



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Office of Proceedings

In the Matter of:

Gordon A. Driver and
Access Fund Management LLC,

Registrants.

*
*
*
*
*
*
*

CFTC Docket No. SD 12-10

OFFICE OF
PROCEEDINGS
CFTC

2012 FEB 17 AM 9:33

RECEIVED
CFTC

INITIAL DECISION ON DEFAULT

Before: Philip V. McGuire,
Commodity Futures Trading Commission

Appearances: W. Derek Shakabpa, Esq., Senior Trial Attorney,
David Acevedo, Esq., Chief Trial Attorney
CFTC Division of Enforcement
New York, NY

Background

By motion dated December 7, 2012, the Commission's Division of Enforcement ("Division") has moved for entry of a default judgment against Gordon A. Driver ("Driver") and Access Fund Management LLC ("Access"), pursuant to Commission rules 3.60(g) and 10.93, 17 C.F.R. §§ 3.60(g) and 10.93 (2012), based on the failure of Driver and Access to answer or otherwise to appear or respond to the Notice of Intent to Revoke the Registrations of Gordon A. Driver and Access Fund Management LLC ("Notice"), issued by the Commission on September 25, 2012. Driver, a Nevada resident, is registered with the Commission as an associated person

with, and listed as the sole principal of, Axxcess, a Nevada limited liability company registered with the Commission as a commodity pool operator.

The Commission's Notice alleges that Driver and Axxcess are subject to statutory disqualification from Commission registration based on the summary judgment order and the final judgment and order of permanent injunction entered by the U.S. District Court for the Central District of California on July 5 and 12, 2012, respectively. The Court found that Driver and Axxcess had violated various provisions of the Commodity Exchange Act and certain Commission rules by operating a Ponzi scheme from February 2006 through May 2009, in furtherance of which Driver and Axxcess: fraudulently solicited over \$14.3 million from over one hundred American and Canadian participants; made materially false and misleading statements and omissions of material facts to pool participants; and commingled pool funds and misappropriated pool funds for personal and business expenses, including Ponzi payments of about \$9 million to several pool participants as purported profits to conceal Driver's theft and trading losses. The Court permanently enjoined Driver and Axxcess from violating the Act and Commission rules, as charged, imposed permanent trading and registration bans on Driver and Axxcess, and ordered Driver and Axxcess to pay over \$9.5 million in restitution and a \$31.8 million civil monetary penalty.

On September 25, 2012, the Commission's Office of Proceedings served the Commission's Notice on Driver at his last registered address¹ and on Axxcess at its last registered address.² That same day, the Notice was served on Driver and Axxcess at Driver's last known

¹ Driver's last listed address with the Commission is 3912 Diamond Ridge Street, Las Vegas, NV, 89129. *See* Guard Affidavit and Certification, Exhibit 2, Division's December 7th motion. The Commission's Notice sent to this address was returned by the Post Office undelivered. Similarly, the Default Notice sent to this address was returned stamped "Unable to Forward" by the Post Office.

² Axxcess' last listed address with the Commission is 2251 N. Rampart Blvd, #265, Las Vegas, NV, 89128. *See* Guard Affidavit and Certification, Exhibit 1, Division's December 7th motion. The Commission's Notice sent to

address.³ Thus, Driver and Axxess were properly served pursuant to CFTC rule 3.50.⁴

Driver and Axxess did not respond to the Commission's Notice. Therefore, on November 8, 2012, I issued a Default Notice finding that Driver and Axxess were in default, and setting a deadline for the Division to file a motion for entry of a default judgment. On November 8, 2012, the Commission's Office of Proceedings served the Default Notice on Driver and Axxess at their last registered addresses and at Driver's last known address. In addition, on November 14, 2012, the Division emailed a copy of the Default Notice to Driver. Driver and Axxess did not file a response to the Default Notice. Accordingly, this matter is ripe for entry of a default judgment.

