

**UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION**

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8:11 am, Sep 27, 2018

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**In the Matter of:**

**WILLIAM EARL BERRY and  
BERRY MEDIA WORKS,**

**Respondents.**

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) **CFTC Docket No. 18-42**  
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**ORDER INSTITUTING PROCEEDINGS PURSUANT TO  
SECTION 6(c) AND (d) OF THE COMMODITY EXCHANGE ACT, MAKING  
FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

**I. INTRODUCTION**

The Commodity Futures Trading Commission (“Commission” or “CFTC”) has reason to believe that William Earl (“Bill”) Berry (“Berry”) and his company Berry Media Works (“BMW”) (collectively, “Respondents” or “BB”) willfully aided and abetted at least twelve affiliate marketers’ violations of Sections 4c(b), 4o(1), and 6(c)(1) of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 6c(b), 6o(1), and 9(1) (2012), and Commission Regulations (“Regulations”) 4.41(a)(1)-(3) and (b)(1)-(2), 32.4, and 180.1(a), 17 C.F.R. §§ 4.41(a)(1)-(3), (b)(1)-(2), 32.4, 180.1(a)(1)-(3) (2018). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondents engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

In anticipation of the institution of an administrative proceeding, Respondents have submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondents consent to the entry of this Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions (“Order”) and acknowledge service of this Order.<sup>1</sup>

<sup>1</sup> Respondents consent to the use of the findings of fact and conclusions of law in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party or claimant, and agrees that they shall be taken as true and correct and be given preclusive effect therein, without further proof. Respondents do not consent, however, to the use of this Order, or the findings or conclusions herein, as the sole basis for any other proceeding brought by the Commission or to which the Commission is a party or claimant, other than: a proceeding in bankruptcy or receivership; or a proceeding to enforce the terms of this Order. Respondents do not consent to the use of the Offer or this Order, or the findings or conclusions in this Order, by any other party in any other proceeding.

## II. FINDINGS

The Commission finds the following:

### A. SUMMARY

Beginning in at least 2012, certain affiliate marketers hired Berry and his company BMW (collectively “BB”) to produce hundreds of custom video sales letters (“VSL(s)”) for them to solicit hundreds of millions of prospective customers to open accounts and trade off-exchange binary options through websites operated by a number of unregistered binary options brokers (“Broker(s)”). Between June 2013 and March 2017 (the “Relevant Period”), BB produced at least sixty-four binary options sales videos (known as “VSLs”) used by at least twelve affiliate marketers to lure viewers into opening and funding these illegal binary options accounts. At least a hundred thousand (100,000) customers opened binary options trading accounts in connection with the sixty-four VSLs Berry produced. Those customers as deposited over twenty-five million dollars (\$25,000,000) in initial investments to trade binary options in their new accounts.

BB knew the VSLs they produced included numerous false and misleading statements about the offer to prospective customers for “free access” to trading software that would purportedly “autotrade” customers’ binary options accounts on their behalf. Among the numerous false statements, the VSLs that Berry produced on behalf of affiliate marketers: (1) guaranteed that the trading software would automatically generate significant profits for customers once they opened and funded a binary options account with a “recommended” Broker; (2) used actors pretending to be real users or owners of the trading software; and (3) included fake bank and trading statements, fictitious testimonials and fake “live” demonstrations, all of which falsely claimed profitable results generated by the automated trading software. Berry also knew that his affiliate marketer clients would disseminate the fraudulent VSLs he produced to prospective customers via email and/or publish the VSLs on campaign websites to lure them to open accounts and trade off-exchange binary options.

Berry willfully aided and abetted at least twelve affiliate marketers’ fraud and earned five hundred and fifty thousand dollars (\$550,000) for doing so. In accepting the offer of settlement in this matter, the Commission recognizes that that BB has materially assisted the Division in its investigations and ongoing litigations involving binary options affiliate marketing fraud. In particular, Berry summarized relevant documents and video files, identified specific items of importance, identified his affiliate marketer clients, and otherwise provided useful information to the Division upon request. Berry entered into a cooperation agreement with the Division in August 2018. Berry’s cooperation is recognized in terms of substantially reduced sanctions, including the Commission’s determination not to impose a significant civil monetary penalty as would otherwise be warranted for this conduct.

