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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT CALIFORNIA**

10 _____)
COMMODITY FUTURES) Case No:
11 TRADING COMMISSION)
)
12 Plaintiff,)
)
13 vs.)
)
14 DENARI CAPITAL, LLC, TRAVIS)
15 CAPSON, ARNAB SARKAR,)
)
16 Defendants.)

17
18 **COMPLAINT FOR INJUNCTIVE RELIEF, CIVIL MONETARY PENALTIES,**
AND OTHER EQUITABLE RELIEF

19 The Commodity Futures Trading Commission (“Commission” or “CFTC”), by and through its
20 attorneys, hereby alleges as follows:

21 **I. SUMMARY**

22 1. Since at least 2012 and continuing to the present (“Relevant Time”), Defendants Travis
23 Capson (“Capson”), Arnab Sarkar (“Sarkar”) and their company Denari Capital LLC (“Denari”)
24 (together, “Defendants”) have fraudulently solicited and accepted at least \$8,300,000 from at least
25 twenty-eight participants, whose funds were commingled in a pooled investment scheme that included
26 leveraged or margined off exchange foreign currency (“forex”) transactions. At least nine specifically

1 invested in forex transactions as part of a pooled account. At least another sixteen provided more than
2 three million dollars to Defendants in the form of purported general loans; and certain others were told
3 that some or all of their funds would be used for investments in real estate, a gold mining company,
4 and/or various securities transactions.

5 2. Capson and Sarkar pooled and commingled participant funds into a Denari bank account
6 and used the funds for various purposes, including at least \$1.9 million deposited into forex trading
7 accounts, and other funds used for real estate investments, securities transactions and personal expenses.
8 As of the end of July 2019, Denari owed its participants more than \$5,200,000, which it does not have
9 sufficient funds or assets to satisfy.

10 3. As part of their fraudulent scheme, Capson and Sarkar willfully or recklessly made
11 misrepresentations of material fact to actual and prospective participants concerning the past
12 profitability of Denari's forex trading activity, and the profits participants were making on their interests
13 in Denari's pooled forex account ("Pool"). Denari also issued false account statements to participants
14 that misrepresented the profitability of their respective interests in the Pool.

15 4. Because Denari, Capson and Sarkar solicited funds for the purpose of trading forex in a
16 pooled account, Denari acted as a Commodity Pool Operator ("CPO") and Capson and Sarkar acted as
17 Associated Persons ("APs") of a CPO without being registered to act in those capacities as required by
18 law.

19 5. On April 1, 2019, Denari and Capson belatedly filed with National Futures Association
20 ("NFA") applications to become registered with the Commission as a CPO and as a Commodity Trading
21 Advisor ("CTA"), and as an Associated Person thereof. On July 15, 2019, NFA commenced an
22 examination of Denari based on information contained in these applications. During that examination,
23 Capson provided false information to NFA investigators. Specifically, Capson falsely told NFA staff
24 that Denari had been trading forex with its own money since 2015, and that Denari did not use third
25 party funds to trade in Denari's forex trading account until after it had applied for and become registered
26 with the Commission in May 2019.

6. By engaging in this conduct and the conduct further described herein, Defendants engaged, are engaging, or are about to engage in acts and practices that violate the anti-fraud and registration provisions of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 1-26 (2012), and Commission Regulations (“Regulations”) promulgated thereunder, 17 C.F.R. pts. 1-190 (2019). Specifically, Defendants have:

- (a) violated anti-fraud provisions contained in Sections 4b(a)(2)(A)-(C) and 4o(1)(A)-(B) of the Act, 7 U.S.C. §§ 6b(a)(2)(A)-(C), 6o(1)(A)-(B) (2012), and Regulation 5.2(b)(1)-(3), 17 C.F.R. § 5.2(b)(1)-(3) (2019);
- (b) violated the registration requirements set forth in Sections 4m(1), 4k(2) and 2(c)(2)(C)(iii)(I)(cc) of the Act, 7 U.S.C. §§ 6m(1), 6k(2), 2(c)(2)(C)(iii)(I)(cc) (2012), and Regulation 5.3(a)(2)(i)-(ii), 17 C.F.R. 5.3(a)(2)(i)-(ii) (2019); and
- (c) commingled participant funds and failed to provide disclosure documents in violation of Regulations 4.20, 4.21, 4.24 and 4.25, 17 C.F.R. §§ 4.20, 4.21, 4.24, 4.25 (2019).

