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

UNITED STATES COMMODITY  
FUTURES TRADING COMMISSION,

Plaintiff,

v.

GORDON A. DRIVER, AXCESS  
AUTOMATION LLC, AND AXCESS  
FUND MANAGEMENT LLC,

Defendants.

Case No. 8:09-cv-00578-ODW(RZx)

**ORDER GRANTING PLAINTIFF’S  
MOTION FOR SUMMARY  
JUDGMENT [99]**

**I. INTRODUCTION**

The United States Commodity Futures Trading Commission (“CFTC”) brings this civil enforcement action alleging that Defendant Gordon Driver (in part through his corporate vehicles Axcass Automation LLC and Axcass Fund Management LLC) operated a Ponzi scheme<sup>1</sup> from February 2006 through May 2009. Throughout the course of the scheme, Driver allegedly solicited at least \$14.3 million from over 100 participants in the United States and Canada to participate in commodity pools to

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<sup>1</sup> A “Ponzi scheme” is a “fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even large investments.” Black’s Law Dictionary 1198 (8th ed. 2004). In ordinary operation (and as used herein), “[m]oney from the new investors is used directly to repay or pay interest to earlier investors,” often with little or no revenue-producing activity other than the continual raising of new funds. *Id.*

1 trade commodity futures and options. Plaintiff contends that Driver sent the pool  
2 participants false and misleading reports and statements claiming profits, while in  
3 reality Driver had only two profitable trading months throughout the course of the  
4 alleged scheme. Meanwhile, Driver used only a small portion of the solicited pool  
5 funds for commodity trading, using the rest for his own personal and business  
6 expenses, including payouts to pool participants to maintain the charade.

7 The CFTC now moves, unopposed, for summary judgment. (ECF No. 99.) In  
8 light of Defendants' failure to oppose Plaintiff's Motion, the Court deems the matter  
9 appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); L.R. 7-15.  
10 Having reviewed the evidence submitted by Plaintiffs, and having considered the  
11 applicable law, the Court **GRANTS** the CFTC's Motion. The Court finds and rules as  
12 follows.

## 13 **II. FINDINGS OF FACT**

### 14 **A. Commodity Pool Ponzi Scheme**

15 Between at least February 2006 and May 2009 (the "Relevant Period"), Gordon  
16 Driver solicited and accepted approximately \$14,319,905 from over 100 participants  
17 in the United States and Canada to invest in a commodity pool for the purpose of  
18 trading commodity futures on or subject to the rules of a contract market. (Driver  
19 SEC Test. 25:25–26:10, Apr. 23, 2009; Santiago Decl. ¶ 9.)

20 In soliciting pool participants, Driver told prospective pool participants (both  
21 directly and indirectly via several "point people") that he:

- 22 • had a proprietary trading software for trading E-mini S&P 500 futures contracts  
23 that he had used to trade futures successfully (Gray Dep. 28:3–18, Dec. 7, 2011;  
24 Traynor Dep. 25:13–26:12, Jan. 13, 2012);
- 25 • obtained profitable returns averaging 1–5% per week (or 20% per month), and  
26 in some cases as high as 43% per month (*e.g.*, Driver SEC Test. 25:25–26:10,  
27 83:16–84:12, 115:11–116:2; Slowly Decl. ¶¶ 3–6 & Exs. 1–4);

- 1 • obtained profits in seven or eight out of ten trades (Driver SEC Test. 51:1–3,  
2 54:22–57:21);
- 3 • minimized risk by terminating trading following three losing trades in one day  
4 and imposing limits on daily losses (Mainse Test. 90:2–11, Apr. 30, 2009;  
5 Shaheen Test. 37:4–38:8, June 5, 2009).

6 Contrary to these representations, Driver’s trading was abysmally unprofitable  
7 throughout the Relevant Period: of the \$3.7 million of pool funds he traded, Driver  
8 lost approximately \$3.5 million (representing a 94% loss), and he had only two  
9 profitable trading months (March and May 2009). (Santiago Decl. ¶¶ 5–7.) Driver  
10 never disclosed his losses to pool participants; instead, he sent pool participants  
11 periodic statements and reports falsely showing profitable returns averaging 5% per  
12 week (or 20% per month) and claimed that he rarely had weekly losses and never had  
13 monthly losses. (Driver SEC Test. 83:16–84:22, 115:11–116:2, 119:15–121:2, 144:1–  
14 12; Taylor Test. 99:2–16, Aug. 6, 2009.) Driver knew these representations were  
15 false, as the actual trading statements showed consistently unprofitable returns every  
16 month prior to 2009. (Driver SEC Test. 19:21–20:13; Santiago Decl. ¶ 7.) Further,  
17 Driver admits that he received the real account statements from three Futures  
18 Commission Merchant accounts held in his name, which reflected consistent losses.  
19 (Driver SEC Test. 142:8–13.)

