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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

U.S. Commodity Futures Trading
Commission,

Plaintiff,

vs.

Gordon A. Driver, Axxess Automation
LLC, and Axxess Fund Management
LLC,

Defendants.

Case SA 09-CV-0578- ODW (RZx)

**FINAL JUDGMENT AND ORDER
OF PERMANENT INJUNCTION,
CIVIL MONETARY PENALTY
AND OTHER EQUITABLE
RELIEF AGAINST DEFENDANTS
GORDON A. DRIVER, AXCESS
AUTOMATION LLC AND
AXCESS FUND MANAGEMENT
LLC**

Hon. Otis D. Wright II

1 **I. INTRODUCTION**

2 On May 14, 2009, Plaintiff U.S. Commodity Futures Trading Commission
3 (the “Commission” or “CFTC”) filed a Complaint against Defendants Gordon A.
4 Driver (“Driver”), Axxess Automation LLC (“Axxess Automation”) and Axxess
5 Fund Management LLC (“Axxess Fund”) (collectively “Defendants”) for
6 Permanent Injunction, Civil Penalties, and Other Equitable Relief for violations of
7 the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. §§ 1 *et seq.*
8 (2008), and CFTC’s Regulations, 17 C.F.R. §§ 1 *et seq.* (2012). A Statutory
9 Restraining Order (“SRO”) was issued on May 14, 2009, and on August 17, 2009,
10 the Court issued an Order of Preliminary Injunction and Other Relief against
11 Defendants (“PI Order”).

12 On April 30, 2012, the CFTC filed an unopposed motion for summary
13 judgment against all Defendants, and on July 5, 2012 the Court entered an Order
14 Granting Plaintiff’s Motion for Summary Judgment (“SJ Order”). In the SJ Order,
15 the Court made findings of fact and conclusions of law and found that between at
16 least February 2006 and May 2009 (the “Relevant Period”):

17 1. Defendants committed fraud and misappropriation of commodity pool
18 funds in violation of Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. § 6b(a)(2)(i)-(iii),
19 for acts prior to October June 18, 2008, and in violation of Section 4b(a)(1)(A)-(C)
20 of the Act, as amended by the Food, Conservation, and Energy Act of 2008, Pub.
21 L. No. 110-246, Title XIII (the CFTC Reauthorization Act (“CRA”)), § 13102, 122
22 Stat. 1651 (effective June 18, 2008), to be codified at 7 U.S.C. § 6b(a)(1)(A)-(C),
23 for acts on or after June 18, 2008;

24 2. During the Relevant Period, Defendant Axxess Fund, a registered
25 CPO, and Defendant Driver, an Associated Person of Axxess Fund, misrepresented
26 or omitted material facts and misappropriated pool funds in violation of Section
27 4o(1)(A)-(B) of the Act, 7 U.S.C. § 6o(1)(A)-(B);

28 ///

1 to be entered for other persons any false report, or (C) willfully
2 deceiving or attempting to deceive other persons by any means
3 whatsoever in regard to any order or contract or the disposition or
4 execution of any order or contract, by (i) falsely claiming profitable
5 trading returns, (ii) falsely claiming a successful trading track record,
6 (iii) sending false reports or statements that fail to disclose the actual
7 trading results, and (iv) misappropriating pool funds for personal or
8 business expenses, including investor redemptions based on non-
9 existent profits in a manner known as a Ponzi scheme, in violation of
10 Section 4b(a)(1)(A)-(C) of the Act as amended by the CRA, to be
11 codified at 7 U.S.C. § 6b(a)(1)(A)-(C), and the Dodd-Frank Wall
12 Street Reform and Consumer Protection Act of 2010, Pub. L. No.
13 111-203 (“Dodd-Frank Act”), Title VII (the Wall Street Transparency
14 and Accountability Act of 2010), §§ 701-774, 124 Stat. 1376 (enacted
15 July 16, 2010);

- 16 b. while acting as a CPO, as that term is defined in Section 1a(5) of the
17 Act, 7 U.S.C. § 1a(5), or an Associated Person of a CPO, as that term
18 is defined in Regulation 1.3(aa), 17 C.F.R. § 1.3(aa), by use of the
19 mails or any means or instrumentality of interstate commerce, directly
20 or indirectly, (A) employing any device, scheme, or artifice to defraud
21 any client or participant or prospective client or participant, or (B)
22 engaging in any transaction, practice, or course of business which
23 operates as a fraud or deceit upon any client or participant or
24 prospective client or participant, by (i) falsely claiming profitable
25 trading returns, (ii) falsely claiming a successful trading track record,
26 (iii) sending false reports or account statements that fail to disclose the
27 actual trading results, and (iv) misappropriating pool funds for
28 personal or other expenses, including Ponzi payments based on non-