Additionally, Defendants Capson and Denari made false statements to NFA in violation of Section 9(a)(4) of the Act, 7 U.S.C. § 13(a)(4) (2012).

7. Unless restrained and enjoined by this Court, Defendants are likely to continue to engage in the acts and practices alleged in this Complaint and similar acts and practices, as more fully described below.

8. Accordingly, the CFTC brings this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), to enjoin Defendants’ unlawful acts and practices and to compel their compliance with the Act. In addition, the CFTC seeks civil monetary penalties and remedial ancillary relief, including, but not limited to, trading and registration bans, disgorgement, restitution, pre- and post-judgment interest, and such other relief as the Court may deem necessary and appropriate.

II. JURISDICTION AND VENUE

9. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (2012) (federal question jurisdiction) and 28 U.S.C. § 1345 (2012) (district courts have original jurisdiction over civil actions commenced by the United States or by any agency expressly authorized to sue by Act of Congress). Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (2012), authorizes the Commission to seek

1 injunctive relief against any person whenever it shall appear that such person has engaged, is engaging, or is
2 about to engage in any act or practice that violates any provision of the Act or any rule, regulation, or order
3 promulgated thereunder. In addition, this Court has jurisdiction over the forex transactions pursuant to
4 Section 2(c)(2)(C) of the Act, 7 U.S.C. § 2(c)(2)(C) (2012), which subjects the forex solicitations and
5 transactions at issue in this action to, *inter alia*, Sections 4b and 4o of the Act, 7 U.S.C. §§ 6b, 6o (2012), as
6 further described below.

7 10. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C.
8 § 13a-l(e) (2012), because Defendants transacted business in this District, and the acts and practices in
9 violation of the Act have occurred, are occurring, or are about to occur within this District.

10 INTRADISTRICT ASSIGNMENT

11 11. Assignment to the San Francisco or Oakland Division is appropriate because Denari has
12 its office in and Sarkar resides in Contra Costa County where San Francisco and Oakland are located.

13 III. PARTIES

14 12. Plaintiff **Commodity Futures Trading Commission** is an independent federal
15 regulatory agency that is charged by Congress with the responsibility for enforcing the provisions of the
16 Act, 7 U.S.C. §§ 1-26 (2012), and the Commission Regulations promulgated thereunder, 17 C.F.R. pts.
17 1-190 (2019).

18 13. Defendant **Denari Capital, LLC** is a California limited liability company. Denari's
19 business address is 3100 Oak Road, Suite 380, Walnut Creek, California. Denari's articles of
20 organization were filed with the State of California on August 14, 2012. On May 1, 2019, Denari
21 became registered with the CFTC as a CPO and a Commodity Trading Advisor ("CTA"), and with NFA
22 as a forex firm. NFA summarily filed a member responsibility action ("MRA") against Denari and
23 Associate Responsibility Action ("ARA") (together "MRA/ARA") against Denari principal Capson, on
24 August 6, 2019, summarily suspending them from NFA membership; prohibiting them and anyone
25 acting on their behalf from soliciting or accepting any funds for any investment in Denari; prohibiting
26 them from disbursing or transferring any funds from accounts in the name of Denari or over which

1 Denari or Capson have control without prior approval of NFA; prohibiting them from placing any
2 commodity interest trades, including forex; requiring Denari to hire a qualified third party to calculate
3 the amount owed to each joint venture investor and each promissory noteholder and to notify each
4 investor of their respective valuation; and requiring Denari and Capson to provide copies of the
5 MRA/ARA to all joint venture investors and promissory noteholders, all NFA members that have an
6 investment over which Denari or Capson exercise control, and any banks or financial institutions that
7 maintain accounts in the name of Denari or Capson or over which they exercise control. NFA
8 19MRA0001 (Aug. 6, 2019).

9 14. Defendant **Travis G. Capson** is a principal and co-owner of Denari. Capson is a resident
10 of Kanab, Utah. Capson became registered with the CFTC as an AP and was listed as a principal of
11 Denari on May 1, 2019. As explained above, his registration has been suspended due to NFA's
12 MRA/ARA effective August 6, 2019.