### B. RESPONDENTS

**William Earl “Bill” Berry** lives in the greater Portland, Oregon area. Berry is the founder of Berry Media Works. Berry has never been registered with the Commission in any capacity.

**Berry Media Works, LLC** is an Oregon limited liability company with its principal place of business in Wilsonville, Oregon. At all times relevant, Berry has directed and controlled BMW's operations, had control over BMW's bank accounts, and filed BMW's annual reports with the Oregon Secretary of State. BMW has never been registered with the Commission in any capacity.

### C. FACTS

Beginning in approximately 2008, BB produced custom VSLs for affiliate marketers. Affiliate marketing is a form of performance based marketing that is predominantly conducted via email solicitations and promotional materials made available on internet websites. An affiliate marketing campaign is a promotion of a product or service designed to convince the audience to take a specific action, including purchasing a product or service or opening and funding a binary options trading account. Affiliate marketing is referred to as a campaign or funnel because the advertising is designed to funnel (or "drive") customers to the service provider or product owner. Affiliate marketing occurs in various business segments, including binary options,<sup>2</sup> internet marketing ("IM"), business opportunities ("BizOp"), foreign exchange ("Forex"), and, more recently, virtual currencies or cryptocurrencies.

Affiliate marketing in binary options generally involves the creation and bulk dissemination of solicitation materials promoting access to automated trading software—available for free upon opening and funding a binary options trading account—that purports to trade successfully on behalf of prospective customers. Affiliate marketers in binary options earn a flat commission from Brokers for every customer that opens and funds a trading account as a result of their solicitation.

Affiliate marketers in binary options like BB's clients launch campaigns by sending out mass email solicitations designed to entice the recipients to click an embedded electronic link that routes the user to a binary options campaign website. To lure prospective customers through the binary options website's funnel, BB's affiliate marketer clients intentionally included VSLs containing numerous false and misleading representations about trading activity, results, risks, and profits.

BB started producing videos related to binary options around 2012 and continued doing so until approximately June 2017. BB created hundreds of binary options videos during that period, all of which included false statements about the promoted trading software's performance. Affiliate marketers in the binary options space identified BB as "the go to guy" for high quality videos that helped increase the likelihood of success of their solicitations.

During the Relevant Period, BB produced at least sixty-four fraudulent VSLs used by at least twelve affiliate marketers in binary options campaigns as follows:

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<sup>2</sup> A binary option is a type of option contract in which the payout depends entirely on the outcome of a discrete event—usually a "yes/no" proposition. The yes/no proposition typically relates to whether the price of a particular asset—such as a currency pairing or commodity future—will rise above or fall below a specified amount at a specified date and time.

<b>Affiliate</b>	<b>Campaign/VSL Name (year)</b>
Affiliate1	Rich Jerk (2013); Free Cash App (2013); Free Profits / Free Profit Code (2014); Live Profits (2015); Quick Money Machine (2015); Drexel Code (2016); Greenwood (2016); Brooks blueprint (2016); Perpetual Formula (2016); Azure method (2016); Shepard SDP (2016); Infinity App (2017)
Affiliates 2&3	Binary (2013); Automated Income App (2014); Binary Cash Creator (2014); Push Button Millions/Millionaire (2014); Binary Cash Creator (2014); Free Money System (2014); Quick Cash System (2014); Easy Money Machines (2014); Secret Millionaire Society (2014); Cash Software (2014); Free Money App (2015); Auto Money App (2015); Cash Code (2015); Push Button Commissions (2015); Free Millionaire System (2015); Easy Money Method (2015); Fast Cash (2015); Push Money App (2016)
Affiliates 4&5	Binary Script (2014); More Binary (2014); Binary Price Changes (2014); Automobile Code (2014); Binary Brain (2014); Stock Matrix Pro (2014); Copy Trade Profit (2015); Stock Matrix Pro (2) (2015); Centument (2016); Trianasoft (2016); Doren videos (2016); Binary Interceptor (2016); Binary Interceptor (2) (2016); Mobile Binary Code (2016); Centument Redux (August 2016)
Affiliate 6	Larry's Cash Machine (2014); Binary Hijack (2015)
Affiliates 7&8	Medallion (2015); Medallion App (2015); Trade Tracker Pro (2016); Million Dollar Challenge (2016)
Affiliate 9	Secret Millionaire (2014); Altronix App (2016); Millionaires Club (2016); Quantum Code (2016); Zero Loss Formula (2016); Orion Code (2016)
Affiliates 10&11	Golden Goose (2013); Binary Script (2013); Platinum Binary (2014); Chess Wizard (2015); Copy Op (2015); Copy Op redux (2015)
Affiliate 12	Cash Chart