As a result of their defaults, Driver and Axxess have waived a hearing on all of the issues and are precluded from introducing evidence of mitigation and rehabilitation necessary to overcome the presumption of unfitness for registration.⁵ In addition, the well-plead allegations in the Notice, as augmented by the evidence produced by the Division, and as supplemented by the proposed findings and conclusions in the Division's motion, are deemed true and conclusive

this address was reported as delivered by the Post Office. In contrast, the Default Notice sent to this address was returned stamped "Attempted Not Known" by the Post Office.

³ Driver's last known address is 2505 Anthem Village Drive, E400, Henderson, Nevada, 89052. The Commission's Notice and the Default Notice sent to this address were reported as delivered by the Post Office.

⁴ Pursuant to CFTC rule 3.30(a), 17 C.F.R. § 3.30(a) (2012), the address of each registrant as submitted on its application for registration or as submitted on the biographical supplement shall be deemed to be the address for delivery to the registrant for any communications from the Commission, including any summons, complaint, notice and other written documents or correspondence, unless the registrant specifies another address for this purpose. CFTC rule 3.30(b), 17 C.F.R. § 3.30(b) (2012), provides that each registrant, while registered and for two years after the termination of registration, must notify the National Futures Association ("NFA") of any change of address, and that failure to do so may result in an order of default in any Commission or NFA proceedings. Moreover, pursuant to CFTC rule 3.50, 17 C.F.R. § 3.50 (2012), for purposes of an action for the denial, suspension or revocation of registration, service upon a registrant will be sufficient if mailed by registered mail or certified mail return receipt requested properly addressed to the registrant at the address shown on his application or any amendment thereto, and will be complete upon mailing.

⁵ The presumption of unfitness for registration under Section 8a(2) of the Act rests on the common-sense inference that once an individual or firm has undertaken serious wrongdoing – as it has been amply demonstrated that Driver and Axxess have done – a substantial risk exists that the individual or firm will undertake similar wrongdoing in the future. *See In re Akar*, Comm. Fut. L. Rep. ¶ 22, 297 (CFTC February 24, 1986).

for purposes of finding: one, that Driver is statutorily disqualified from registration under Sections 8a(2)(C) and (E) of the Commodity Exchange Act (“Act”), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 (“CRA”)), §§ 13102 – 13204, 122 Stat. 1651 (enacted June 18, 2008), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010 (“Dodd-Frank Act”)), §§ 701-774, 124 Stat. 1376 (enacted July 16, 2010), to be codified at 7 U.S.C. §§ 12a(2)(C), and (E); and two, that Axxess is statutorily disqualified under Sections 8a(2)(C), (E) and (H) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C §§ 12a(2)(C), (E) and (H). Thus, as set out below, the Division’s motion has been granted, Driver and Axxess have been found to be unfit for registration and statutorily disqualified from registration, and the registrations of Driver and Axxess have been revoked.

Findings of Fact

1. Axxess Fund Management LLC, a Nevada limited liability company, has been registered with the Commission as a commodity pool operator since on or around July 25, 2008. Axxess is not a financial institution, registered broker dealer (or their associated person), insurance company, bank holding company, or investment bank holding company.

2. Gordon A. Driver, a Nevada resident, has been registered as an associated person of Axxess since on or about September 3, 2008. Driver has been listed as the sole principal of Axxess and sole owner of a 10% or more financial interest in Axxess.

3. On May 14, 2009, the Commission filed a civil injunctive complaint in the U.S. District Court for the Central District of California against Driver, and his two firms, Axxess

Fund Management LLC and Axxess Automation LLC.⁶ The Commission contended that Driver, in part through his corporate vehicles Axxess Automation and Axxess Fund Management, had operated a Ponzi scheme from February 2006 through May 2009, and that throughout the course of the scheme Driver: fraudulently solicited at least \$14.3 million from over 100 participants in the United States and Canada to participate in commodity pools to trade commodity futures and options; sent pool participants false and misleading reports and statements claiming profits, when in reality Driver had only two profitable trading months over a thirty-nine month period and had lost 94% of the funds actually traded; used only a small portion of the solicited funds for trading, and commingled and misappropriated the rest for his own personal and business expenses, including payouts to pool participants to maintain the charade of profitability; and acted as an unregistered commodity pool operator. *CFTC v.*

Gordon A. Driver, Axxess Automation LLC, and Axxess Fund Management LLC, Case No. 09-CV-0578 (ODW) (C.D. Cal.) (“*CFTC v. Driver*”).