13 15. Defendant **Arnab Sarkar** is a resident of El Cerrito, California. He is a principal and co-
14 owner of Denari along with Capson. Sarkar has been listed as a principal of Denari with NFA since
15 July 10, 2019. Sarkar has never been registered with the CFTC in any capacity.

16 **IV. STATUTORY BACKGROUND**

17 16. Denari accepted funds from participants and pooled those funds into a trading account at
18 a Retail Foreign Exchange Dealer ("RFED"), in which Denari engaged in retail forex transactions.

19 17. Neither Denari nor the third party participants in Denari's pool were eligible contract
20 participants ("ECP"). Section 1a(18)(A)(xi) of the Act, 7 U.S.C. § 1a(18)(A)(xi) (2012), sets a high dollar-
21 value threshold requirement for an ECP. For individuals, it is generally limited to those who have more than
22 \$10 million invested on a discretionary basis. Moreover, pursuant to Section 1a(18)(A)(iv)(II) of the Act, the
23 Denari pool additionally cannot be an ECP because at least some, if not all of its participants are not ECPs.

24 18. Pursuant to Section 2(c)(2)(C)(ii)(I) of the Act, 7 U.S.C. § 2(c)(2)(C)(ii)(I) (2012), these
25 leveraged or margined retail forex transactions with non-ECPs are subject to certain provisions of the
26 Act, including certain anti-fraud provisions.

1 Capson and Sarkar began illegally operating Denari in 2012 while they were working for an
2 investment firm registered with the Financial Institution Regulatory Authority (“FINRA”), including
3 opening a bank account in Denari’s name and soliciting two participants who were customers of the
4 FINRA registered firm where they worked. Capson and Sarkar settled a subsequent FINRA proceeding
5 regarding this conduct in June 2014 based on their failure to disclose outside business activities and
6 engaging in a private securities transaction without providing prior written notice to the FINRA member
7 firm where they worked. Neither Capson nor Sarkar disclosed the FINRA settlement to certain Denari
8 participants and only disclosed it to participants who confronted them about it after learning about the
9 settlement themselves, or who requested an explanation as to why Capson and Sarkar left their prior
10 investment firm.

11 24. Between 2012 and the present, Capson and Sarkar solicited at least twenty-eight relatives,
12 friends, business associates, and others by various means, including in-person communication, phone,
13 email, and word-of-mouth. Capson and Sarkar solicited participants for various investments, including
14 forex trading, real estate, and investment in a gold mining company, among other investments.

15 25. Denari provided participants with promotional brochures it created in 2012, 2018 and
16 2019. In the brochures created in 2018 and 2019, Denari claimed that “over the past 10 years we have
17 developed a disciplined investment strategy that has earned positive returns in 36 of the past 40
18 quarters.” Denari also represented in its 2012, 2018 and 2019 brochures that it “charges no management
19 fees. We will pay all expenses associated with the fund management, performance reporting and market
20 research. By not passing any of these expenses on to our clients through traditional quarterly fees we
21 are compensated through performance, not assets under management.”

22 26. Denari’s promotional materials included claimed annual rates of return for 2017 of
23 50.22% and for 2018 of 36.33%, and portrayed Denari as never having a losing year. However,
24 Denari’s forex trading account actually experienced a negative return of more than 49% in 2017 and a
25 positive return of only 19% in 2018.
26

1 27. Denari's promotional material also reported monthly "trading results" for January
2 through July 2018 that are inconsistent with the actual monthly trading results realized in its trading
3 account. Specifically, Denari's promotional material states rates of return of 3.79%, 3.55%, 3.43%,
4 3.09%, 3.53%, 0.94%, and 2.47% for January through July 2018 respectively, while its actual monthly
5 trading results are -7.42%, -2.82%, -6.09%, 6.92%, 17.29%, 0.01%, and 4.69% for the same time period.
6 Consequently, these statements in Denari's promotional materials are false.

7 28. Additionally, Denari did not provide any prospective or actual participants in the Denari
8 pool with the disclosure documents required by CFTC Regulations, nor did Denari register with the
9 CFTC as a CPO or file or claim any exemption from registration with the CFTC as required by the Act.