To create these VSLs, BB used scripts provided by his clients and/or drafted by Copywriter A, a friend who Berry referred his clients to. On about a dozen occasions, BB's associate drafted scripts for BB's binary options VSLs based on generic, vague information provided by BB's affiliate marketer clients. In all instances, Berry knew that the scripts he used for the VSLs, including the sixty-four VSLs identified above, were fiction even though they claimed to reflect real trading performance and results based on actual use of the advertised system. Berry also knew that the actors he hired for the videos did not use or create the advertised system even though their characters were portrayed as such.

Berry further knew that bank and trading account statements portrayed as real proof of the success of the advertised systems in the VSLs he produced, including the sixty-four

identified above, were fake. In fact, Berry created dozens of fake bank and trading statements for the Push Money App VSL that was ultimately disseminated to millions of prospective customers. Berry also at times re-used bank and trading account statements from prior projects. In some instances, Berry used fake bank and trading statements provided to him by BMW's affiliate marketer clients and tweaked or blurred the names or dollar amounts as necessary.

Berry also knew the testimonials included in the VSLs he produced were fake. At times Berry juxtaposed pictures of people he copied from the Internet next to quotes attesting to their purported experience with the software to create the illusion of attribution to a real person. In other instances, Berry hired actors to read testimonials from a script with specific instructions on how to record themselves so that it would appear realistic.

At affiliate marketers' requests, Berry procured "props" for the VSLs to make the "life of the rich and famous" style of video more credible. For example, Berry rented luxury cars, mansions, private jets, and yachts for certain binary options VSLs. At times, Berry also ordered merchandise with logos of the advertised system or with the name of a fake company that created the advertised system such as clothing for actors to wear or branding for luxury cars and private jets.

Berry also at times tweaked binary options VSLs that he had previously made by changing the name of the product or characters at affiliate marketers' requests. Berry knew that the "proof" in the tweaked videos, and even some "original" videos he produced, was taken from other projects and did not relate to the advertised trading system.

Berry knew that the videos he made for affiliate marketers would be disseminated to prospective customers and published on the internet. Berry willfully assisted his affiliate marketers create fictitious VSLs that were designed to entice prospective customers to open accounts and trade binary options with Brokers.

Berry deleted materials related to binary options on at least one occasion when Affiliate 1 asked him to do so due to concerns about regulator inquiries in or around mid-2016. In addition, on at least three occasions beginning in mid-2016, actors Berry had used in binary options VSLs notified him about "hate mail" from customers who had opened binary options accounts after viewing a VSL the actors were in. Berry nonetheless continued to produce binary options VSLs until at least March 2017.

Berry retrieved his binary options VSL files and assisted the Division in identifying the pertinent materials among the voluminous records, summarized documents and information, identified certain affiliate marketer clients and VSLs unknown to the Division at that time, and otherwise provided helpful information to the Division on an as needed basis. Berry entered into a cooperation agreement with the Division in August 2018. Berry's cooperation is recognized in terms of substantially reduced sanctions, including the Commission's determination not to impose a significant civil monetary penalty as would otherwise be warranted for this conduct.