20 Driver deposited pool funds in at least five bank accounts held in his name or in  
21 the name of Axxcess Automation. (Driver SEC Test. 38:21–39:2, 76:24–77:16;  
22 Santiago Decl. ¶ 9.) Driver used only \$3.7 million of the \$14.3 million in pool funds  
23 to actually trade E-mini S&P 500 futures contracts, which he never disclosed to pool  
24 participants. (Taylor Test. 231:9–134:3, Aug. 6, 2009; Kozlowski Dep. 67:3–17, Apr.  
25 6, 2012; Batzner Dep. 94:18–95:2, Nov. 30, 2011; Driver SEC Test. 78:10–13, 78:24–  
26 79:3; Santiago Decl. ¶ 6.) Driver used the remainder of the pool funds for personal  
27 and business expenses, including payment of \$9.7 million to several pool participants  
28 as purported profits to conceal his trading losses. (Santiago Decl. ¶ 14 & Ex. II, at 6;

1 Driver SEC Test. 45:13–18, 87:2–10, 158:2–17, 161:12–162:8.) These purported  
2 profits were not actual profits, but rather money invested by other pool participants.  
3 Driver used an additional \$1.6 million of pool funds on gambling in Las Vegas  
4 casinos, rent, meals, travel, entertainment, car payments, computer equipment,  
5 clothing, and cash withdrawals. (Santiago Decl. ¶ 14; Driver SEC Test. 45:13–18,  
6 87:2–10, 158:2–17, 161:12–162:8.) Approximately 83 defrauded pool participants are  
7 still owed some or all of their principal, which amounts in the aggregate to  
8 \$9,562,488. (Santiago Decl. ¶ 11 & Exs. II, IV.) Only \$77,592 of pool funds remain  
9 and have been frozen. (Santiago Decl. ¶ 12 & Ex. IV, at 1.)

10 **B. The Axxess Defendants, Failure to Register as Commodity Pool Operators,**  
11 **and Failure to Produce Books and Records**

12 Driver is the founder, owner, and sole principal of Defendants Axxess  
13 Automation LLC and Axxess Fund Management LLC, both of which are Nevada  
14 limited liability companies based in Las Vegas, Nevada. (Answer ¶¶ 18, 23, 58.) The  
15 Court finds that Driver acted within the scope of employment or office on behalf of  
16 and directly controlled the actions of both entities.

17 Neither Driver nor Axxess Automation have ever registered with the CFTC as  
18 Commodity Pool Operators (“CPOs”). (Answer ¶ 21.) Nevertheless, Driver and  
19 Axxess Automation, acting as CPOs, solicited, accepted, and received millions of  
20 dollars from individuals for commodity futures trading purposes and commingled  
21 pool funds with non-pool property. (Answer ¶ 24; Driver SEC Test. 72:9–11, 76:24–  
22 77:8, 77:20–22, 78:6–9; Santiago Decl. ¶ 9; Sass Dep. 136:25–138:13, Aug. 11,  
23 2009.) In addition, Driver (acting as an employee of Axxess Automation), directly  
24 and indirectly emailed pool participants periodic reports showing profitable returns  
25 and provided pool participants with instructions on wiring funds to his bank accounts.  
26 (Driver SEC Test. 83:16–84:22, 144:1–12; Taylor Test. 72:20–73:2.)

27 Axxess Fund, on the other hand, has been registered with the CFTC as a CPO  
28 since July 2008, and Driver has been registered as an associated person of Axxess

1 Fund since September 2008. (Slowly Decl. ¶20, Ex 18; Answer ¶¶ 18, 20, 58–60.)  
2 On April 15, 2009, the CFTC sent Axxess Fund a document request under 7 U.S.C.  
3 § 6g requesting Axxess Fund’s books and records. (Answer ¶ 55; Slowly Decl ¶ 19 &  
4 Ex. 17.) While Axxess Fund produced some of its records, it did not produce its  
5 emails or customer subscription agreements. (Slowly Decl. ¶¶ 24–25.) On April 28,  
6 2008, Axxess Fund and Driver’s attorney sent a letter to the CFTC stating that “Driver  
7 [would] be unable to produce true and correct records evidencing actual trading  
8 activity and corresponding financial records.” (Slowly Decl. ¶ 26 & Ex. 24.) Driver  
9 asserted his Fifth Amendment right to be free from self-incrimination at his deposition  
10 when asked whether Axxess Fund had failed to timely produce documents upon a  
11 CFTC request. (Driver Dep., June 18, 2012.)