10 29. Denari provided "Joint Venture Agreements" or "Promissory Notes" to prospective and
11 actual participants. Since September of 2012, at least nine participants signed "Joint Venture
12 Agreements" with Denari. Capson also signed these agreements as managing partner of Denari. These
13 agreements state that "the Joint Venturers have agreed to make contributions to a common fund for the
14 purpose of investing under the direction of Denari Capital, LLC." The agreements also state that Denari
15 could acquire "any assets, which may include but are not limited to real estate, foreign currency," or
16 other business interests, in connection with the venture. The Denari Joint Venture Agreements provide
17 that "Denari Capital, LLC will be solely responsible for all investment decisions and will receive a
18 portion of the investment earnings equal to the percentage agreed upon by each of the Joint Venturers."

19 30. At least sixteen Denari participants signed the Promissory Notes. Capson signed the
20 Promissory notes as managing partner of Denari. The Promissory Notes state that Denari agrees to
21 repay the loans, usually with 10% to 12% interest annually. Most of the loans had a one-year term with
22 an option to renew at the lender's choice.

23 31. For example, one of the Promissory Notes involved a \$50,000 loan made by an individual
24 on May 15, 2018 to Denari. The note had a one-year term, with a promise for the principle to be repaid
25 upon demand at the end of any month after June 2019. The note also provided for monthly interest
26 payments at a rate of 10% annually on the outstanding principle balance.

1 32. Denari, through Capson and Sarkar, deposited and commingled investor and participant
2 funds received pursuant to the Joint Venture Agreements and Promissory Notes into one or more bank
3 accounts in Denari's name and subsequently transferred some of these funds into forex trading accounts
4 for the purpose of trading forex.

5 33. Of the at least \$8,300,000 that Denari solicited and accepted, at least \$3,200,000 was
6 received from participants who signed promissory notes, at least \$3,700,000 was received from
7 participants who signed Joint Venture Agreements and were advised that at least some of their funds
8 could be used for foreign currency trading, and at least \$1,450,000 was received from participants for
9 the purpose of other investments.

10 **B. Denari's Forex Trading Accounts**

11 34. Denari first opened a forex trading account in its own name in August 2012 with a futures
12 commission merchant ("FCM A"), at the time an RFED registered with the CFTC. Capson was the sole
13 authorized trader on the account. Denari's account opening application with FCM A falsely claimed
14 that it was only investing proprietary funds, and not funds of third parties. Denari funded its FCM A
15 account with a deposit of \$270,000 it received from a pool participant who was also a purported co-
16 founder and former part owner of the company in August 2012.

17 35. In February 2017, Denari transferred its trading account held at FCM A to a different
18 RFED, FCM B. Capson is the sole authorized trader on the account at FCM B. In addition to the nearly
19 \$9,000 opening transfer balance in February 2017, Denari made seven additional deposits to the FCM B
20 account through July 2019. The deposits ranged in amounts from \$20,000 to \$700,000 and totaled
21 \$1,662,000. The account at FCM B experienced overall trading losses of approximately \$228,000.

22 **C. Denari Does Not Have Sufficient Funds To Cover Its Obligations To Participants**

23 36. Capson and Sarkar are signatories on the Denari bank accounts into which participant and
24 investor funds were deposited.

25 37. Between October 2017 and July 2019, Capson and Sarkar transferred approximately
26 \$1,085,000 from Denari's forex trading account at FCM B to a Denari bank account. Denari's bank

1 records also show deposits from a least five pool participants to a Denari bank account since January 1,
2 2017 totaling more than \$1,000,000. Denari and Capson distributed funds from one or more Denari
3 bank accounts to participants as purported profit and interest payments and Capson and Sarkar withdrew
4 and, on information and belief, misappropriated funds from one or more Denari bank accounts for their
5 personal use, including purchasing items on Amazon, meals at restaurants, gas, and gym memberships,
6 among other things.

7 38. As of June 30, 2019, Denari's forex trading account at FCM B had a net liquidating value
8 ("NLV") of approximately \$1,000,000. However, according to a June 30, 2019 Denari financial
9 statement, the value of Denari's forex pool participants' interest is approximately \$1,600,000.

10 39. In addition to the NLV of approximately \$1,000,000 in Denari's forex trading account as
11 of June 30, 2019, Denari's only other liquid asset consisted of a bank account that had a balance of
12 approximately \$200,000 as of June 30, 2019. Therefore, as of June 30, 2019, Denari did not have
13 sufficient liquid assets to cover its forex pool participants' interests in the Pool.