### III. LEGAL DISCUSSION

#### A. Violation of Section 4c(b) of the Act and Regulation 32.4: Options Fraud

Section 4(c)(b) of the Act, 7 U.S.C. § 6c(b) (2012), makes it unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity regulated under the Act which is of the character of, or is commonly known to the trade as, inter alia, an “option,” “bid,” “offer,” “put,” or “call,” contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe. Binary options qualify as commodity option transactions within the meaning of the Act and Regulations. *See CFTC v. Vision Fin. Partners, LLC*, Case No. 16-60297-CIV-Cohn/Seltzer, 2016 WL 3163071, at \*3 (S.D. Fla. June 3, 2016) (denying motion to dismiss; holding that binary options are commodity options within the meaning of Section 4c(b) of the Act).

Regulation 32.4, 17 C.F.R. § 32.4 (2018), provides that, in connection with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction, it shall be unlawful for any person, directly or indirectly: (a) to cheat or defraud or attempt to cheat or defraud any other person; (b) to make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof; or (c) to deceive or attempt to deceive any other person by any means whatsoever. Fraud involving commodity options is established when a person or entity: (A) makes a misrepresentation, misleading statement, or a deceptive omission; (B) acts with scienter; and (C) the misrepresentation or omission is material. *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002) (finding commercial that overemphasized profit potential, downplayed risk of loss, and urged viewers to take immediate action or risk missing the opportunity materially misleading despite inclusion of boilerplate risk disclosures); *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 446-47 (D.N.J. 2000) (holding to establish a claim for futures and options fraud under section 4b(a) and 4c(b) of the CEA . . . the CFTC must demonstrate that the defendant made a material misrepresentation of presently existing or past fact with scienter).

For each of the sixty-four (64) binary options VSLs that BB produced for their affiliate marketer clients, those affiliate marketers violated Section 4c(b) of the Act and Regulation 32.4 because they intentionally or recklessly created and/or disseminated solicitations replete with material misrepresentations as described above.

A person is liable for aiding and abetting where that person: (A) had knowledge of the principal’s intent to commit a violation; (B) had the intent to further that violation; and (C) committed some act in furtherance of the principal’s objective. *In re Nikkhah*, CFTC No. 95-13, 2000 WL 622872, at\*11-12 and n.28 (May 12, 2000); *see also In re Richardson Sec., Inc.*, CFTC No. 78-10, 1981 WL 26081, at\*6-8 (Jan. 27, 1981) (holding to be liable for aiding and abetting under the Act, one must knowingly associate himself with an unlawful venture, participate in it as something that he wishes to bring about, and seek by his actions to make it succeed). Although knowing participation in the primary wrongdoer’s conduct is required, knowledge of the unlawfulness of such conduct need not be demonstrated. *In re Lincolnwood Commodities, Inc.*, CFTC No. 78-48, 1984 WL 48104, at \*27-29 (Jan. 31, 1984). Knowing participation can be inferred from the surrounding facts and circumstances. *Id.*

BB, through Berry, knew that the VSLs he created and that were used by Affiliates 1-12 regarding the automated binary options trading software repeatedly misrepresented, among other things: (i) hypothetical and fictitious trading results as real results; (ii) outsized fake profits; (iii) the risk of loss; (iv) actors as true users of the Systems; (v) fake “proof” as real; (vi) the fictitious experience, background and skill of the “creators” of the Systems; (vii) the System’s limited availability; and/or (viii) fabricated testimonials. Berry willfully assisted Affiliates 1-12’s fraud by creating at least sixty-four (64) VSLs that Berry knew would be disseminated to prospective customers to persuade them to open accounts and trade binary options.

Affiliates 1-12 violated Section 4c(b) of the Act and Regulation 32.4 when they intentionally or recklessly created and disseminated binary options solicitation materials replete with material misrepresentations as described above. Berry willfully aided and abetted their acts, misrepresentations and omissions described above. Therefore, Berry is liable for their fraud pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a) (2012). .