4. On July 5, 2012, in *CFTC v. Driver*, in response to an unopposed motion for summary judgment filed by the Commission, the Honorable Judge Otis D. Wright II entered an Order Granting Plaintiff’s Motion for Summary Judgment (“Summary Judgment Order”) which found, in relevant part, that Driver and Axxess: operated a Ponzi scheme from February 2006 through May 2009; fraudulently solicited over \$14.3 million from over 100 pool participants; misrepresented Driver’s trading track record, falsely reported profits ranging up to 20% a month; failed to disclose that Driver had traded only \$3.7 million of the pool funds, had lost nearly all of those funds, and had only two out of thirty-nine profitable trading months; and commingled and misappropriated at least \$1.6 million for personal expenses and about \$9 million for Ponzi redemptions to conceal the fraud and the massive trading losses. The Court concluded

⁶ Axxess Automation LLC was never registered with the Commission.

that the fraudulent conduct and misappropriation for the entire period violated Section 4o(1)(A)-(B) of the Commodity Exchange Act (“Act”), 7 U.S.C. § 6o(1)(A)-(B), that the fraudulent conduct and misappropriation before June 18, 2008 violated Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C § 6b(a)(2)(i)-(iii), and that the fraudulent conduct and misappropriation on or after June 18, 2008 violated Section 4b(a)(1)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C § 6b(a)(1)(A)-(C). The Court further, in pertinent part: found that Driver had failed to register as a commodity pool operator in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1); found that Driver had commingled pool funds with non-pool funds in violation of Commission rule 4.20(c), 17 C.F.R. § 4.20(c) (2012);⁷ found Driver liable for Axxess’ violations of the Act and Commission rules as a controlling person pursuant to Section 13(b) of the Act, 7 U.S.C. §13c(b); found Axxess liable for Driver’s violations pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C § 2(a)(1)(B), and CFTC rule 1.2, 17 C.F.R § 1.2 (2012); granted the Commission’s request for imposition of a restitution award of \$9,562,488, and a civil monetary penalty of \$31,800,000; and granted the Commission’s request for a permanent injunction, trading ban and registration ban.⁸

5. On July 12, 2012, in *CFTC v. Driver*, Judge Wright entered a Final Judgment and Order of Permanent Injunction, Civil Monetary Penalty and other Equitable Relief against Driver, Axxess and Axxess Automation LLC (“Final Judgment and Order”) which permanently enjoined Driver and Axxess: one, from further violations of the Act and Commission rules, including Section 4b(a)(1)(A)-(C) of the Act as amended by the CRA and the Dodd-Frank Act, 7

⁷ The Court also found that Axxess had failed to produce books and records in violation of Section 4n(3)(A) of the Act, 7 U.S.C. § 6n(3)(A), and Commission rule 1.31(a), 17 C.F.R. §1.31(a) (2012).

⁸ In explaining his determination to enter a permanent injunction, Judge Wright noted, on top of defendants’ past widespread fraudulent conduct: that Driver continued to advise customers and to solicit customers to buy his futures trading software in contempt of the Court’s order of preliminary injunction; that Driver demonstrated no remorse for his actions or his victims’ losses; and that Driver continued to insist that he was a successful and profitable futures trader despite overwhelming evidence to the contrary. *See* page 16, slip opinion. Thus, in essence, Judge Wright found that Driver continued to display the unmistakable traits of an unreconstructed Ponzi scheme operator.