14 40. In July 2019, Capson and Sarkar withdrew \$74,423.81 from the Denari forex trading
15 account and transferred the funds to a Denari bank account. As of July 31, the NLV of Denari's account
16 at FCM B declined to approximately \$530,000. Meanwhile, Denari's bank account balance totaled
17 approximately \$300,000 as of July 22, for combined liquid assets of approximately \$830,000.

18 41. Combining all of Denari's liquid assets and even attributing them to the Denari forex
19 pool, the Denari forex pool had a shortfall of at least \$400,000 as of June 30, 2019.

20 42. Additionally, Denari's June 30, 2019 balance sheet indicates that the firm owes more
21 than \$5,200,000 in "business loans," which, according to Denari, represents the firm's obligation to the
22 forex pool participants, promissory note holders and others, though the firm represented to NFA that its
23 actual liability on these obligations exceeds \$5,300,000. Excluding the approximately \$1,600,000 that
24 Denari and Capson have represented is owed to forex pool participants as of June 30, 2019, Denari,
25 Capson and Sarkar appear to owe more than \$3,600,000 to the promissory noteholders and others whose
26

1 funds were commingled with the pool participants' funds. On information and belief, Defendants
2 misappropriated some or all of these funds.

3 43. Denari does not have sufficient liquid assets to meet its current liabilities to its investors
4 and pool participants nor, on information and belief, does it have sufficient assets, liquid or non-liquid,
5 to satisfy its current obligations to its pool participants. Prior to issuance of NFA's MRA/ARA on
6 August 6, 2019, Denari did not disclose to participants that it did not have sufficient funds or assets to
7 meet its obligations to them.

8 44. Denari's June 30, 2019 balance sheet also included other assets purportedly valued at
9 more than \$6,100,000. These assets consist of stock in three mining-related companies and a real estate
10 holding in Nevada. However, Denari has not been able to substantiate its ownership of these assets nor
11 the value Denari assigns to them to NFA.

12 45. Denari, Capson and Sarkar hold ownership interests in or have roles with the mining
13 entities listed as Denari's assets. These assets include penny stock in one company that is insolvent;
14 stock in a privately-held company of which Denari and Sarkar are majority shareholders; and stock in a
15 third company in which Denari and Capson regularly engage in buying and selling the stock by privately
16 arranging transactions in the stock.

17 46. The real estate holding in Nevada is not in Denari's name, and Denari also included on its
18 balance sheet Capson's and Sarkar's personal shares in the mining-related companies, which had the
19 effect of improperly increasing the assets listed on the firm's balance sheet.

20 47. NFA confronted Capson and Sarkar, on July 30, 2019, about the difference between the
21 firm's liquid assets and its financial obligations to the participants. Capson and Sarkar were uncertain
22 whether they could immediately repay these obligations and said they would liquidate the stock they
23 own to make everyone whole. However, to date, they have not done so.

24 **D. Denari Issued False or Misleading Account Statements to Participants**

25 48. During the Relevant Time, Defendants sent quarterly account statements to participants
26 via mail or email that misrepresented the value of their respective investments and interests in the Pool,

1 and exaggerated returns. In particular, the account statements Defendants issued to participants depicted
2 false returns, and misrepresented the value of the participants' respective accounts.

3 49. The statements reflected that Denari participants' funds were earning consistent profits
4 with no losses. However, Denari improperly calculated the Pool's net asset value ("NAV"). Denari
5 failed to factor in the impact of unrealized losses in its forex trading account and, therefore, inflated its
6 performance results. Moreover, Denari regularly closed out profitable positions to recognize gains,
7 while continuously rolling forward losing positions.

8 50. At least eleven participants received quarterly statements from Denari reflecting that their
9 investments were earning consistent profits with no losses.

10 51. Further, Capson and Sarkar did not trade all of the funds that participants invested in
11 Denari for the purpose of forex trading. Instead, on information and belief, Capson and Sarkar
12 misappropriated a portion of these funds for personal and other uses.

13 **E. NFA's July 2019 Examination of Denari**

14 52. In furtherance of its official duties under the Act, NFA conducts periodic audits and
15 examinations of NFA members as a means of monitoring and assuring compliance with NFA rules, the
16 Act, and the Regulations.