12 In January 2010, the Court ordered Defendants to produce all of their business  
13 records related to pool activities or risk being held in contempt of the Court’s August  
14 17, 2009 Order of Preliminary Injunction. (ECF No. 37, 41.) Defendants  
15 subsequently substantially complied with the Court’s Order by producing, among  
16 other things, Axxess Fund’s emails and customer subscription agreements. (ECF No.  
17 45.)

### 18 **C. Commingling of Commodity Pool Funds**

19 During the Relevant Period, Driver and Axxess Automation, while acting as  
20 CPOs, commingled pool funds with non-pool property. Driver deposited solicited  
21 pool funds in bank accounts held in his own name and in the name of Axxess  
22 Automation. (Driver SEC Test. 38:21–39:2,76:24–77:16; Santiago Decl. ¶ 9.)  
23 Axxess Automation commingled pool funds by transferring approximately \$345,000  
24 of pool funds to Driver’s personal bank accounts. (Santiago Decl. ¶10.) Driver  
25 commingled pool funds by directly depositing pool participants’ funds into his  
26 personal bank accounts at M&T Bank, HSBC, and Citibank Canada. (Driver SEC  
27 Test. 77:9–16, 78:6–9; Santiago Decl. ¶ 9.) Driver also deposited approximately \$3.7  
28 million of pool funds into three Futures Commission Merchant trading accounts held



1 **B. Adverse Inference in Civil Cases for Fifth Amendment Claims**

2 The CFTC requests that the Court exercise its discretion to draw an adverse  
3 inference against Driver with regard to every matter on which Driver asserted his Fifth  
4 Amendment privilege against self-incrimination. In his deposition before the CFTC,  
5 Driver was asked many questions about the commodity pool he operated during the  
6 Relevant Period, the pool funds he had traded, the bank accounts he controlled  
7 containing pool funds, the false emails and statements he sent to pool participants, the  
8 Ponzi payments he made to some investors, and the pool funds he had  
9 misappropriated. Driver took the Fifth in response to every question. (Driver Dep.,  
10 June 18, 2012.)

11 In civil cases, a court may, in its discretion, draw an adverse inference from a  
12 claimant's invocation of his or her Fifth Amendment right against self-incrimination.  
13 *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). On summary judgment, however, an  
14 adverse inference alone is not enough to support the absence of a genuine dispute of  
15 material fact, and a moving party must submit further evidence in support of a  
16 summary judgment motion. *See Sec. & Exch. Comm'n v. Colello*, 139 F.3d 674, 678  
17 (9th Cir. 1998). Because there is ample additional evidence to support the CFTC's  
18 claims on summary judgment, the Court finds it appropriate to grant the CFTC's  
19 request. The Court therefore draws an adverse inference against Driver with respect  
20 to every question to which he asserted his Fifth Amendment privilege.

21 **IV. DISCUSSION**

22 The Commodity Exchange Act (the "Act"), 7 U.S.C. § 13a-1, authorizes the  
23 CFTC to seek injunctive relief against any person whenever it appears to the CFTC  
24 that the person has engaged, is engaging, or is about to engage in any act or practice  
25 constituting a violation of the Act or any rule, regulation, or order under the Act. The  
26 CFTC's May 14, 2009 Complaint alleged that Defendants had violated the antifraud  
27 provisions of the Commodity Exchange Act (the "Act"), failed to register as CPOs,  
28 failed to keep and produce books and records, and commingled commodity pool

1 funds. The Court will address each in turn, followed by a discussion of the  
2 appropriate remedies in this case.

3 **A. Fraud and Misappropriation in Connection with Futures**

4 The CFTC first contends that Defendants committed fraud and misappropriated  
5 funds in violation of section 4b the Act, 7 U.S.C. § 6b. Plaintiffs specifically allege  
6 violations of 7 U.S.C. § 6b(a)(2) for acts before June 18, 2008, and 7 U.S.C.  
7 § 6b(a)(2)(A)–(C) for acts on or after June 18, 2008.

