

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:	)	CFTC Docket No. <u>06 -</u>
	)	
Toby Wayne Denniston, II,	)	ORDER INSTITUTING
	)	PROCEEDINGS PURSUANT TO
Respondent.	)	SECTIONS 6(c) AND 6(d) OF THE
	)	COMMODITY EXCHANGE ACT,
	)	MAKING FINDINGS AND
	)	IMPOSING REMEDIAL SANCTIONS

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Toby Wayne Denniston, II ("Denniston" or "Respondent") has violated Section 4b(a)(2) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6b(a)(2) (2002). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Denniston engaged in the violations set forth herein, and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, the Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Without admitting or denying the findings of fact herein, the Respondent consents to the entry of this Order in full and final settlement of any alleged violations of the above referenced law solely as it relates to the activities and conduct described in Section C below, and acknowledges service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions ("Order"). Respondent consents to the use by the Commission of the findings herein in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.<sup>1</sup>

<sup>1</sup> Respondent does not consent to the use of his Offer or the findings in this Order as the sole basis for any other proceeding brought by the Commission, other than a proceeding in bankruptcy or to enforce the terms of this Order. Respondent does not consent to the use of the Offer or the findings in this Order by any other person or entity in this or any other proceeding. The findings made in this Order are not binding on any other person or entity, including, but not limited to, any person or entity named as a defendant or respondent in any other proceeding.

*Toby Wayne Denniston*  
6/20/2006

### III.

#### A. SUMMARY

Denniston was employed by a Commission registrant that served as an introducing broker for a trading account owned by commodity pool Acceleration Mercury Fund 4X L.P. ("Acceleration Mercury Fund" or "the pool"), of Northridge, California. From November 2004 through August 2005, Denniston misappropriated One Hundred Ninety Thousand Eight Hundred and Eight-Three Dollars (\$190,883) from the pool's account. Denniston carried out this misappropriation by forging checks from the pool's checking account. Denniston concealed his theft by: (i) altering the pool's bank and trading account statements; and (ii) creating and causing to be issued to pool participants false monthly account statements.

#### B. RESPONDENT

**Toby Wayne Denniston, II**, an individual, resides at 10123 Finch Avenue, Alta Loma, California 91737. Denniston has never been registered with the Commission in any capacity.

#### C. FACTS

From September 2003 to August 2005, Acceleration Capital, LLC ("Acceleration Capital"), a registered commodity pool operator, operated a commodity pool known as the Acceleration Mercury Fund. The pool traded commodity futures on behalf of approximately sixteen pool participants. Acceleration Capital maintained a trading account at a Futures Commission Merchant ("FCM") and a bank checking account, both in the name of the pool.

Between approximately April 2003 and August 2005, Denniston was employed by Castle Trading Inc. ("Castle Trading"), a registered Introducing Broker that served as an introducing broker for the pool's FCM trading account. Denniston was initially employed by Castle Trading as a clerk. However, by June 2003, his responsibilities expanded to include accounting and compliance work. Castle Trading shared an office with Acceleration Capital. In addition to his duties with Castle Trading, Denniston routinely performed work on behalf of Acceleration Capital, including preparing the monthly account statements that were sent to Acceleration Mercury Fund pool participants.

Between November 2004 and August 2005, Denniston misappropriated \$190,883 from Acceleration Mercury Fund for his own use and benefit. Denniston perpetrated this fraud by writing at least fifty-eight checks payable to himself from the Acceleration Mercury Fund checking account and forging the signature of the account's only signatory on each check. On numerous occasions, Denniston surreptitiously transferred funds from the pool's trading account to its bank account for the purpose of misappropriating such

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funds. Denniston used the pool participants' funds to pay for personal items, such as a BMW automobile, vacations and electronic equipment.

To conceal his misappropriation of Acceleration Mercury Fund monies, Denniston regularly altered the pool's bank and FCM account statements and created false account statements to be sent to Acceleration Mercury Fund pool participants.

#### **D. LEGAL DISCUSSION**

##### **1. By Misappropriating Funds From Acceleration Mercury Fund, Denniston Violated Section 4b(a)(2) of the Act**

Section 4b(a)(2)(i) and (iii) of the Act provides that it shall be unlawful, in or in connection with any order to make or the making of a futures contract, for or on behalf of any other person, (i) to cheat or defraud, or attempt to cheat or defraud, such other person . . . or (iii) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person.

Misappropriation of customer funds violates Section 4b(a)(2) of the Act. *CFTC ex rel Kelley v. Skorupskas*, 605 F.Supp. 923, 932 (E.D. Mich. 1985) (defendant violated Section 4b(a) of the Act by misappropriating customer funds entrusted to her for trading commodity futures contracts); *CFTC v. Weinberg*, 287 F.Supp. 2d. 1100, 1106 (C.D. Cal. 2003) (CTA violated Section 4b(a)(i) and (iii) of the Act by misappropriating investor funds); *CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F.Supp. 2d. 676, 687 (D. Md. 2000) (misappropriation of funds constitutes "willful and blatant" fraudulent activity violative of Section 4b(a) of the Act).

By his acts of misappropriation as set forth above, Denniston violated Section 4b(a)(2)(i) and (iii) of the Act.

##### **2. By Creating False Account Statements and Causing Those Statements to be Delivered to Pool Participants, Denniston Violated Section 4b(a)(2)(ii) of the Act**

Section 4b(a)(2)(ii) provides that it is unlawful for any person, in or in connection with any order to make or the making of a futures contract for or on behalf of any other person, willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof.

