

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

DWIGHT A. FOSTER and
K.E.L. ENTERPRISES, INC.,

Defendants.

Case No. 2:23-cv-11552-SFC-EAS

**SUPPLEMENTAL CONSENT ORDER ASSESSING RESTITUTION,
DISGORGEMENT, AND A CIVIL MONETARY PENALTY AGAINST
DEFENDANTS DWIGHT A. FOSTER AND K.E.L. ENTERPRISES, INC.**

On June 28, 2023, Plaintiff Commodity Futures Trading Commission (“CFTC” or “Commission”) filed its Complaint (ECF No. 1) against Dwight A. Foster (“Foster”) and K.E.L. Enterprises, Inc. (“KEL”) (collectively, “Defendants”) seeking injunctive and other equitable relief and civil monetary penalties for violations of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 1–26, and the Commission Regulations (“Regulations”) promulgated thereunder, 17 C.F.R. pts. 1–190 (2023). On July 18, 2023, the Court entered a Consent Order for Permanent Injunction and Other Statutory and Equitable Relief Against Foster and KEL (“Consent Order”). (ECF No. 11.)

I. CONSENTS AND AGREEMENTS

To resolve the remaining issues of the amounts of restitution, disgorgement, and civil monetary penalty (as provided in the Consent Order and in accordance with the Court's Order entered on March 20, 2024), without any further judicial proceedings, Foster and KEL:

1. Consent to the entry of this Supplemental Consent Order Assessing Restitution, Disgorgement, and a Civil Monetary Penalty Against Defendants Dwight A. Foster and K.E.L. Enterprises, Inc. ("Supplemental Consent Order");

2. Affirm that they have read and agreed to this Supplemental Consent Order voluntarily, and that no promise, other than as specifically contained herein, or threat, has been made by the Commission or any member, officer, agent, or representative thereof, or by any other person, to induce consent to this Supplemental Consent Order;

3. Acknowledge service of the summons and Complaint;

4. Admit the jurisdiction of this Court over them and the subject matter of this action pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a), and 28 U.S.C. §§ 1331, 1345;

5. Admit the jurisdiction of the Commission over the conduct and transactions at issue in this action pursuant to the Act;

6. Admit that venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e);

7. Waive:

- (a) Any and all claims that they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2023), relating to, or arising from, this action;
- (b) Any and all claims that they may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, §§ 201–253, 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 action;
- (c) Any claim of Double Jeopardy based upon the institution of this action or the entry in this action of any order imposing a civil monetary penalty or any other relief, including this Supplemental Consent Order; and
- (d) Any and all rights of appeal from this action;

8. Acknowledge that the Commission is the prevailing party in this action for purposes of the waiver of any and all rights under the Equal Access to Justice Act specified in subpart (a) of paragraph 7 above;

9. Consent to the continued jurisdiction of this Court over them for the purpose of implementing and enforcing the terms and conditions of the Consent Order and this Supplemental Consent Order and for any other purpose relevant to this action, even if Foster, individually or as the officer of KEL, now or in the future resides outside the jurisdiction of this Court;

10. Agree that they will not oppose enforcement of this Supplemental Consent Order on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure and hereby waive any objection based thereon;

11. Agree that neither they, nor any of their agents or employees under their authority or control, shall take any action or make any public statement denying, directly or indirectly, any allegation in the Complaint or the Findings of Fact or Conclusions of Law in this Supplemental Consent Order, or creating or tending to create the impression that the Complaint, the Consent Order, and/or this Supplemental Consent Order is without a factual basis; provided, however, that nothing in this provision shall affect their: (a) testimonial obligations; or (b) right to take legal positions in other proceedings to which the Commission is not a party. Defendants shall comply with this agreement, and shall undertake all steps necessary to ensure that all of their agents and/or employees under their authority or control understand and comply with this agreement;

12. Consent to the entry of this Supplemental Consent Order without admitting or denying the allegations of the Complaint or any findings or conclusions in the Consent Order and/or in this Supplemental Consent Order, except as to jurisdiction and venue, which they admit;

13. Consent to the use of the findings and conclusions in the Consent Order and this Supplemental Consent Order in this proceeding, and in any other proceeding brought by the Commission or to which the Commission is a party or claimant, and agree that they shall be taken as true and correct and be given preclusive effect therein, without further proof;

14. Do not consent, however, to the use of this Supplemental Consent Order, or the findings and conclusions herein, as the sole basis for any other proceeding brought by the Commission or to which the Commission is a party, other than: a statutory disqualification proceeding; a proceeding in bankruptcy, or receivership; or a proceeding to enforce the terms of this Supplemental Order;