## **B. Violation of Section 4o(1) of the Act: CTA Fraud**

Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (2012), makes it unlawful for a commodity trading advisor (“CTA”), using the instrumentalities of interstate commerce, directly or indirectly:

- (A) Employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or
- (B) To engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

Section 1a(12) of the Act, 7 U.S.C. § 1a(12) (2012), defines CTA as any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any swap or commodity option. *See CFTC v. Wall St. Underground, Inc.*, 281 F. Supp. 2d 1260, 1269 (D. Kan. 2003) (entering preliminary injunction on CTA fraud claims; defendants “acted as CTAs in that the trading systems they author and sell provide specific recommendations for clients and prospective clients to use to trade commodity futures and commodity options”), *aff’d*, 128 F. App’x 726 (10th Cir. 2005).

Section 4o(1) of the Act applies to CTAs regardless of whether or not they register with the Commission. *Wall St. Underground*, 281 F. Supp. 2d at 1269-70; *CFTC ex rel. Kelley v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985).

Affiliates 1-12 acted as CTAs by advising potential customers through emails, websites and VSLs as to the value and advisability of trading in binary options using the advertised automated trading software that purported to trade in customers’ accounts on their behalf. Affiliates 1-12 earned compensation, not directly from customers, but as commissions for each trading account opened and funded as a result of solicitation materials, including VSLs.

Therefore, Affiliates 1-12 acted as CTAs for compensation. *See CFTC v. Savage*, 611 F.2d 270, 279-80 (9th Cir. 1979) (“We do not believe that the definition of commodity trading advisor requires that the ‘compensation or profit’ flow directly from the person or persons advised” (citing CFTC Interpretive Letter No. 75-11 (1975-77 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 20,098 at 20,763 n.6)). Berry willfully assisted Affiliates 1-12 in acting as CTAs by creating the VSLs that they used to advise potential customers as part of their solicitations.

By the same conduct that violated Section 4c(b) of the Act and Regulation 32.4, Affiliates 1-12 violated Section 4o of the Act when they created and disseminated binary options solicitation materials replete with material misrepresentations and false statements as described above.

Berry willfully aided and abetted Affiliates 1-12’s acts, misrepresentations and omissions described above. Therefore, Berry is liable for their fraud pursuant to Section 13(a) of the Act.

### **C. Violation of Section 6(c)(1) of the Act and Regulation 180.1(a): Manipulative or Deceptive Devices**

Section 1a(47)(A) of the Act, 7 U.S.C. § 1a(47)(A) (2012), defines “swap” to include, among other things, any agreement, contract, or transaction that: (a) is an option of any kind; (b) provides for payment dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency; or (c) provides on an executory basis for payments based on the value or level of one or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or properly of any kind, without also conveying an ownership interest in any asset or liability. Binary options qualify as swaps based on the plain language of Section 1a(47)(A). *See CFTC v. Vault Options, Ltd.*, No. 1:16-CV-01881, 2016 WL 5339716, at \*6 (N.D. Ill. July 20, 2016) (default judgment, holding that binary options are swaps).

Section 6(c)(1) of the Act, 7 U.S.C. § 9(1) (2012), provides in relevant part, “[i]t shall be unlawful for any person, directly or indirectly, to use or employ or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate . . . .”

Regulation § 180.1(a)(1)-(3), 17 C.F.R. § 180.1(a)(1)-(3) (2018), provides in relevant part, that it shall be unlawful for any person, in directly or indirectly:

In connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly: (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud; (2) Make, or attempt to make, any untrue or misleading statement of material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading; (3) Engage,



or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person . . . .

By intentionally or recklessly engaging in the same conduct that violated Sections 4c(b) and 4o of the Act and Regulation 32.4, Affiliates 1-12 violated Section 6(c)(1) of the Act and Regulation 180.1(a)(1)-(3). *See CFTC v. Hunter Wise Commodities, LLC*, 21 F.Supp.3d 1317, 1347 (S.D. Fla. 2014) (finding that material misrepresentations and omissions in connection with the sale of commodities violated Section 6(c)(1) of the Act and Regulation 180.1). Berry willfully aided and abetted Affiliates 1-12's acts, misrepresentations and omissions described above.