Delivering, or causing the delivery of, false account statements to commodity pool participants constitutes a violation of Section 4b(a)(2) of the Act. *Skorupskas*, 605 F.Supp at 932-33 (defendant violated section 4b(a) of the Act by delivering false monthly

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account statements to commodity pool participants); *Weinberg*, 287 F.Supp. at 1107 (false and misleading statements as to the amount and location of investors' money violated Section 4b(a) of the Act.); *Noble Wealth*, 90 F.Supp. 2d. at 685-87 (defendants violated Section 4b(a) of the Act through the delivery of false account statements).

Denniston violated Section 4b(a)(2)(ii) of the Act when he caused false monthly account statements to be delivered to Acceleration Mercury Fund's pool participants in his efforts to conceal his misappropriation..

#### IV.

### FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondent violated Sections 4b(a)(2) of the Act, 7 U.S.C. § 6b(a)(2) (2002).

#### V.

### OFFER OF SETTLEMENT

Respondent has submitted an Offer of Settlement in which, without admitting or denying the findings herein, he acknowledges service of the Order; admits jurisdiction of the Commission with respect to the matters set forth in this Order and, for any action or proceeding brought or authorized by the Commission based upon violations of or for enforcement of the Order; waives service and filing of a complaint and notice of hearing, a hearing, all post-hearing procedures, judicial review by any court, any objection to the staff's participation in the Commission's consideration of the Offer; any claim of Double Jeopardy based on the institution of this proceeding or the entry of any order imposing a civil monetary penalty or other relief, and all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2005), relating to, or arising from, this action; stipulates that the record basis on which this Order is entered consists solely of this Order, including the findings in this Order; and consents to the Commission's issuance of this Order. Pursuant to the Offer of Settlement herein, Denniston agrees to the entry of an Order in which the Commission makes findings, including findings that Denniston violated Section 4b(a)(2) of the Act, and orders that Denniston: (i) cease and desist from violating Section 4b(a)(2) of the Act; (ii) make restitution to Acceleration Mercury Fund in the amount of One Hundred Ninety Thousand Eight Hundred and Eighty Three Dollars (\$190,883), plus prejudgment interest and post judgment interest; (iii) pay a civil monetary penalty in the amount of Two Hundred and Fifty Thousand Dollars (\$250,000), plus post judgment interest; (iv) be permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29), for his own account, for any account in which he has a direct interest or indirect interest, or for any other account, and all registered entities shall refuse him all privileges; and (v) comply with the conditions and undertakings as set forth in this Order.

*Joby W. Denniston*  
6/20/2006

VI.

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

1. Denniston shall cease and desist from violating Section 4b(a)(2) of the Act.

2. Denniston shall pay restitution to Acceleration Mercury Fund in the amount of One Hundred Ninety Thousand Eight Hundred and Eighty Three Dollars (\$190,883), representing funds fraudulently obtained from the pool as described herein, together with prejudgment interest thereon in the amount of Eighteen Thousand One Hundred and Eighty Seven Dollars (\$18,187), for a total of Two Hundred Nine Thousand and Seventy Dollars (\$209,070), plus post-judgment interest which shall accrue beginning on the date of entry of this Order.

3. Denniston shall pay a civil monetary penalty of Two Hundred and Fifty Thousand Dollars (\$250,000) plus post-judgment interest pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1. Payments by Respondent shall not be treated as a civil monetary penalty until Respondent has fully paid his restitution obligation. Post-judgment interest shall accrue beginning on the date of entry of this Order. Respondent shall pay this penalty by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order made payable to the CFTC and sent to the attention of the Office of Cooperative Enforcement, Division of Enforcement, CFTC, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581. Respondent shall accompany payment of the penalty with a cover letter that identifies Denniston, and the name and docket number of this proceeding. Respondent shall simultaneously transmit a copy of the cover letter and the form of payment to the Director, Division of Enforcement, CFTC, 1155 21<sup>st</sup> N.W., Washington, D.C. 20581;

4. Denniston is permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29), for his own account, for any account in which he has a direct interest or indirect interest, or for any other account, and all registered entities shall refuse him all privileges.

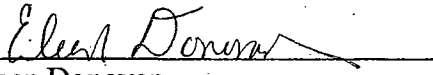
5. Denniston shall comply with the following conditions and undertakings as specified:

(a) Denniston shall never apply for registration or claim exemption from registration with the Commission in any capacity, and shall never 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), or act as a principal, agent, officer or employee of any person registered, required to be registered, or exempted from registration, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9).

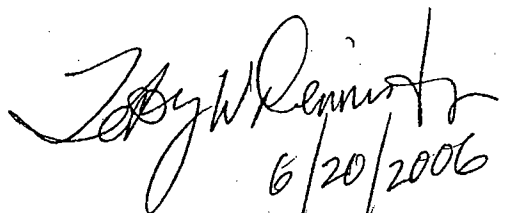
*Joseph A. Ryan*  
6/20/2006

(b). By neither admitting nor denying the findings of fact or conclusions of law, Denniston agrees that neither he nor any of his agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order, or creating, or tending to create, the impression that the Order is without factual basis; provided, however, that nothing in this provision shall affect Respondent's: (i) testimonial obligations; or (ii) right to take factual or legal positions in other proceedings to which the Commission is not a party. Respondent will undertake all steps necessary to assure that all of the agents and employees under his authority or control understand and comply with this agreement.

By the Commission.

  
Eileen Donovan  
Acting Secretary of the Commission  
Commodity Futures Trading Commission

Dated: 8/7, 2006

  
6/20/2006