15. Agree to provide immediate notice to this Court and the Commission by certified mail, in the manner required by paragraph 35 of Section IV of this Supplemental Consent Order, of any bankruptcy proceeding filed by, on behalf of, or against them, whether inside or outside the United States; and

16. Agree that no provision of this Supplemental Consent Order shall in any way limit or impair the ability of any other person or entity to seek any legal or equitable remedy against Defendants in any other proceeding.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, being fully advised in the premises, finds that there is good cause for the entry of this Supplemental Consent Order and that there is no just reason for

delay. The Court therefore directs the entry of equitable relief pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, as set forth herein.

THE PARTIES AGREE AND THE COURT HEREBY FINDS:

17. The Findings of Fact and Conclusions of Law contained in the Consent Order are incorporated herein by reference given preclusive effect as provided in the Consent Order.

**III. RESTITUTION, DISGORGEMENT,
AND CIVIL MONETARY PENALTY**

IT IS FURTHER ORDERED THAT Foster and KEL shall comply fully with the following terms, conditions, and obligations relating to the payment of restitution, disgorgement, and civil monetary penalty:

A. Restitution

18. Foster and KEL shall pay, jointly and severally, restitution in the amount of four million five hundred and forty-eight thousand three hundred ninety dollars and fifty-one cents (\$4,548,390.51) (“Restitution Obligation”). If the Restitution Obligation is not paid immediately in full, post-judgment interest shall accrue on the unpaid portion of the Restitution Obligation beginning on the date of entry of this Supplemental Consent Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Supplemental Consent Order pursuant to 28 U.S.C. § 1961.

19. To effect payment of the Restitution Obligation and the distribution of

any restitution payments to Defendants' pool participants, the Court appoints the National Futures Association ("NFA") as Monitor ("Monitor"). The Monitor shall receive restitution payments from Foster and KEL and make distributions as set forth below. Because the Monitor is acting as an officer of this Court in performing these services, the NFA shall not be liable for any action or inaction arising from NFA's appointment as Monitor, other than actions involving fraud.

20. Foster and KEL shall make Restitution Obligation payments, and any post-judgment interest payments, under this Supplemental Consent Order to the Monitor in the name "CFTC v. Foster – Restitution Fund" and shall send such payments by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's, or bank money order, to the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606 under cover letter that identifies the paying Defendant and the name and docket number of this proceeding. Defendants shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

21. The Monitor shall oversee the Restitution Obligation and shall have the discretion to determine the manner of distribution of such funds in an equitable fashion to Defendants' pool participants identified by the Commission or may

defer distribution until such time as the Monitor deems appropriate. In the event that the amount of Restitution Obligation payments to the Monitor are of a *de minimis* nature such that the Monitor determines that the administrative cost of making a distribution to eligible pool participants 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 following the instructions for civil monetary penalty payments set forth in Part C below.

22. Defendants shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify Defendants' pool participants to whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any Restitution Obligation payments. Defendants shall execute any documents necessary to release funds that they have in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment toward the Restitution Obligation.

23. The Monitor shall provide the Commission at the beginning of each calendar year with a report detailing the disbursement of funds to Defendants' pool participants during the previous year. The Monitor shall transmit this report under a cover letter that identifies the name and docket number of this proceeding to the Chief Financial Officer, Commodity Futures Trading Commission, Three

Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

24. The amounts payable to each pool participant shall not limit the ability of any participant from proving that a greater amount is owed from Defendants or any other person or entity, and nothing herein shall be construed in any way to limit or abridge the rights of any pool participant that exist under state or common law.

25. Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each pool participant of Defendants who suffered a loss is explicitly made an intended third-party beneficiary of this Supplemental Consent Order and may seek to enforce obedience of this Supplemental Consent Order to obtain satisfaction of any portion of the Restitution Obligation that has not been paid by Defendants to ensure continued compliance with any provision of this Supplemental Consent Order and to hold Defendants in contempt for any violations of any provision of this Supplemental Consent Order.

26. To the extent that any funds accrue to the U.S. Treasury for satisfaction of Defendants' Restitution Obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth above.

B. Disgorgement

27. Foster and KEL shall pay, jointly and severally, disgorgement in the amount of eight hundred and three thousand, one hundred twenty-six dollars and

eighty-three cents (\$803,126.83) (“Disgorgement Obligation”). If the Disgorgement Obligation is not paid immediately in full, post-judgment interest shall accrue on the unpaid portion of the Disgorgement Obligation beginning on the date of entry of this Supplemental Consent Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Supplemental Consent Order pursuant to 28 U.S.C. § 1961.