1 existent profits, in violation of Section 4o(1)(A)-(B) of the Act, 7
2 U.S.C. § 6o(1)(A)-(B);

- 3 c. while acting as a CPO, as that term is defined in Section 1a(5) of the
4 Act, 7 U.S.C. § 1a(5), and making use of the mails or any means of
5 instrumentality of interstate commerce in connection with the business
6 as such CPO, failing to register as a CPO in violation Section 4m(1)
7 of the Act, 7 U.S.C. § 6m(1);
- 8 d. while acting as a CPO, as that term is defined in 7 U.S.C. § 1a(5), of a
9 pool that Defendants operate, commingling pool funds with non-pool
10 property in violation of Regulation 4.20(c), 17 C.F.R. § 4.20(c); and
- 11 e. while registered as a CPO, failing to produce, in a timely manner,
12 documents to the Commission upon request in violation of
13 Section 4n(3)(A) of the Act, 7 U.S.C. § 6n(3)(A), and Regulations
14 1.31(a) and 4.23, 17 C.F.R. §§ 1.31(a) and 4.23.

15 2. Defendants are also permanently restrained, enjoined, and prohibited
16 from engaging, directly or indirectly, in:

- 17 a. trading on or subject to the rules of any registered entity, as that term
18 is defined by Section 1a(29) of the Act, as amended, 7 U.S.C.
19 § 1a(29);
- 20 b. entering into any transactions involving commodity futures, options
21 on commodity futures, or commodity options (as that term is defined
22 by Regulation 1.3(hh), 17 C.F.R. § 1.3 (2012) (“commodity
23 options”)), security futures products, and/or foreign currency (as
24 described in Section 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as
25 amended, 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i) (“forex contracts”))
26 for their own accounts or for any accounts in which they have a direct
27 or indirect interest;

- 1 c. having any commodity futures, options on commodity futures, or
2 commodity options, security futures products, and/or forex contracts
3 traded on their behalf;
- 4 d. controlling or directing the trading for or on behalf of any other
5 person or entity, whether by power of attorney or otherwise, in any
6 account involving commodity futures, options on commodity futures,
7 commodity options, security futures products, and/or forex contracts;
- 8 e. soliciting, receiving or accepting any funds from any person for the
9 purpose of purchasing or selling commodity futures, options on
10 commodity futures, commodity options, security futures products,
11 and/or forex contracts;
- 12 f. applying for registration or claiming exemption from registration with
13 the Commission in any capacity, and engaging in any activity
14 requiring such registration or exemption from registration with the
15 Commission, except as provided for in Regulation 4.14(a)(9),
16 17 C.F.R. § 4.14(a)(9) (2012), including but not limited to selling
17 futures trading software or programs while directing client accounts or
18 providing commodities trading advice based on, or tailored to, the
19 commodity interest or cash market positions or other circumstances or
20 characteristics of particular clients; and/or
- 21 g. acting as a principal (as that term is defined in Regulation 3.1(a),
22 17 C.F.R. § 3.1(a) (2012)), agent or any other official or employee of
23 any person (as that term is defined in Section 1a(28) of the Act, as
24 amended, 7 U.S.C. § 1a(28)) registered, exempted from registration or
25 required to be registered with the CFTC, except as provided for in
26 Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2012).

1 **III. RESTITUTION AND CIVIL MONETARY PENALTY**

2 **A. Restitution**

3 1. Defendants shall pay restitution, jointly and severally, in the amount of
4 nine million, five hundred sixty-two thousand, four hundred eighty-eight dollars
5 (\$9,562,488) (the “Restitution Obligation”), plus post-judgment interest, within ten
6 (10) days of the date of this Final Judgment. Post-judgment interest shall be
7 calculated by using the Treasury Bill rate prevailing on the date of the entry of this
8 Final Judgment pursuant to 28 U.S.C. § 1961.

9 2. To effect payment of the Restitution Obligation and the distribution of
10 any restitution payments to Defendants’ pool participants, the Court hereby
11 appoints the National Futures Association (“NFA”) as Monitor. The Monitor shall
12 collect restitution payments from Defendants and make distributions as set forth
13 below. Because the Monitor is acting as an officer of the Court in performing
14 these services, the NFA shall not be liable for any action or inaction arising from
15 the NFA’s appointment as Monitor, other than actions involving fraud.