17 53. In July 2019, NFA began an examination of Denari.

18 54. On July 15, 2019, NFA sent Capson a document request and spoke to him by telephone.
19 During that phone call, Capson told NFA representatives that Denari has been trading forex with its
20 own, proprietary funds since 2015, and that Denari did not trade forex for third party investors until after
21 Denari became registered as a CPO in 2019.

22 55. Capson's representations to NFA are false. Denari has been operating a forex pool and
23 trading third party funds since at least 2012.

1 **VI. VIOLATIONS OF THE COMMODITY EXCHANGE ACT AND REGULATIONS**

2 **COUNT I**

3 **FRAUD BY MISREPRESENTATIONS, OMISSIONS AND FALSE STATEMENTS**

4 **VIOLATIONS OF SECTION 4b(2)(A)-(C) OF THE ACT, 7 U.S.C. § 6b(a)(2)(A)-(C) (2012), AND**
5 **REGULATION 5.2(1)-(3), 17 C.F.R. § 5.2(b)(1)-(3) (2019)**

6 56. The allegations set forth in paragraphs 1 through 56 are re-alleged and incorporated
7 herein by reference.

8 57. 7 U.S.C. § 6b(2)(A)-(C) makes it unlawful:

9 (2) for any person, in or in connection with any order to make, or the
10 making of, any contract of sale of any commodity for future delivery, or
11 swap, that is made, or to be made, for or on behalf of, or with, any other
12 person, other than on or subject to the rules of a designated contract
13 market

14 (A) to cheat or defraud or attempt to cheat or defraud the other
15 person;

16 (B) willfully to make or cause to be made to the other person any
17 false report or statement or willfully to enter or cause to be entered
18 for the other person any false record;

19 (C) willfully to deceive or attempt to deceive the other person by any
20 means whatsoever in regard to any order or contract or the disposition
21 or execution of any order or contract, or in regard to any act of agency
22 performed, with respect to any order or contract for or, in the case of
23 paragraph (2), with the other person[.]

24 58. 17 C.F.R. § 5.2(b) provides, in relevant part, that:

25 [i]t shall be unlawful for any person, by use of the mails or by any means
26 or instrumentality of interstate commerce, directly or indirectly, in or in
connection with any retail forex transaction:

(1) To cheat or defraud or attempt to cheat or defraud any person;

(2) Willfully to make or cause to be made to any person any false
report or statement or cause to be entered for any person any
false record; or

(3) Willfully to deceive or attempt to deceive any person by any
means whatsoever.

59. Defendants, in connection with retail forex transactions, knowingly or recklessly: cheated or defrauded or attempted to cheat or defraud pool participants and deceived or attempted to deceive pool participants by, among other things, fraudulently soliciting pool participants by making material misrepresentations and omissions regarding their trading profits, trading performance track record, and value of their interest in the Pool, issuing false statements to participants, and on information and belief, misappropriating their funds.

60. Defendants made or caused to be made false account statements issued to pool participants via regular and electronic mail showing consistent profits with no losses.

61. By reason of the foregoing, Defendants violated 7 U.S.C. § 6b(a)(2)(A)-(C) and 17 C.F.R. § 5.2(b)(1)-(3).

62. The foregoing acts, omissions, and failures occurred within the scope of Capson's and Sarkar's employment or office with Denari. Therefore, Denari is liable for their acts, omissions, and failures in violation of 7 U.S.C. § 6b(a)(2)(A)-(C) and 17 C.F.R. § 5.2(b)(1)-(3), pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Regulation 1.2, 17 C.F.R. § 1.2 (2019).

63. Defendants Capson and Sarkar control Denari directly or indirectly, and did not act in good faith or knowingly induced, directly or indirectly, Denari's conduct alleged in this Count. Therefore, under Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2012), Capson and Sarkar are liable for Denari's violations of 7 U.S.C. § 6b(a)(2)(A)-(C) and 17 C.F.R. § 5.2(b)(1)-(3).

64. Each misrepresentation, omission of material fact and false statement, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of 7 U.S.C. § 6b(a)(2)(A)-(C) and 17 C.F.R. § 5.2(b)(1)-(3).