8 To establish liability under either section, the CFTC must establish that  
9 Defendants made a material misrepresentation or omission with scienter. *Commodity*  
10 *Futures Trading Comm’n v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328–29 (11th Cir.  
11 2002). Proof of scienter requires evidence that a Defendant committed the alleged  
12 wrongful acts intentionally, or “that the representations were made with a reckless  
13 disregard for their truth or falsity.” *U.S. Commodity Futures Trading Comm’n v.*  
14 *Nat’l Inv. Consultants*, No. C 05-02641 JSW, 2005 WL 2072105, at \*8 (N.D. Cal.  
15 Aug. 26, 2005). A statement is material if it is substantially likely that a reasonable  
16 investor would consider the matter important in making an investment decision. *TSC*  
17 *Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Misrepresentations of profit  
18 and risk are material. *See R.J. Fitzgerald & Co.*, 310 F.3d at 1332–33.

19 The CFTC must additionally show that the fraud was (1) in connection with an  
20 order to make or the making of a contract of sale of a commodity for future delivery,  
21 and (2) made for or on behalf of another person. *U.S. Commodity Futures Trading*  
22 *Comm’n v. Weinberg*, 287 F. Supp. 2d 1100, 1105 (C.D. Cal. 2003), *aff’d in relevant*  
23 *part, vacated in part on other grounds, U.S. Commodity Futures Trading Comm’n v.*  
24 *Barrogosh*, 278 F.3d 319 (9th Cir. 2002). Actionable misrepresentations include  
25 those made to customers when soliciting their funds. *Commodity Futures Trading*  
26 *Comm’n v. Rosenberg*, 85 F. Supp. 2d 424, 447–48 (D.N.J. 2000); *Saxe v. E.F. Hutton*  
27 *& Co.*, 789 F.2d 105, 110–11 (2d Cir. 1986).

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1 Plaintiff has presented ample evidence of misrepresentations by all Defendants,  
2 that the misrepresentations were material, and that the misrepresentations were made  
3 with scienter. The undisputed facts show that Driver made materially false and  
4 misleading statements or omissions of facts to pool participants by falsely claiming he  
5 had been successfully trading commodity futures when in fact his trading was  
6 unsuccessful. Driver directly or indirectly sent pool participants false account  
7 statements depicting trading profits when in fact Driver had lost money trading in all  
8 but two months during the Relevant Period. Additionally, Driver only used \$3.7  
9 million of the pool's approximately \$14.3 million to actually trade commodity futures,  
10 a fact he failed to disclose to investors. When investors withdrew money, Driver used  
11 funds from other investors to pay the withdrawing investors off in order to conceal  
12 and continue his fraudulent scheme. Driver's representations and omissions were  
13 false and material because they impacted the pool participants' decisions to invest,  
14 remain in the pool, or make additional investments.

15 The undisputed facts also reveal that Driver had control over the bank accounts  
16 where pool funds were deposited and controlled the futures trading accounts. Driver  
17 admitted that he received statements from the trading accounts. Thus, when Driver  
18 sent statements depicting profits in the pool, Driver at most knew those statements  
19 were false, or at the very least recklessly distributed those statements without regard  
20 for the truth of the statements.

21 Finally, "[s]oliciting or obtaining funds from investors for trading, then failing  
22 to trade the funds while using them for personal and business expenses, is  
23 misappropriation." *U.S. Commodity Futures Trading Comm'n v. Emerald Worldwide*  
24 *Holdings, Inc.*, No. CV03-8339AHM, 2005 WL 1130588, at \*7 (C.D. Cal. Apr. 19,  
25 2005). Misappropriation or diversion of funds entrusted to one for trading purposes is  
26 "willful and blatant fraudulent activity" that clearly violates the Act. *Weinberg*, 287  
27 F. Supp. 2d at 1106. The undisputed facts show that Defendants only traded \$3.7  
28 million of the \$14.3 million Driver obtained from pool participants. Defendants

1 therefore misappropriated more than \$10 million from the pool to pay for expenses  
2 such as the payments to withdrawing investors, rent on Driver's residence, and  
3 Driver's other personal expenses.

4 For these reasons, the Court finds that Defendants committed fraud and  
5 misappropriated funds in violation of the Act. The CFTC's Motion for Summary  
6 Judgment is therefore **GRANTED** with respect to the CFTC's first claim for fraud  
7 and misappropriation.