28. Foster and KEL shall pay their Disgorgement Obligation 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
6500 S. MacArthur Blvd.
HQ Room 266
Oklahoma City, OK 73169
9-amc-ar-cftc@faa.gov

If payment by electronic funds transfer is chosen, Defendants shall contact the Federal Aviation Administration at the email address above to receive payment instructions and shall fully comply with those instructions. Defendants shall accompany payment of the Disgorgement Obligation with a cover letter that identifies Defendants and the name and docket number of this proceeding.

Defendants shall simultaneously transmit copies of the cover letter and the form of

payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

Defendants shall also transmit a copy of the cover letter and the form of payment to Paul Hayeck, Deputy Director, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

C. Civil Monetary Penalty

29. Foster and KEL shall pay, jointly and severally, a civil monetary penalty in the amount of one million six hundred thousand dollars (\$1,600,000) (“CMP Obligation). If the CMP Obligation is not paid immediately in full, post-judgment interest shall accrue on the unpaid portion of the CMP Obligation beginning on the date of entry of this Supplemental Consent Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Supplemental Consent Order pursuant to 28 U.S.C. § 1961.

30. Defendants shall pay their CMP Obligation and any post-judgment interest 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
6500 S. MacArthur Blvd.
HQ Room 266

Oklahoma City, OK 73169
9-amc-ar-cftc@faa.gov

If payment by electronic funds transfer is chosen, Defendants shall contact the Federal Aviation Administration at the email address above to receive payment instructions and shall fully comply with those instructions. Defendants shall accompany payment of the Disgorgement Obligation with a cover letter that identifies Defendants and the name and docket number of this proceeding.

Defendants shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

Defendants shall also transmit a copy of the cover letter and the form of payment to Paul Hayeck, Deputy Director, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

D. Provisions Related to Monetary Sanctions

31. Partial Satisfaction: Any acceptance by the Commission or the Monitor of any partial payment of Defendants' Restitution Obligation, Disgorgement Obligation, or CMP Obligation shall not be deemed a waiver of their obligation to make further payments pursuant to this Supplemental Consent Order, or a waiver of the CFTC's right to seek to compel payment of any remaining balance.

E. Cooperation

32. Defendants shall cooperate fully and promptly with the Commission, including the Commission's Division of Enforcement, in this action, and in any current or future Commission investigation related to the subject matter of this action. As part of such cooperation, Defendants shall comply, to the full extent of their abilities, promptly and truthfully with any inquiries or requests for information, including but not limited to, requests for production of documents and authentication of documents, and shall provide assistance at any trial, proceeding, or investigation related to the subject matter of this action, including but not limited to, requests for testimony, depositions, and/or interviews. The Commission will endeavor to make any such requests reasonable and practical and will provide reasonable advance notification to Defendants. Should the Commission file any additional actions related to the subject matter of this action, Defendants are directed to appear in the judicial district in which such actions are pending, or in a suitable judicial district agreed to by the parties, to provide deposition testimony and trial testimony should such testimony be necessary.

33. Defendants shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, this action. As part of such cooperation, Defendants shall comply, to the full extent of their abilities, promptly and truthfully with any inquiries or requests for information including but not

limited to, requests for production of documents and authentication of documents, and shall provide assistance at any trial, proceeding, or investigation related to the subject matter of this action, including but not limited to, requests for testimony, depositions, and/or interviews. The Commission will endeavor to make any such requests reasonable and practical and will provide reasonable advance notification to Defendants. Should the Commission file any additional actions related to, or arising from, the subject matter of this action, Defendants are directed to appear in the judicial district in which such actions are pending, or in a suitable judicial district agreed to by the parties, to provide deposition testimony and trial testimony should such testimony be necessary.

IV. MISCELLANEOUS PROVISIONS

34. Until such time as Defendants satisfy in full their Restitution Obligation, Disgorgement Obligation, and CMP Obligation under this Supplemental Consent Order, upon the commencement by or against Defendants of insolvency, receivership, or bankruptcy proceedings, or any other proceedings for the settlement of Defendants' debts, all notices to creditors required to be furnished to the Commission under Title 11 of the United States Code or other applicable law with respect to such insolvency, receivership bankruptcy, or other proceedings, shall be sent to the address below:

Secretary of the Commission
Legal Division

Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

35. Notice: All notices required to be given by any provision in this Supplemental Consent Order, except as provided in the preceding paragraph, shall be sent certified mail, return receipt requested, as follows:

Notice to Commission:

Paul G. Hayeck
Deputy Director
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Notice to Defendants Foster and KEL:

Jeffrey M. Henderson
Greenberg Traurig, LLP
77 West Wacker Drive, Suite 3100
Chicago, IL 60601

All such notices to the Commission shall reference the name and docket number of this action.