COUNT II

FRAUD BY A CPO

VIOLATIONS OF SECTION 4o(1) OF THE ACT, 7 U.S.C. § 6o(1) (2012)

65. The allegations set forth in paragraphs 1 through 56 are re-alleged and incorporated herein by reference.

1 66. 7 U.S.C. § 6o(1) (2012) prohibits any CPO or AP of a CPO from using the mails or any
2 other means of interstate commerce, directly or indirectly:

3 (A) to employ any device, scheme or artifice to defraud any client or
4 participant or prospective client or participant; or

5 (B) to engage in any transaction, practice or course of business which operates as a fraud or
6 deceit upon any client or participant or prospective participant.

7 67. Pursuant to Regulation 5.1(d)(1), 17 C.F.R. § 5.1(d)(1) (2019), and subject to certain
8 exceptions not relevant here, any person who operates or solicits funds, securities, or property for a
9 pooled investment vehicle and engages in retail forex transactions is defined as a retail forex CPO.

10 68. Pursuant to Section 2(c)(2)(C)(ii)(I) of the Act, 7 U.S.C. § 2(c)(2)(C)(ii)(I) (2012),
11 “[a]greements, contracts, or transactions” in retail forex and accounts or pooled investment vehicles
12 “shall be subject to . . . section[] 6o [of the Act],” except in circumstances not relevant here.

13 69. During the Relevant Time, Denari acted as a CPO in that it engaged in a business that is
14 of the nature of an investment trust, syndicate or similar form of enterprise operated for the purpose of
15 trading in commodity interests or commodity futures, and in connection therewith, solicited, accepted
16 and received funds from others for the purpose of trading in commodity interests and commodity futures.

17 70. During the Relevant Time, Capson and Sarkar acted as APs of Denari by soliciting funds
18 for the pool and handling participant funds while being associated with Denari as partners, officers,
19 employees, consultants, or agents.

20 71. Capson and Sarkar, while acting as APs of a CPO, and Denari, while acting as a CPO,
21 defrauded and deceived participants of the Denari Pool by using the mails or any other means of
22 interstate commerce in violation of 7 U.S.C. § 6o(1) by, among other things:

23 (a) on information and belief, misappropriating participant funds;

24 (b) fraudulently soliciting participants and prospective participants by making
25 material misrepresentations and omitting material facts regarding Defendants
26 trading profits, trading performance track record, and the value of participants’
interest in the Pool; and

1 (c) causing false account statements to be issued to participants in the Pool that
2 reflected consistent profits with no losses.

3 72. Defendants engaged in the acts and practices described in this Count willfully or with
4 reckless disregard for the truth.

5 73. The foregoing acts, omissions, and failures occurred within the scope of Sarkar's and
6 Capson's employment or office with Denari. Therefore, Denari is liable for their acts, omissions, and
7 failures in violation of 7 U.S.C. § 6o(1), pursuant to 7 U.S.C. § 2(a)(1)(B) and 17 C.F.R. § 1.2.

8 74. Defendants Capson and Sarkar control Denari directly or indirectly, and did not act in
9 good faith or knowingly induced, directly or indirectly, Denari's conduct alleged in this Count.
10 Therefore, under 7 U.S.C. § 13c(b), Capson and Sarkar are liable for Denari's violations of 7 U.S.C.
11 § 6o(1)(A) and (B).

12 75. Each fraudulent or deceptive act, including without limitation those specifically alleged
13 herein, is alleged as a separate and distinct violation of 7 U.S.C. § 6o(1).

14 **COUNT III**

15 **FAILURE TO REGISTER AS A CPO**

16 **VIOLATIONS OF SECTION 4m(1) OF THE ACT, 7 U.S.C. §§ 6m(1), 2(c)2(C)(iii)(I)(cc) (2012), AND**
17 **REGULATION 5.3(a)(2)(i), 17 C.F.R. § 5.3(a)(2)(i) (2019)**

18 76. The allegations set forth in paragraphs 1 through 56 are re-alleged and incorporated herein by
19 reference.

20 77. With certain exemptions and exclusions not applicable here, 7 U.S.C. § 6m(1) requires all
21 CPOs operating a commodity pool to be registered with the Commission.

22 78. Subject to certain exceptions not relevant here, 7 U.S.C. § 6m(1) states that it shall be
23 "unlawful for any . . . [CPO], unless registered under this chapter, to make use of the mails or any means
24 or instrumentality of interstate commerce in connection with his business as such . . . [CPO]."