8 **B. Fraud by a CPO**

9 The CFTC next seeks summary judgment on its claims that Axxcess Fund  
10 committed fraud as CPOs and that Driver committed fraud as Axxcess Fund's  
11 "associated person" in violation of 7 U.S.C. § 6o(1)(A)–(B). The Court agrees.

12 The same intentional or reckless misappropriations, misrepresentations, and  
13 omissions of material fact violative of section 4b of the Act (as discussed above) also  
14 violate section 4o(1)(A)–(B) of the Act, 7 U.S.C. ¶ 6o(1)(A)–(B). *See U.S.*  
15 *Commodity Futures Trading Comm'n ex rel. Kelley v. Skorupskas*, 605 F. Supp. 923,  
16 932 (E.D. Mich. 1985) (finding that a violation of section 4b of the Act also violated  
17 section 4o). The primary difference is that unlike sections 4b and 4o(1)(A) of the Act,  
18 section 4o(1)(B) has no scienter requirement. *In re Kolter*, [1994–1995 Transfer  
19 Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,262 at 42,198 (CFTC Nov. 8, 1994) (citing  
20 *U.S. Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 284–86 (9th Cir.  
21 1980).

22 The undisputed facts reveal that Defendants acted as CPOs during the Relevant  
23 Period. Axxcess Fund was registered as a CPO in September 2008, and Driver was its  
24 only associated person. Therefore, these Defendants' misrepresentations and  
25 omissions of material facts and Driver's misappropriation of pool funds, as discussed  
26 above, violated not only section 4b of the Act, but also section 4o(1) of the Act,  
27 7 U.S.C. § 6o(A)–(B). The CFTC's Motion for Summary Judgment is therefore  
28 **GRANTED** with respect to its second claim.

1 **C. Failure to Register as CPOs**

2 The CFTC's third claim contends that Driver and Axxess Automation are liable  
3 under section 4m of the Act, 7 U.S.C. § 6m(1), for failure to register with the CFTC as  
4 a CPOs. Section 1a(11) defines a CPO as any person in a business in the nature of a  
5 commodity pool, investment trust, syndicate, or similar form of enterprise who, in  
6 connection therewith, has solicited, accepted, or received funds, security, or property  
7 from others for the purpose of trading in any commodity for future delivery or subject  
8 to the rules of any contract market or derivatives transaction execution facility.

9 7 U.S.C. § 1a(11)(i). As described above, Driver and Axxess Automation were in a  
10 business wherein they solicited or accepted funds from others, and pooled those funds  
11 for the purpose of trading E-mini S&P 500 futures traded on the CME. Driver and  
12 Axxess Automation therefore qualify as CPOs.

13 Section 4m(1) of the Act requires a CPO who uses the mails or instrumentalities  
14 of interstate commerce in connection with its CPO business to register with the CFTC  
15 unless it is exempt from registration. 7 U.S.C. § 6m(1). During the Relevant Period,  
16 Driver and Axxess Automation used means of interstate commerce to receive funds  
17 from pool participants via checks and wire transfers, deposited that money into bank  
18 accounts that were pooled with other investors' funds, and used part of those funds to  
19 trade commodity futures on behalf of the pool. Driver and Axxess Automation  
20 therefore acted as unregistered CPOs in violation of section 4m(1) of the Act, 7 U.S.C.  
21 § 6m(1). Accordingly, the Court **GRANTS** the CFTC's Motion as to its third claim.

22 **D. Commingling of Pool Funds**

23 The CFTC's fourth claim alleges that all Defendants commingled pool funds  
24 with non-pool property in violation of CFTC Regulation 4.20(c). CFTC Regulation  
25 4.20(c) prohibits CPOs from commingling pool property with non-pool property.  
26 17 C.F.R. § 4.20(c). The undisputed facts reveal that Defendants, all of whom acted  
27 as CPOs during the Relevant Period (regardless of registration status), commingled  
28 pool funds with non-pool property by transferring funds to personal bank accounts

1 and futures trading accounts in Driver's name. Thus, each Defendant has violated  
2 Regulation 4.20(c) by commingling pool property with non-pool property. The  
3 CFTC's Motion is therefore **GRANTED** with respect to its fourth claim.

4 **E. Failure by a CPO to Produce Books and Records**

5 The CFTC contends next that Axxcess Fund failed to produce books and records  
6 at the request of the CFTC in violation of the Act and CFTC Regulations.