#### **D. Violation of Regulation 4.41(a)(1)-(3) and (b)(1)-(2): Fraudulent Advertising**

Regulation 4.41(a)(1)-(2), 17 C.F.R. § 4.41(a)(1)-(2) (2018), prohibits fraudulent advertising by a CTA. Regulation 4.41(a)(3) makes it unlawful for any CTA to refer to any testimonial, unless the advertisement or sales literature providing the testimonial prominently discloses, in pertinent part: (i) That the testimonial may not be representative of the experience of other clients; (ii) That the testimonial is no guarantee of future performance or success; and (iii) If, more than a nominal sum is paid, the fact that it is a paid testimonial. Regulation 4.41(b)(1)-(2) requires CTAs to include specific disclosures in immediate proximity to any simulated or hypothetical performance presented in advertisements.

Affiliates 1-12 acted as CTAs in connection with the sixty-four (64) binary options advertising campaigns that included the VSLs that Berry created or helped to create. Those VSLs included testimonials without prominently disclosing for each testimonial that: (i) it may not represent the experience of other users of the advertised System; (ii) the testimonial was not a guarantee of future performance; and (iii) the testimonial was entirely fake and portrayed by paid actors.

Further, the sixty-four (64) VSLs depicted fabricated performance results of binary options transactions in, among other instruments, commodity futures, options, swaps and forex, without displaying the required disclosure in immediate proximity to those statements. To the contrary, the VSLs repeatedly referred to trading performance, activity and results as real and/or "live". This conduct violated Regulation 4.41(a)(1)-(3) and (b)(1)-(2). *See Wall St. Underground*, 281 F. Supp. 2d at 1270 (finding that a CTA's advertising of a trading system in a manner that was misleading and omitted material information regarding commodity trading violated Regulation 4.41(a)); *CFTC v. Heffernan*, 245 F.Supp.2d 1276, 1296-99 (S.D. Ga. 2003) (finding CTA advertising of hypothetical results without the required disclaimer regarding such results violated Regulation 4.41(b)).

By this conduct, Affiliates 1-12 violated Regulation 4.41(a)(1)-(3) and (b)(1)-(2). Berry willfully aided and abetted Affiliates 1-12's violations of Regulation 4.41(a)(1)-(3) and (b)(1)(2).

### **IV. FINDINGS OF VIOLATIONS**

Based on the foregoing, the Commission finds that, during the Relevant Period, Respondents willfully aided and abetted at least twelve affiliate marketers' violations of Sections

4c(b), 4o(1), and 6(c)(1) of the Act, 7 U.S.C. §§ 6c(b), 6o(1), 9(1) (2012), and Regulations 4.41(a)(1)-(3) and (b)(1)-(2), 32.4, and 180.1(a)(1)-(3), 17 C.F.R. §§ 4.41(a)(1)-(3), (b)(1)-(2), 32.4, 180.1(a)(1)-(3) (2018), by creating and/or helping to create VSLs used in the affiliate marketers' binary options advertising campaigns that fraudulently solicited prospective customers and customers to access purported automated trading software guaranteed to enter profitable trades in binary option accounts which customers were directed to open with recommended Brokers. Berry is liable for their violations pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a) (2012).

## V. OFFER OF SETTLEMENT

Respondents have submitted the Offer in which they, without admitting or denying the findings and conclusions herein:

- A. Acknowledge service of this Order;
- B. Admit the jurisdiction of the Commission with respect to all matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based on violation of or enforcement of this Order;
- C. Waive:
  1. The filing and service of a complaint and notice of hearing;
  2. A hearing;
  3. All post-hearing procedures;
  4. Judicial review by any court;
  5. Any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;
  6. Any and all claims that he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2012), and 28 U.S.C. § 2412 (2012), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2018), relating to, or arising from, this proceeding;
  7. Any and all claims that he may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, §§ 201-53, 110 Stat. 847, 857-74 (codified as amended at 28 U.S.C. § 2412 and in scattered sections of 5 U.S.C. and 15 U.S.C.), relating to, or arising from, this proceeding; and
  8. Any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief, including this Order;

