

Engelhardt

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. COMMODITY FUTURES TRADING  
COMMISSION,

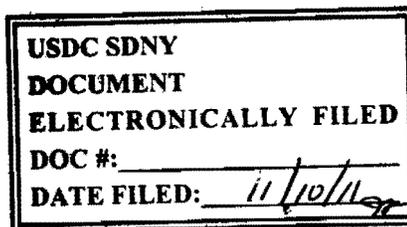
Plaintiff,

v.

PROFITSTARS INT'L CORP., a Texas  
corporation, and ULYSIS K. STARLING,  
an individual,

Defendants.

CASE NO. 1:11-CV-07742-PAE



<sup>PAE</sup>  
~~PROPOSED~~ STATUTORY RESTRAINING ORDER PROHIBITING DEFENDANTS  
FROM DESTROYING BOOKS AND RECORDS, FREEZING ASSETS AND  
APPOINTING A TEMPORARY RECEIVER

On October 31, 2011, Plaintiff, U.S. Commodity Futures Trading Commission (the "Commission" or "CFTC"), filed a complaint for injunctive and other relief, and moved, pursuant to Section 6c of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 13a-1(a)(2006), for an order to show cause why a statutory restraining order ("SRO") should not be entered against Defendants ProfitStars Int'l Corp. ("PSI") and Ulysis K. Starling ("Starling") prohibiting the destruction of books, records or other documents, freezing the assets of Defendant PSI and appointing a temporary receiver.

On November 1, 2011, the Court issued an order to show cause why an SRO should not be entered against Defendants PSI and Starling.

On November 8, 2011, the Court held a hearing to show cause why an SRO should not be entered against Defendants PSI and Starling, freezing the assets of Defendant PSI and appointing a temporary receiver to take control of PSI's assets.

The Court, having considered the pleadings, declarations, exhibits, and memorandum filed in support of the Commission's Motion, opposition papers submitted by Paragon FX, and the Court having heard oral argument on November 8, 2011, now, being fully advised, finds that:

1. This Court has jurisdiction over the parties and over the subject matter of this action pursuant to Section 6c of the Commodity Exchange Act (the "Act"), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XII (the CFTC Reauthorization Act of 2008 ("CRA")) §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), to be codified at 7 U.S.C. § 13a-1, and Section 2(c)(2) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2);
2. Venue lies properly within this District pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2006);
3. There is good cause to believe that Defendants PSI and Starling (collectively, the "Defendants") have engaged, are engaging, and are about to engage in acts and practices constituting violations of the Act, as amended, to be codified at 7 U.S.C. §§ 1, *et seq.*;
4. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for customers in the form of monetary redress will occur from the sale, transfer, assignment, or other disposition by Defendants of assets or records unless Defendants are immediately restrained and enjoined by Order of the Court;
5. Good cause exists for the freezing of assets owned, controlled, managed, or held by, on behalf of, or for the benefit of Defendant PSI and for entry of an order prohibiting Defendants, their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with Defendants, including any successor thereof, from destroying records and/or refusing to permit Commission representatives access to inspect and copy records;

6. Good cause exists for the appointment of a temporary receiver for Defendant PSI's assets and the assets of any affiliates or subsidiaries of Defendant PSI, with the full powers of an equity receiver, as set-forth herein;

7. Good cause exists for the appointment of a temporary receiver to take all investigative steps deemed appropriate with respect to assets owned, controlled, managed or held by, on behalf of, or for the benefit of Defendant PSI, in order to preserve, investigate, and determine customer claims, determine unlawful proceeds retained by Defendant PSI, and amounts due to customers as a result of Defendants' alleged violations; and

8. Weighing the equities and considering the Commission's likelihood of success in its claims for relief, the issuance of a statutory restraining order is in the public interest.