U.S.C. § 6b(a)(1)(A)-(C), Section 4o(1)(A)-(B), of the Act, 7 U.S.C. § 6o(1)(A)-(B), CFTC rule 4.20(c), 17 C.F.R. § 4.20(c), and Section 4m(1) of the Act, 7 U.S.C. § 6m(1); two, from entering into any transaction involving commodity futures, options on commodity futures, or commodity options for their own accounts or for any accounts in which they have a direct or indirect interest; and three, applying for registration or claiming exemption from registrations with the commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R § 4.14(a)(9) (2012).⁹

Conclusions of Law

Section 8a(2)(C) of the Act

Section 8a(2)(C) of the Commodity Exchange Act ("Act"), as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 12a(2)(C), in relevant part, authorizes the Commission to revoke the registration of any person "if such person is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction . . . including an order entered pursuant to an agreement of settlement to which the Commission . . . is a party, from . . . (i) acting as a futures commission merchant, introducing broker, floor broker, floor trader, commodity trading advisor, commodity pool operator, [or] associated person of any registrant under this Act . . . or (ii) engaging in or continuing any activity when such activity involves . . . fraud . . ." Cause exists for statutory disqualification of Driver and Axxess pursuant to Section 8a(2)(C) of the Act, because the Final Judgment and Order in *CFTC v. Driver*, which was entered by the United States District Court for the Central District of California, a court of

⁹ In a related action, on December 14, 2009, after the U.S. Securities and Exchange Commission filed an injunctive complaint against Driver and Axxess Automation, Judge Wright issued separate judgments enjoining Driver and Axxess Automation from violations of certain antifraud provisions of the Securities Exchange Act of 1934. *SEC v. Gordon Driver, et al.*, Case no. 09-cv-3410 (ODW) (C.D. Cal.). In another related action, the Ontario Securities Commission, on September 27, 2012, issued a Decision finding that Driver and Axxess, among others, had knowingly perpetuated a fraudulent scheme in violation of the Ontario Securities Act. *In the matter of Axxess Automation LLC, et al.*

competent jurisdiction, permanently enjoins both Driver and Axxess from committing fraud in violation of the Act.

Section 8a(2)(E) of the Act

Section 8a(2)(E) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 12a(2)(E), in relevant part, authorizes the Commission to revoke the registration of any person "if such person, within ten years preceding the filing of the application [for registration] or any time thereafter, has been found in a proceeding brought by the Commission... (i) to have violated any provision of [the] Act... where such violation involves ... fraud [or] misappropriation of funds..." Cause also exists for statutory disqualification of Driver and Axxess pursuant to Section 8a(2)(E) of the Act, because the Summary Judgment Order in *CFTC v. Driver* found Driver and Axxess each to have violated the Act for conduct involving fraud and misappropriation.

Section 8a(2)(H) of the Act

Section 8a(2)(H) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 12a(2)(H), in relevant part, authorizes the Commission to revoke the registration of any person if "revocation of the registration of any principal of such person would be warranted because of a statutory disqualification listed in this paragraph." Section 8a(2)(H) of the Act further provides that the term "principal," as used in Section 8a(2) of the Act, includes a general partner of a partnership or a person who owns more than 10% of the voting shares of a corporation. Because Driver is listed with the Commission as Axxess' sole principal, owns more than a 10% financial interest in Axxess, and is subject to the revocation of his registration

pursuant to Sections 8a(2)(C) and (E) of the Act, Axxess' registration is also subject to revocation pursuant to Section 8a(2)(H) of the Act.

ORDER

Gordon A. Driver is statutorily disqualified from registration under Sections 8a(2)(C) and (E) of the Commodity Exchange Act, and Axxess Fund Management LLC is statutorily disqualified under Sections 8a(2)(C), (E) and (H) of the Commodity Exchange Act.

Accordingly: the Division's motion for entry of a default judgment is hereby granted; Gordon A. Driver and Axxess Fund Management LLC are unfit for registration; and the registration of Gordon A. Driver and the registration of Axxess Fund Management LLC are hereby revoked.

Dated February 19, 2013.


Philip V. McGuire,
Judgment Officer