7 Section 4n of the Act, 7 U.S.C. § 6n(3)(A), and CFTC Regulation 1.31(a), 17  
8 C.F.R. § 1.31(a), require registered CPOs to maintain certain books and records and  
9 produce them to the CFTC upon request. Regulation 4.23 further provides that all  
10 registered CPOs must make and keep books and records relating to the pool and  
11 produce them to the CFTC upon request. The undisputed facts reveal that Axxcess  
12 Fund, a registered CPO, failed to comply with CFTC document requests served on it  
13 by failing to timely produce its emails and subscription agreements related to the pool.  
14 Although Defendants later produced the Axxcess Fund subscription agreements and  
15 related emails, they did so only upon a Court order, and not as a result of the CFTC's  
16 document request. The Court therefore finds that Axxcess Fund violated section 4n of  
17 the Act, 7 U.S.C. 6n(3)(A), and CFTC Regulations 1.31(a) and 4.23, 17 C.F.R.  
18 §§ 1.31(a). The Court accordingly **GRANTS** the CFTC's Motion with respect to its  
19 fifth claim.

20 **F. Principal-Agent and Controlling Person Liability**

21 The CFTC further seeks to hold Driver liable for the Axxcess Defendants'  
22 violations of the Act and CFTC Regulations outlined above. The undisputed facts  
23 show that Driver was a principal of both Axxcess Defendants and controlled their  
24 financial and business activities. Driver solely controlled the Axxcess Defendants'  
25 bank accounts and corporate activities, and Driver was the sole source of the updates  
26 and account statements that were sent, directly or indirectly, to the pool participants.  
27 Since no other person had control over the Axxcess Defendants' activities, it is  
28 reasonable to infer that Driver knowingly induced the Axxcess Defendants' violations

1 and did not act in good faith. Accordingly, the Court finds that Driver is liable for the  
2 Access Defendants' violations and CFTC regulations under 7 U.S.C. §13c(b).

3 The undisputed facts also show that Driver was an officer or employee of the  
4 Access Defendants and acted within the course and scope of his employment or office  
5 when he committed the acts in violation of the ACT and CFTC regulations. Thus, the  
6 Access Defendants are liable for Driver's violations of the Act and CFTC Regulations  
7 under 7 U.S.C. § 2(a)(1)(B) and 17 C.F.R. § 1.2.

## 8 V. REMEDIES

9 Pursuant to the Court's finding of liability, the CFTC seeks both restitution and  
10 permanent injunctive relief to remedy Defendants' pervasive violations of the  
11 Commodity Exchange Act. The Court will **GRANT** both.

### 12 A. Restitution

13 A court may order restitution under section 6c of the Act, 7 U.S.C. § 13a-1, and  
14 the Court's inherent equitable authority. *See Commodity Futures Trading Comm'n*  
15 *v. Co Petro Mktg. Grp., Inc.*, 680 F.2d 573, 583–84 (9th Cir. 1982) (“[W]e conclude  
16 that it would frustrate the regulatory purposes of [section 6c of] the Act to allow a  
17 violator to retain his ill-gotten gains.”). While proof of investors' individual reliance  
18 typically is required to obtain restitution relief, the Ninth Circuit has held that reliance  
19 may be presumed in some enforcement cases of pervasive or widespread  
20 misrepresentation. *Cf. Fed. Trade Comm'n v. Figgie, Int'l Inc.*, 994 F.2d 595, 605  
21 (9th Cir. 1993) (actual reliance for restitution under section 13 of the FTC Act  
22 presumed where the FTC proved defendant made material misrepresentations, that the  
23 misrepresentations were widely disseminated, and that consumers purchased  
24 defendant's product).

25 The purpose of restitution is to restore the status quo and return the parties to  
26 the positions they occupied before the transactions at issue occurred. *Porter v.*  
27 *Warner Holding Co.*, 328 U.S. 395, 402 (1946). Thus, the amount of restitution  
28 should be calculated as the difference between what defendants obtained and the

1 amount customers received back, but payments to customers that exceeded their  
2 principal should not be included in this calculation. *Commodity Futures Trading*  
3 *Comm'n v. Capital Street Fin., LLC*, No. 3:09-cv-387-RJC-DCK, 2012 WL 79758, at  
4 \* 14 (W.D.N.C. Jan. 11, 2012) (excluding customers who received overpayment from  
5 restitution calculation).