#### **DEFINITIONS**

For the purposes of this Order, the following definitions apply:

9. "Assets" means any legal or equitable interest in, right to, or claim to, any real or personal property, including but not limited to: chattels, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, claims and causes of action, checks, notes, accounts including bank accounts and accounts at financial institutions, credits, receivables, lines of credit, contracts including spot and futures contracts, insurance policies, and all cash, wherever located.

10. The term "document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes, but is not limited to, writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through

detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

11. “Defendants” mean PSI and Starling, and any person insofar as he or she has acted or is acting in the capacity of an officer, agent, servant, employee, or attorney of PSI or Starling, and any person who receives actual notice of this Order by personal service or otherwise insofar as he or she is acting in concert or participating with PSI or Starling.

**RELIEF GRANTED**

**I.**

**Order Against Transfer, Dissipation, and Disposal of Assets**

**IT IS HEREBY ORDERED** that:

12. Defendants PSI and Starling, and their officers, agents, servants, employees, attorneys, and persons in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, are restrained and enjoined from directly or indirectly transferring, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, dissipating, converting, withdrawing, or otherwise disposing of any of PSI’s assets, wherever located, including assets held outside the United States. The assets affected by this paragraph shall include, but are not limited to, \$1,770,326 in ProfitStars pool participants’ funds held in a Forex Direct Dealer (“FXDD”) account at J.P. Morgan Chase bank named “Forex Direct Dealer ProfitStars Customer Funds” (hereinafter referred to as “PSI FXDD Account”).

13. Defendants PSI and Starling are restrained and enjoined from directly or indirectly opening or causing to be opened any safe deposit boxes titled in the name of, or subject to access by Defendants.

**II.**

**Directives to Financial Institutions and Others**

**IT IS FURTHER ORDERED**, pending further Order of this Court, that any financial or brokerage institution, business entity, or person that holds or has held, controls or has controlled, or maintains or has maintained control of any of Defendant PSI's assets at any time since October 18, 2010, shall:

14. Prohibit Defendants PSI and Starling and all other persons, other than the Temporary Receiver, from withdrawing, removing, assigning, transferring, pledging, encumbering, disbursing, dissipating, converting, selling, or otherwise disposing of PSI's assets, except as directed by further order of the Court. This provision applies to, but is not limited to, the PSI FXDD Account, held at J.P. Morgan Chase Bank, N.A., named "Forex Direct Dealer ProfitStars Customer Funds," Account No. \*\*\*\*\*0724;

15. Deny Defendants and all other persons, other than the Temporary Receiver, access to any safe deposit box that is: (a) owned, controlled, managed, or held by, on behalf of, or for the benefit of Defendant PSI, either individually or jointly; or (b) otherwise subject to access by Defendant PSI;

16. Provide counsel for the Commission and the Temporary Receiver, within five (5) business days of receiving a copy of this Order, a statement setting forth: (a) the identification number of each and every account or other asset owned, controlled, managed, or held by, on behalf of, or for the benefit of Defendant PSI, either individually or jointly; (b) the balance of each such account, or a description of the nature and value of such asset as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the

account, and the name of the person or entity to whom such account or other asset was remitted; and (c) the identification of any safe deposit box that is owned, controlled, managed, or held by, on behalf of, or for the benefit of Defendant PSI, either individually or jointly, or is otherwise subject to access by Defendant PSI; and

17. Upon request by the Commission and/or the Temporary Receiver, promptly provide the Commission with copies of all records or other documentation pertaining to such account or asset, including, but not limited to, originals or copies of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, Internal Revenue Service Form 1099s, and safe deposit box logs.

### **III.**

#### **Records of Accounts and Assets**

**IT IS FURTHER ORDERED** that within five (5) business days following the service of this Order, Defendants PSI and Starling shall:

18. Provide the Commission access to all records of accounts or assets of Defendant PSI held by financial institutions located both within and outside the territorial United States by signing the Consent to Release of Financial Records attached to this Order.