- D. Stipulate that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondents have consented in the Offer;
- E. Consents, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. Makes findings by the Commission that pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a) (2012), Respondents are liable for willfully aiding and abetting at least twelve affiliate marketers' violations of Sections 4c(b), 4o(1), and 6(c)(1) of the Act, 7 U.S.C. §§ 6c(b), 6o(1), 9(1) 92012), and Regulations 4.41(a)(1)-(3) and (b)(1)-(2), 32.4, and 180.1(a), 17 C.F.R. §§ 4.41(a)(1)-(3), (b)(1)-(2), 32.4, 180.1(a)(1)-(3) (2018), by creating and/or helping to create VSLs used in the affiliate marketers' binary options advertising campaigns that fraudulently solicited prospective customers and customers to access purported automated trading software guaranteed to enter profitable trades in binary option accounts which customers were directed to open with recommended brokers;
  2. Orders Respondents to cease and desist from willfully aiding and abetting at least twelve affiliate marketers' violations of Sections 4c(b), 4o(1), and 6(c)(1) of the Act and Regulations 4.41(a)(1)-(3) and (b) (1)-(2), 32.4, and 180.1(a)(1)-(3) by creating and/or helping to create VSLs for use in the affiliate marketers' binary options advertising campaigns that fraudulently solicit prospective customers and customers to access purported automated trading software guaranteed to enter profitable trades in binary option accounts which customers were directed to open with recommended brokers;
  3. Orders that Respondents be permanently prohibited from, directly or indirectly, engaging in trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012)), and all registered entities shall refuse them trading privileges; and
  4. Orders Respondents and their successors and assigns to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VI of this Order.

Upon consideration, the Commission has determined to accept the Offer.

## **VI. ORDER**

### **Accordingly, IT IS HEREBY ORDERED THAT:**

- A. Respondents shall cease and desist from willfully aiding and abetting at least twelve binary options affiliate marketers' violations of Sections 4c(b), 4o(1), and 6(c)(1) of the Act, 7 U.S.C. §§ 6c(b), 6o(1), 9(1) (2012), and Regulations 4.41(a)(1)-(3) and (b)(1)-(2), 32.4, and 180.1(a)(1)-(3), 17 C.F.R. §§ 4.41(a)(1)-(3), (b)(1)-(2), 32.4, 180.1(a)(1)-(3) (2018), by creating and/or helping to create VSLs for use in the affiliate marketers' binary options advertising campaigns that fraudulently solicit prospective customers and customers to access purported automated trading software guaranteed to enter profitable trades in binary option accounts which customers were directed to open with recommended brokers;

- B. Respondents are permanently prohibited from, directly or indirectly, engaging in trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012)), and all registered entities shall refuse them trading privileges; and
- C. Respondents shall comply with the following conditions and undertakings set forth in the Offer:
1. **Public Statements:** Respondents agree that neither they nor any agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondents': (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondents shall comply with this agreement, and shall undertake all steps necessary to ensure that all agents and/or employees under their authority or control understand and comply with this agreement.
  2. Respondents agree that they shall never, directly or indirectly:
    - a. enter into any transactions involving "commodity interests" (as that term is defined in Regulation 1.3, 17 C.F.R. § 1.3 (2018)), for Respondents' own personal accounts or for any accounts in which Respondents have a direct or indirect interest;
    - b. have any commodity interests traded on Respondents' behalf;
    - c. control or direct the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;
    - d. solicit, receive, or accept any funds from any person for the purpose of purchasing or selling any commodity interests;
    - e. apply for registration or claim exemption from registration with the Commission in any capacity, and engage in any activity requiring such registration or exemption from registration with the Commission except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2018); and/or
    - f. act as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2018)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012)), registered, required to be registered, or exempted from registration with the Commission except as provided for in Regulation 4.14(a)(9).

3. Respondents shall pay disgorgement in the amount of five hundred and fifty thousand dollars (\$550,000) (the “Disgorgement Obligation”), jointly and severally, plus post-judgment interest, within ten (10) days of the date of entry of this Order. If the Disgorgement Obligation is not paid in full within ten (10) days of the date of entry of this Order, then post-judgment interest shall accrue on the Disgorgement Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2012).

