcement personnel are specially appointed by the Court to effect service.
20

21 64. The United States Marshal's Service, the Federal Bureau of Investigation, the local police
22 and other law enforcement personnel are authorized to: (a) accompany and assist the Commission's
23 representatives in the service and execution of this Order on Defendants, and (b) help maintain lawful
24 order while Commission representatives inspect records as provided in this Order.

25 **Service on the Commission**

26 65. The Defendants shall comply with all electronic filing rules and requirements of the U.S.
27 District Court of the Northern District of California and shall serve all pleadings, correspondence,
28

1 notices required by this Order, and other materials on the Commission by delivering a copy to Carlin
2 Metzger, Senior Trial Attorney, Division of Enforcement, Commodity Futures Trading Commission,
3 525 West Monroe Street, Suite 1100, Chicago, Illinois 60661, cmetzger@cftc.gov, by electronic filing,
4 e-mail, personal delivery or courier service (such as Federal Express or United Parcel Service) and not
5 by regular mail due to potential delay resulting from heightened security and decontamination
6 procedures applicable to the Commission's regular mail.
7

8
9 DATED: _____, 2019

The Honorable _____
United States District Court

CERTIFICATE OF SERVICE

I, Carlin Metzger, an attorney with the U.S. Commodity Futures Trading Commission, certify that I served the CFTC's Proposed Order for Preliminary Injunction upon counsel for Defendants listed below, who have been representing Defendants in connection with the CFTC's investigation prior to the filing of the CFTC's action against Defendants, via e-mail, on November 8, 2019.

Date: November 8, 2019

Attorney for Plaintiff CFTC

/s/ Carlin Metzger

Carlin Metzger

IL ARDC No. 6275516

(Pro Hac Vice)

Commodity Futures Trading Commission

525 W. Monroe St., Suite 1100

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(312) 596-0536

cmetzger@cftc.gov

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