### **IV.**

#### **Maintenance of, and Access to, Books and Records**

**IT IS FURTHER ORDERED** that:

19. Defendants and their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with Defendants, including any successor thereof, and all other persons or entities who receive notice of this Order by personal service or otherwise, are

restrained and enjoined from directly or indirectly destroying, mutilating, erasing, altering, concealing or disposing of, in any manner, directly or indirectly, any documents or records, wherever they may be situated, that relate to the business practices or business finances of Defendant PSI.

V.

**Commission's Access to, and Inspection of, Books and Records**

20. Representatives of the Commission (accompanied by representatives of other federal or state authorities or the National Futures Association, if the Commission so desires) shall be allowed immediate and continued access, until further Order of this Court, to inspect the books, records, and other documents of Defendant PSI and its agents including, but not limited to, paper documents, electronically stored data, tape recordings, and computer discs, wherever they may be situated and whether they are in the possession of Defendants or others, and to copy said documents, data and records, either on or off the premises where they may be situated.

21. Defendants PSI and Starling and their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with Defendants, including any successor thereof, and all other persons or entities who receive notice of this Order by personal service or otherwise, are immediately restrained and enjoined from directly or indirectly refusing to permit Representatives of the Commission (accompanied by representatives of other federal or state authorities or the National Futures Association, if the Commission so desires) to have immediate and ongoing unimpeded access, until further Order of this Court, to inspect the books, records, and other documents of Defendant PSI and its agents including, but not limited to, paper documents, electronically stored data, tape recordings, and computer discs, wherever they may

be situated and whether they are in the possession of Defendants or others, and to copy said documents, data and records, either on or off the premises, where they may be situated;

22. Upon request of the Commission, Defendants are ordered to deliver to the Commission documents of Defendant PSI, including but not limited to all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, cancelled checks, records of wire transfers, and check registers), lists of all customers or investors, title documents, other papers, all keys, computer passcodes, entry codes, and combination to locks necessary to gain or to secure access to any of the assets or documents of Defendant PSI, including but not limited to, access to Defendant PSI's business premises, means of communication, accounts, computer systems, or other property and information identifying the accounts, employees, properties, or other assets or obligations of PSI.

## VI.

### **Order Appointing Temporary Receiver**

23. Kelly Crawford of the firm of Scheef & Stone, LLP, Dallas, Texas, is appointed Temporary Receiver for Defendant PSI's assets and the assets of any affiliates or subsidiaries of Defendant PSI, with the full powers of an equity receiver. The Temporary Receiver shall have the powers enumerated below.

24. Subject to the approval of the Court, the Temporary Receiver is directed and authorized to accomplish the following:

- a. Assume full control of PSI by removing any officer, independent contractor, employee, or agent of PSI, from full control and management of the affairs of the same;

- b. Take exclusive custody, control, and possession of all the funds, property, mail and other assets of, in the possession of, or under the control of Defendant PSI, wherever situated, including but not limited to the PSI FXDD Account at J.P. Morgan Chase Bank. The Temporary Receiver shall have full power to sue for, collect, receive and take possession of all goods, chattels, rights, credits, moneys, effects, land, leases, books, records, work papers, and records of accounts, including computer-maintained information, and other papers and documents of Defendant PSI, including documents related to customers or clients whose interest are now held by or under the direction, possession, custody or control of Defendants;
- c. To sue for and bring actions to recover assets improperly transferred by Defendants to third parties, or pursue any other litigation which, in the Temporary Receiver's best judgment, may bring value to the receivership estate;
- d. Take all steps necessary to secure the business premises of Defendant PSI, and all other real property owned or controlled by PSI;
- e. Preserve, hold and manage all receivership assets, and perform all acts necessary to preserve the value of those assets, in order to prevent any loss, damage or injury to Defendant PSI's customers, clients, or pool participants;
- f. Prevent the withdrawal or misapplication of funds entrusted to Defendants, and otherwise protect the interests of customers, clients, or pool participants;
- g. Manage and administer the assets of Defendant PSI by performing all acts incidental thereto that the temporary receiver deems appropriate, including hiring or dismissing any and all personnel or suspending operations;
- h. Collect all money owed to Defendant PSI;