16 3. Defendants shall make Restitution Obligation payments under this Final
17 Judgment to the Monitor in the name of “**Driver-Axcess Restitution Fund**” and
18 shall send such Restitution Obligation payments by electronic funds transfer, or by
19 U.S. postal money order, certified check, bank cashier’s check, or bank money
20 order, to the Office of the Administration, National Futures Association, 300 South
21 Riverside Plaza, Suite 1800, Chicago, IL 60606 under a cover letter that identifies
22 the paying Defendant and the name and docket number of this proceeding.

23 Defendants shall simultaneously transmit copies of the cover letter and the form of
24 payment to the Chief Financial Officer, Commodity Futures Trading Commission,
25 Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

26 4. The Monitor shall oversee the Restitution Obligation and shall have the
27 discretion to determine the manner of distribution of such funds in an equitable
28 fashion to Defendants’ pool participants identified by the Commission or may

1 defer distribution until such time as the Monitor deems appropriate. In the event
2 that the amount of Restitution Obligation payments to the Monitor are of a *de*
3 *minimis* nature, such that the Monitor determines that the administrative cost of
4 making a distribution to eligible pool participants is impractical, the Monitor may,
5 in its discretion, treat such restitution payments as civil monetary payments, which
6 the Monitor shall forward to the Commission following the instructions for civil
7 monetary payments set forth in Part B below.

8 5. Defendants shall cooperate with the Monitor as appropriate to provide
9 such information as the NFA deems necessary and appropriate to identify
10 Defendants' pool participants to whom the Monitor, in its sole discretion, may
11 determine to include in any plan for distribution of any Restitution Obligation
12 payments. Defendants shall execute any documents necessary to release funds that
13 they have in any repository, bank, investment or other financial institution
14 wherever located, in order to make partial or total payment toward the Restitution
15 Obligation.

16 6. Within thirty (30) days of receiving this Final Judgment, any financial
17 institution, including any Futures Commission Merchant ("FCM"), holding funds
18 in the name of Gordon A. Driver, Axxess Automation LLC, or Axxess Fund
19 Management LLC is specifically directed to liquidate and release all funds,
20 whether the funds are held in a single or joint account, or any other capacity, and to
21 convey by wire transfer to an account designated by the Monitor, all funds in these
22 accounts, less any amounts required to cover the financial institutions' outstanding
23 administrative or wire transfer fees. At no time during the liquidation, release,
24 and/or wire transfer of these funds pursuant to this Final Judgment shall
25 Defendants be afforded any access to, or be provided with, any funds from these
26 accounts. Defendants and all banks and financial institutions subject to this Final
27 Judgment shall cooperate fully and expeditiously with the CFTC and the Monitor
28 in the liquidation, release, and wire transfer of these funds.

1 7. The Monitor shall provide the CFTC at the beginning of each calendar
2 year with a report detailing the disbursement of funds to Defendants' pool
3 participants during the previous year. The Monitor shall transmit this report under
4 a cover letter that identifies the name and case number of this proceeding to the
5 Chief Financial Officer, Commodity Futures Trading Commission, Three
6 Lafayette Square, 1155 21st Street, NW, Washington, DC 20581 and copies to the
7 Regional Counsel, Commodity Futures Trading Commission, 140 Broadway, 19th
8 Floor, New York, NY 10005.

9 8. The amounts payable to each pool participant shall not limit the ability of
10 any pool participant from proving that a greater amount is owed from Defendants
11 or any other person or entity, and nothing herein shall be construed in any way to
12 limit or abridge the rights of any pool participant that exist under state or common
13 law.

14 9. Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each pool
15 participant of Defendants who suffered a loss is explicitly made an intended third-
16 party beneficiary of this Final Judgment and may seek to enforce obedience of this
17 Final Judgment against Defendants to obtain satisfaction of any portion of the
18 restitution that has not been paid by Defendants, to ensure continued compliance
19 with any provision of this Final Judgment and to hold Defendants in contempt for
20 any violation of any provision of this Final Judgment.

21 10. To the extent that any funds accrue to the U.S. Treasury for satisfaction
22 of Defendants' Restitution Obligation, such funds shall be transferred to the
23 Monitor for disbursement in accordance with the procedures set forth above.

24 **B. Civil Monetary Penalty**

25 1. Defendants shall pay a civil monetary penalty, jointly and severally, of
26 thirty-one million, eight hundred thousand dollars (\$31,800,000), plus post-
27 judgment interest within ten (10) days of the date of entry of this Final Judgment
28 (the "CMP Obligation"). Post-judgment interest shall accrue on the CMP

1 Obligation beginning on the date of entry of this Final Judgment and shall be
2 determined by using the Treasury Bill rate prevailing on the date of entry of this
3 Final Judgment pursuant to 28 U.S.C. § 1961.