36. Change of Address/Phone: Until such time as Foster and KEL satisfy in full their Restitution Obligation, Disgorgement Obligation, and CMP Obligation as set forth in this Supplemental Consent Order, they shall provide written notice to the Commission by certified mail of any change to their telephone number and mailing address within ten calendar days of the change.

37. Entire Agreement and Amendments: This Supplemental Consent Order incorporates all of the terms and conditions of the settlement among the parties hereto to date. Nothing shall serve to amend or modify this Supplemental Consent Order in any respect whatsoever, unless: (a) reduced to writing; (b) signed by all parties hereto; and (c) approved by order of this Court.

38. Invalidation: If any provision of this Supplemental Consent Order or if the application of any provision or circumstance is held invalid, then the remainder of this Supplemental Consent Order and the application of the provision to any other person or circumstance shall not be affected by the holding.

39. Waiver: The failure of any party to this Supplemental Consent Order or of any pool participant at any time to require performance of any provision of this Supplemental Consent Order shall in no manner affect the right of the party or pool participant at a later time to enforce the same or any other provision of this Supplemental Consent Order. No waiver in one or more instances of the breach of any provision contained in this Supplemental Consent Order shall be deemed to be or construed as a further or continuing waiver of such breach or waiver of the breach of any other provision of this Supplemental Consent Order.

40. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this action to ensure compliance with this Supplemental Consent

Order and for all other purposes related to this action, including any motion by Defendants to modify or relief from the terms of this Supplemental Consent Order.

41. Injunctive and Equitable Relief Provisions: The injunctive and equitable relief provisions of this Supplemental Consent Order shall be binding upon the following persons who receive actual notice of this Supplemental Consent Order, by personal service, e-mail, or otherwise: (1) Defendants; (2) any officer, agent, servant, employee, or attorney of Defendants; and (3) any other persons who are in active concert or participation with any persons described in subsections (1) and (2) above.

42. Authority: Foster hereby warrants that he is the President and CEO of KEL, and that this Supplemental Consent Order has been duly authorized by KEL and he has been duly empowered to sign and submit this Supplemental Consent Order on behalf of KEL.

43. Counterparts and Electronic Execution: This Supplemental Consent Order may be executed in two or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties hereto and delivered (by facsimile, e-mail, or otherwise) to the other party, it being understood that all parties need not sign the same counterpart. Any counterpart or other signature to this Supplemental Consent Order that is delivered by any means shall be deemed

for all purposes as constituting good and valid execution and delivery by such party of this Supplemental Consent Order.

44. Contempt: Defendants understand that the terms of this Supplemental Consent Order are enforceable through contempt proceedings to the fullest extent of applicable law, and that, in any such proceedings, they may not challenge the validity of this Supplemental Consent Order.

45. Agreements and Undertakings: Defendants shall comply with all of the undertakings and agreements set forth in this Supplemental Consent Order.

46. This Order supplements the Consent Order and the Consent Order remains in full force and effect.

There being no just reason for delay, the Clerk of the Court is hereby directed to enter this *Supplemental Consent Order Assessing Restitution, Disgorgement, and a Civil Monetary Penalty Against Defendants Dwight A. Foster and K.E.L. Enterprises, Inc.*

IT IS SO ORDERED on this 25th day of June, 2024.

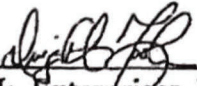
s/Sean F. Cox
Sean F. Cox
Chief Judge, United States District Court

CONSENTED TO AND APPROVED BY:



Dwight A. Foster

Date: April 19, 2024



K.E.L. Enterprises, Inc.
Dwight A. Foster, President and CEO

Date: April 19, 2024


APPROVED AS TO FORM:



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CONSENTED TO AND APPROVED BY:

Dwight A. Foster

Date: _____

K.E.L. Enterprises, Inc.
Dwight A. Foster, President and CEO

Date: _____

APPROVED AS TO FORM:

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/s/ Timothy J. Mulreany

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Date: June 17, 2024

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