6 The undisputed facts indicate that Defendants solicited and obtained  
7 approximately \$14,319,805 from over 100 pool participants. (Santiago Decl. ¶ 9.)  
8 Driver even admitted that he had over 100 investors and reported to them returns of 1–  
9 5% per week. (Driver SEC Test. 25:25–26:10, 83:16–84:12, 115:11–116:2.) The  
10 bank and trading records, as well as Driver's own admission, demonstrate that  
11 Defendants' fraud was pervasive. The Court therefore finds restitution appropriate.

12 Of the \$14.3 million in fraudulently solicited funds, investors are still owed  
13 approximately \$9,562,488, which is the amount the CFTC seeks in restitution from  
14 Defendants. (Santiago Decl. ¶ 11 & Exs. II, IV.) The Court finds that this amount  
15 reasonably reflects the amount necessary to restore the defrauded pool participants to  
16 the status quo ante and therefore **GRANTS** the CFTC's request for restitution in the  
17 amount of **\$9,562,488**.

18 As the CFTC notes, the Court's May 14, 2009 statutory restraining order froze  
19 approximately \$77,337 in several bank accounts and one futures trading account. The  
20 Court orders that these frozen funds be applied to partially satisfy Defendants'  
21 restitution obligation.

## 22 **B. Injunctive Relief**

23 The CFTC additionally seeks permanent injunctive relief against Defendants  
24 under section 6c(a) of the Act, 7 U.S.C. §13a-1, to prohibit future violations of the Act  
25 and CFTC Regulations. The CFTC is entitled to a permanent injunction upon a  
26 showing that a violation has occurred and is likely to continue unless enjoined. *See*  
27 *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Commodity Futures*  
28 *Trading Comm'n v. Co Petro Mktg. Grp., Inc.*, 502 F. Supp. 806, 818 (C.D. Cal.

1 1980), *aff'd*, 680 F.2d 573 (9th Cir. 1982). Determining the likelihood of future  
2 violations may involve consideration of past unlawful conduct. *Co Petro Mktg. Grp.,*  
3 *Inc.*, 502 F. Supp. at 818. In drawing such an inference from past violations, “the  
4 Court should look at the totality of the circumstances, and factors suggesting that the  
5 infraction might not have been an isolated occurrence are always relevant.” *Id.*  
6 (internal quotation marks omitted). In addition, “[w]hen the violation has been  
7 predicated upon systematic wrongdoing, rather than an isolated occurrence, a court  
8 should be more willing to enjoin future conduct.” *Id.*

9 To obtain a permanent injunction, the CFTC “need not establish irreparable  
10 harm or inadequate remedy at law, as would a private litigant.” *Cf. SEC v. Interlink*  
11 *Data Network of L.A., Inc.*, No. 93-3073 R, 1993 WL 603274, at \*11 (C.D. Cal. Nov.  
12 15, 1993) (internal quotation marks omitted) (citing *Sec. & Exch. Comm’n v.*  
13 *Caterinicchia*, 613 F.2d 102, 105 n.3 (5th Cir. 1980)). Factors the Court may consider  
14 in determining whether permanent injunctive relief is appropriate include the  
15 egregiousness of the defendant’s actions, whether the violation was isolated or  
16 recurrent, the degree of scienter involved, the sincerity of the defendant’s assurances  
17 against future violations, the defendant’s recognition of his conduct’s wrongfulness,  
18 and the likelihood that the defendant’s occupation will present opportunities for future  
19 violations. *Cf. Sec. & Exch. Comm’n v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir.  
20 2004).

21 As discussed above, Defendants defrauded over 100 pool participants and  
22 obtained over \$14.3 million in pool participants’ funds. Defendants misrepresented  
23 Driver’s personal trading track record and falsely reported profits averaging up to 20%  
24 per month. Defendants failed to disclose that Driver traded only \$3.7 million of the  
25 pool funds, lost nearly all of it, and never had a profitable trading month save for  
26 March and May 2009. Driver used at least \$1.6 million to pay for personal expenses.  
27 In all, Defendants misappropriated at least \$10.6 million and used it for investor  
28 redemptions to conceal their fraud and for Driver’s personal and business expenses.

1 In addition, Driver continues to engage in commodity-futures-related  
2 activities—in contempt of the Court’s August 17, 2009 Order of Preliminary  
3 Injunction and for which he faces a criminal contempt hearing on July 10, 2012 (ECF  
4 Nos. 95, 121)—by soliciting customers to buy his futures trading software and  
5 advising them on their futures trading. (Rogers Decl. ¶¶ 2, 7.) This demonstrates that  
6 Driver remains harmful to the commodity futures markets.