4 2. Defendants shall pay this CMP Obligation by electronic funds transfer,
5 U.S. postal money order, certified check, bank cashier's check, or bank money
6 order. If payment is to be made other than by electronic funds transfer, the
7 payment shall be made payable to the Commodity Futures Trading Commission
8 and sent to the address below:

9
10 Commodity Futures Trading Commission
11 Division of Enforcement
12 ATTN: Accounts Receivable – AMZ 340
13 E-mail Box: 9-AMZ-AR-CFTC
14 DOT/FAA/MMAC
15 6500 S. MacArthur Blvd
16 Oklahoma, OK 73169
17 Telephone: (405) 954-5644

18 If payment by electronic transfer is chosen, Defendants shall contact Linda
19 Zurhorst at the address above or her successor for instructions and shall fully
20 comply with those instructions. The paying Defendant shall accompany payment
21 of the CMP Obligation with a cover letter that identifies the paying Defendant and
22 the name and case number of this proceeding. The paying Defendant shall
23 simultaneously transmit copies of the cover letter and the form of payment to the
24 Chief Financial Officer, Commodity Futures Trading Commission, Three
25 Lafayette Centre, 1155 21st Street, NW, Washington DC 20581.

26 **C. Provisions Related to Monetary Sanctions**

27 1. Partial Satisfaction: Any acceptance by the Commission or the Monitor
28 of partial payment of Defendants' Restitution Obligation or CMP Obligation shall
not be deemed a waiver of Defendants' obligation to make further payments

1 pursuant to this Final Judgment, or a waiver of the Commission's right to seek to
2 compel payment of any remaining balance.

3 **IV. MISCELLANEOUS PROVISIONS**

4 1. Notice: All notices required to be given by any provision in this Final
5 Judgment shall be sent certified mail, return receipt requested, or by facsimile as
6 follows:

7 Notice to the Commission:

8 Regional Counsel/Associate Director
9 Commodity Futures Trading Commission
10 Division of Enforcement
11 140 Broadway, 19th Floor
12 New York, NY 10005
13 Facsimile: (646) 746-9940

14 Notice to Defendants:

15 Gordon A. Driver
16 Axxess Automation LLC
17 Axxess Fund Management LLC
18 2505 Anthem Village Drive E400
19 Henderson, NV 89052
20 Facsimile: (801) 849-5870

21 All such notices to the Commission shall reference the name and case number of
22 this action.

23 2. Change of Address/Telephone: Until such time as Defendants satisfy the
24 Restitution Obligation and CMP Obligation as set forth in this Final Judgment,
25 Defendants shall provide written notice of their new telephone numbers and
26 mailing addresses within ten (10) calendar days of the change.

27 3. Invalidation: If any provision of this Final Judgment or if the application
28 of any provision or circumstance is held invalid, the remainder of this Final
Judgment and the application of the provisions to any other person or
circumstances shall not be affected by the holding.

4. Waiver: The failure of any party to this Final Judgment or any pool
participant at any time or times to require performance of any provision hereof

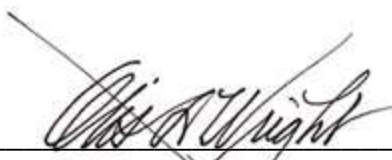
1 shall in no manner affect the right of such party or pool participant at a later time to
2 enforce the same or any other provision of this Final Judgment. No waiver in one
3 or more instances of the breach of any provision contained in this Final Judgment
4 shall be deemed to be or construed as a further or continuing waiver of such breach
5 or waiver of the breach of any other provision of this Final Judgment.

6 5. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction
7 of this cause to assure compliance with this Final Judgment and for all other
8 purposes related to this action, including any motion by Defendants to modify, or
9 for relief, from the terms of this Final Judgment.

10 6. Injunctive and Equitable Relief Provision: The injunctive and equitable
11 relief provisions of this Final Judgment shall be binding upon Defendants, upon
12 any person under their authority or control, and upon any person who receives
13 actual notice of this Final Judgment, by personal service, e-mail, facsimile or
14 otherwise insofar as he or she is in active concert or participation with Defendants.

15 There being no just reason for delay, the Clerk of the Court is hereby
16 directed to enter this Final Judgment and Order for Permanent Injunction, Civil
17 Monetary Penalty and Other Equitable Relief.

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19 **IT IS SO ORDERED** this 12th day of July, 2012.

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23 _____
24 Hon. Otis D. Wright II
25 UNITED STATES DISTRICT COURT JUDGE
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