To effect payment by Respondents and the distribution to customers, the Commission appoints the National Futures Association as “Monitor.” The Monitor shall receive payments of the Disgorgement Obligation from Respondents and make distributions as set forth below. Because the Monitor is not being specially compensated for these services, and these services are outside the normal duties of the Monitor, it shall not be liable for any action or inaction arising from its appointment as Monitor other than actions involving fraud.

Respondents shall make their payments of the Disgorgement Obligation under this Order in the name of the “BO Fraud Settlement Fund” and shall send such payments by electronic funds transfer, or U.S. postal money order, certified check, bank cashier’s check, or bank money order to the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606, under a cover letter that identifies the paying Respondent and the name and docket number of this proceeding. The paying Respondent shall simultaneously transmit copies of the cover letter and the form of payment to (i) the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581; and (ii) Regional Counsel, Division of Enforcement, Commodity Futures Trading Commission, 525 West Monroe, Suite 1100, Chicago, Illinois 60661.

The Securities and Exchange Commission (“SEC”) is seeking disgorgement from Respondents for the same conduct at issue in this case. Consequently, any disgorgement that Respondents pay to the SEC for aiding and abetting binary options solicitation fraud shall result in a dollar for dollar reduction of Respondents’ disgorgement obligation in this matter.

The Monitor shall oversee Respondents’ Disgorgement Obligation and shall have the discretion to determine the manner of distribution of funds in an equitable fashion to the Respondents’ customers or may defer distribution until such time as the Monitor may deem appropriate. In the event that the amount of payments of the Disgorgement Obligation to the Monitor are of a de minimis nature such that the Monitor determines that the administrative cost of making a restitution distribution is impractical, the Monitor may, in its discretion, treat such restitution payments as civil monetary penalty payments, which the Monitor shall forward to the Commission, as discussed below.

To the extent any funds accrue to the U.S. Treasury for satisfaction of Respondents' Disgorgement Obligation, such funds shall be transferred to the Monitor for disbursement by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

MMAC/ESC/AMK326  
Commodity Futures Trading Commission  
Division of Enforcement  
6500 S. MacArthur Blvd.  
HQ Room 181  
Oklahoma City, OK 73169  
(405) 954-6569 office  
(405) 954-1620 fax  
9-AMC-AR-CFTC@faa.gov

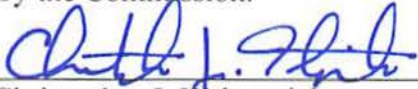
If payment is to be made by electronic funds transfer, the Monitor shall contact Marie Thorne or her successor at the above address to receive payment instructions and shall fully comply with those instructions. The Monitor shall accompany payment of the Disgorgement Obligation with a cover letter that identifies the paying Respondents and the name and docket number of this proceeding. The Monitor shall simultaneously transmit copies of the cover letter and the form of payment to: (i) the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581; and (ii) Regional Counsel, Division of Enforcement, Commodity Futures Trading Commission, 525 West Monroe, Suite 1100, Chicago, Illinois 60661.

4. Cooperation with Monitor: Respondents shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify Respondents' customers, whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any restitution payments. Respondents shall execute any documents necessary to release funds that he has in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment toward the Disgorgement Obligation
5. Cooperation, in General: Respondents shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, in this action, and in any current or future Commission investigation or action related thereto. Respondents shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, this action. Respondent Berry must also comply with the terms of the Cooperation Agreement entered into in August 2018 with the CFTC.

6. Partial Satisfaction: Respondents understand and agree that any acceptance by the Commission or the Monitor of any partial payment of Respondents' Disgorgement Obligation shall not be deemed a waiver of their obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
7. Change of Address/Phone: Until such time as Respondents satisfy in full their Disgorgement Obligation as set forth in this Order, Respondents shall provide written notice to the Commission by certified mail of any change to their telephone numbers and mailing addresses within ten (10) calendar days of the change.

**The provisions of this Order shall be effective as of this date.**

By the Commission.



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Christopher J. Kirkpatrick  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: September 27, 2018