7 Defendants’ past fraudulent misconduct and Driver’s ongoing and  
8 contemptuous business activities in the futures market in violation of a prior  
9 preliminary injunction make it highly likely that Defendants will commit future  
10 violations of the Act and CFTC Regulations unless permanently enjoined. Moreover,  
11 Driver has demonstrated no remorse for his actions or the victims’ losses, and he  
12 continues to insist that he was a successful and profitable futures trader despite all  
13 evidence to the contrary. Accordingly, the Court **GRANTS** the CFTC’s request for a  
14 permanent injunction, trading ban, and registration ban against all Defendants,  
15 consistent with the language contained in the CFTC’s Proposed Statement of Decision  
16 filed concurrently with its Motion.

17 **C. Civil Monetary Penalty**

18 Finally, section 6c of the Act, 7 U.S.C. § 13a-1(d)(1), together with CFTC  
19 Regulation 143.8(2)(ii)–(iii), 17 C.F.R. § 143.8(2)(ii)–(iii), permit civil monetary  
20 penalties of up to the greater of \$130,000 per violation for acts before October 23,  
21 2008, and \$140,000 per violation for acts on or after October 23, 2008, or triple a  
22 defendant’s monetary gain. The CFTC seeks a civil monetary penalty of \$31.8  
23 million, or triple the Defendants’ monetary gain.

24 The CFTC’s Complaint alleges each act of fraud or wrongdoing as separate  
25 violations. Courts and the CFTC have found that a high civil monetary penalty is  
26 warranted where customers have been defrauded of a substantial amount of money.  
27 *See JCC, Inc. v. Commodity Futures Trading Comm’n*, 63 F.3d 1557, 1571 (11th Cir.  
28 1995) (“Conduct that violates core provisions of the Act’s regulatory system—such as



1 . . . *defrauding customers should be considered very serious . . .*” (quoting *In re*  
2 *Premex, Inc.*, [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at  
3 34,890–91 (CFTC Feb. 17, 1988)). The CFTC has stated that civil monetary  
4 penalties “signify the importance of particular provisions of the Act and the  
5 Commission’s rules, and act to vindicate these provisions in individual cases”—  
6 especially where the defendant has intentionally violated the Act or the Commission’s  
7 rules. *In re GNP Commodities, Inc.*, [1990–1992 Transfer Binder] Comm. Fut. L.  
8 Rep. (CCH) ¶ 25,360 at 39,222 (CFTC Aug. 11, 1992). “Civil monetary penalties are  
9 also exemplary; they remind both the recipient of the penalty and other persons  
10 subject to the Act that noncompliance carries a cost.” *Id.*

11 Of the \$14.3 million fraudulently solicited by Defendants, Defendants only  
12 used \$3.7 million to trade futures, using the remaining \$10.6 million for Ponzi  
13 redemptions and personal expenses. The CFTC seeks a civil monetary penalty of  
14 \$31.8 million, which is three times \$10.6 million. Because the Court finds that a  
15 penalty of three times Defendants’ gains would be greater than \$130,000 or \$140,000  
16 per violation, *see* 7 U.S.C. § 13a-1(d)(1); 17 C.F.R. § 143.8(2)(ii)–(iii), the Court  
17 deems \$31.8 million to be an appropriate civil monetary penalty in this case under  
18 section 6 of the Act and CFTC Regulation 143.8(2)(ii)–(iii). The Court therefore  
19 **GRANTS** the CFTC’s request Defendants pay a civil monetary penalty of  
20 **\$31.8 million** for their violations of the Commodities Exchange Act and CFTC  
21 Regulations.

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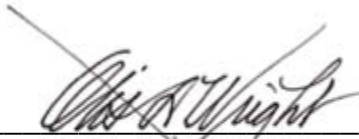
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1 **VI. CONCLUSION**

2 For the reasons discussed above, Defendants' Motion is **GRANTED**. All  
3 pretrial and trial dates contained in the Court's June 8, 2012 Order granting the  
4 CFTC's ex parte application are hereby **VACATED**. The CFTC shall submit a  
5 proposed judgment consistent with this order in electronic format no later than  
6 Thursday, July 12, 2012.

7  
8 **IT IS SO ORDERED.**

9  
10 July 5, 2012

11  
12 

13 **OTIS D. WRIGHT, II**  
14 **UNITED STATES DISTRICT JUDGE**