- i. Initiate, prosecute, compromise, adjust, intervene in or become a party to any actions or proceedings in state, federal or foreign courts that the Temporary Receiver deems necessary to preserve or increase the assets of Defendant PSI to carry out his or her duties pursuant to this Order;
- j. Defend, compromise, adjust or otherwise dispose of any actions or proceedings in state, federal or foreign courts instituted against the Temporary Receiver or Defendants that the Temporary Receiver deems necessary to preserve or increase the assets of Defendant PSI to carry out his or her duties pursuant to this Order;
- k. Choose, engage and employ attorneys, accountants, appraisers, and other independent contractors and technical specialists, as the Temporary Receiver deems advisable or necessary in the performance of duties and responsibilities under the authority granted by this Order;
- l. Issue subpoenas to obtain documents and records pertaining to the receivership, and conduct discovery in this action on behalf of the receivership estate;
- m. Open one or more bank accounts as designated depositories for funds of Defendant PSI. The Temporary Receiver shall deposit all funds of Defendant PSI in such designated accounts and shall make all payments and disbursements from the receivership estate from such accounts; and
- n. Make payments and disbursements from the receivership estate that are necessary or advisable for carrying out the directions of, or exercising the authority granted by, this Order. The Temporary Receiver shall apply to the Court for prior approval of any payment of any debt or obligation incurred by Defendants prior to the date of

entry of this Order, except for payments that the Receiver deems necessary or advisable to secure assets of Defendant PSI.

25. Immediately upon service of this Order upon them, Defendants, and any other person or entity served with a copy of this Order, shall immediately or within such time as permitted by the Temporary Receiver in writing, deliver over to the Temporary Receiver:

- a. Possession and custody of all funds, property, and other assets, owned beneficially or otherwise, wherever situated, of Defendant PSI;
- b. Possession and custody of documents of Defendant PSI, including but not limited to, all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), client lists, title documents and other papers;
- c. Possession and custody of all precious metals, other commodities, funds, and other assets being held by or on behalf of Defendant PSI or on behalf of PSI's customers, clients, pool participants or investors;
- d. All keys, computer passwords, entry codes, and combinations to locks necessary to gain or to secure access to any of the assets or documents of Defendant PSI, including but not limited to, access to Defendant PSI's business premises, means of communication, accounts, computer systems, or other property; and
- e. Information identifying the accounts, employees, properties or other assets or obligations of Defendant PSI.

26. Defendants and all other persons or entities served with a copy of this Order shall cooperate fully with and assist the Temporary Receiver. This cooperation and assistance shall

include, but not be limited to, providing any information to the Temporary Receiver that the Temporary Receiver deems necessary to exercising the authority; providing any password required to access any computer or electronic files in any medium; and discharging the responsibilities of the Temporary Receiver under this Order, and advising all persons who owe money to Defendant PSI that all debts should be paid directly by the Temporary Receiver.

27. Except by leave of the Court, during the pendency of the receivership ordered herein, Defendants, and all other persons and entities seeking relief of any kind from Defendant PSI's assets (other than the present action by the Commission) including but not limited to customers, clients, pool participants, investors, members, partners, trust beneficiaries, note holders, creditors, claimants, lessors, in law or in equity, and all persons acting on behalf of any such customer, client, pool participant, investor, member, partner, trust beneficiary, note holder, creditor, claimant, lessor, or other person, including sheriffs, marshals, and all offices and deputies, and their respective attorneys, servants, agents and employees, are, until further orders of this Court, be and hereby are restrained, enjoined and stayed from doing anything, directly or indirectly, to interfere with the Temporary Receiver's performance of his duties and the administration of Defendant PSI's assets. Accordingly, all such persons are enjoined and stayed from taking any action to establish or enforce any claim, right or interest for, against, on behalf of, in, or in the name of, Defendant PSI, the Temporary Receiver, receivership assets, or the Temporary Receiver's duly authorized agents acting in their capacities as such, including but not limited to, the following actions:

- a. Commencing, prosecuting, litigating or enforcing any suit, except that actions may be filed to toll any applicable statute of limitations;

- b. Accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession of, or retaining possession of, property of Defendant PSI or any property claimed by PSI, or attempting to foreclose, forfeit, alter or terminate any of PSI's interests in property, whether such acts are part of a judicial proceeding or otherwise;
- c. Using self-help or executing or issuing, or causing the execution or issuance of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon any property, wherever located, owned by or in the possession of PSI, or the Temporary Receiver, or any agent of the Temporary Receiver; and
- d. Doing any act or thing to interfere with the Temporary Receiver taking control, possession or management of the property subject to the receivership, or to in any way interfere with the Temporary Receiver or the duties of the Temporary Receiver; or to interfere with the exclusive jurisdiction of this Court over the property and assets of Defendant PSI. This paragraph does not stay the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

28. Within sixty (60) days of the date of this Order, the Temporary Receiver shall file with this Court and serve Plaintiff a report outlining the steps taken to identify clients or pool participants, marshal assets, determine the amount invested by each customer, and the portion of assets available to pay back clients or pool participants. This report shall also include a statement as to the estimated time it will take to distribute available assets to clients or pool participants and wind up the receivership.

29. The Temporary Receiver and all personnel hired by the Temporary Receiver as herein authorized, including counsel to the Temporary Receiver, are entitled to reasonable compensation for the performance of duties pursuant to this Order and for the cost of actual out-of-pocket expenses incurred by them, from the assets now held by, or in the possession or control of, or which may be received by Defendants. The Temporary Receiver shall file with the Court and serve on the parties, including Plaintiff, periodic requests for the payment of such reasonable compensation, with the first such request filed no more than ninety (90) days after the date of this Order. Plaintiff may object to any part of a request within thirty (30) calendar days of service of a request. The Temporary Receiver shall not increase the hourly rates used as the bases for such fee applications without prior approval of the Court.

## **VII.**

### **Service**

**IT IS FURTHER ORDERED** that:

30. This Order shall be served by any means, including e-mail, facsimile transmission, or a private express courier service, upon Defendant or any entity or person that may have possession, custody, or control of any documents or assets of Defendant, or that may be subject to any provision of this Order.

31. Defendants shall serve all pleadings, correspondence, notices required by this Order, and other materials on the Commission by personal delivery or reliable overnight delivery service (such as Federal Express or United Parcel Service) to Peter M. Haas, Chief Trial Attorney, and Danielle E. Karst, Trial Attorney, Division of Enforcement, U.S. Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581.

32. The Summons, Complaint, or other process may be effected by any Commission representative, any U.S. Marshal or Deputy U.S. Marshal, or in accordance with Fed. R. Civ. P. 4.

**VIII.**

**Bond Not Required of Plaintiff**

**IT IS FURTHER ORDERED** that:

33. Plaintiff Commission is an agency of the United States of America and, accordingly, no bond need be posted by the Commission.

**IX.**

**Assistance of U.S. Marshals Office and Other Law Enforcement Personnel**

34. The U.S. Marshals Office shall accompany and assist the Commission's representatives outside and inside the premises, as well as secure the premises, in the service and execution of this Order and to undertake such efforts as are reasonably necessary to ensure that the Commission's representatives have an unimpeded right to inspect and copy books, records, and documents as set forth above wherever such books, records, and documents are or are believed by the Commission to be located. State and local law enforcement agencies are also authorized to so assist the Commission in this manner.

**X.**

**Force and Effect of Order**

35. This Order shall remain in full force and effect until further order of this Court and that this Court retains jurisdiction of this matter for all purposes.

**SO ORDERED**, at New York, New York this 10<sup>th</sup> day of November, 2011

*Paul A. Engelmayer*  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF NEW YORK

*2*