25 79. Subject to certain exceptions not relevant here, 7 U.S.C. § 2(c)(2)(C)(iii)(I)(cc) states in
26 part, that:

1 A person, unless registered in such capacity as the Commission by rule,
2 regulation, or order shall determine and a member of a futures association
registered under section 17, shall not . . .

3

(cc) operate or solicit funds, securities, or property for any
4 pooled investment vehicle that is not an eligible contract
participant in connection with [applicable retail forex contracts,
5 agreements, or transactions].

6 80. For the purposes of retail forex transactions, a CPO is defined in 17 C.F.R. § 5.1(d)(1)
7 “as any person who operates or solicits funds, securities, or property for a pooled investment vehicle that
8 is not an eligible contract participant as defined in section 1(a)(18) of the Act, and who engages in retail
9 forex transactions.” Denari was not an ECP as defined in section 1(a)(18) of the Act, 7 U.S.C.
10 § 1(a)(18) (2012).

11 81. Except in circumstances not relevant here, 17 C.F.R. § 5.3(a)(2)(i) requires those that
12 meet the definition of a retail forex CPO to register as a CPO with the Commission.

13 82. During the Relevant Time, Denari engaged in activities as a retail forex CPO, with
14 participants who are not ECPs, without being registered as such, and in connection therewith used the
15 mails or other means or instrumentalities of interstate commerce, in violation of 7 U.S.C. § 6m(1) (2012)
16 and 17 C.F.R. § 5.3(a)(2)(i) and 17 C.F.R. § 2(c)(2)(C)(iii)(I)(cc).

17 83. Each use of the mails or any means or instrumentality of interstate commerce in
18 connection with Denari’s business as a CPO without proper registration during the Relevant Time
19 period, including but not limited to those specifically alleged herein, is alleged as a separate and distinct
20 violation.

21 84. During the Relevant Time, Capson and Sarkar directly or indirectly controlled Denari,
22 and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting Denari’s
23 violations described in this Count. Pursuant to 7 U.S.C. § 13c(b), Capson and Sarkar are therefore liable
24 for Denari’s violations described in this Count to the same extent as Denari.

COUNT IV

**FAILURE TO REGISTER AS APs AND
ALLOWING UNREGISTERED APs TO REMAIN ASSOCIATED WITH A CPO
VIOLATIONS OF SECTION 4k(2) OF THE ACT, 7 U.S.C. § 6k(2) (2012), AND
REGULATION 5.3(a)(2)(ii), 17 C.F.R. § 5.3(a)(2)(ii) (2019)**

85. The allegations set forth in paragraphs 1 through 56 are re-alleged and incorporated herein by reference.

86. With certain exemptions and exclusions not applicable here, it is unlawful for a person to be associated with a CPO as a partner, officer, employee, consultant, or agent, or a person occupying a similar status or performing similar functions, in any capacity that involves the solicitation of funds, securities, or property for participation in a commodity pool unless registered with the Commission as an AP of the CPO pursuant to 7 U.S.C. § 6k(2).

87. Except in certain circumstances not relevant here, 17 C.F.R. § 5.3(a)(2)(ii) requires those that meet the definition of an AP of a retail forex CPO under 17 C.F.R. § 5.1(d) to register as an AP of a CPO with the Commission.

88. It is also unlawful under this section of the Act for a CPO to permit such a person to become or remain associated with the CPO in any such capacity if the CPO knew or should have known that the person was not registered as an AP.

89. Further, pursuant to 17 C.F.R. § 5.1(d)(2), any person associated with a CPO “as a partner, officer, employee, consultant or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves: (i) [t]he solicitation of funds, securities, or property for a participation in a pooled vehicle; or (ii) [t]he supervision of any person or persons so engaged” is an AP of a retail forex CPO.

90. During the Relevant Period, Defendants Capson and Sarkar were associated with a CPO as a partner, officer, employee or consultant, or agent in a capacity that involved the solicitation of funds, securities, or property for participation in a commodity pool or the supervision of any person or

1 persons so engaged. Therefore, Defendants Capson and Sarkar were APs of a CPO as defined by
2 17 C.F.R. § 1.3.

3 91. Capson and Sarkar violated 7 U.S.C. § 6k(2) and 17 C.F.R. § 5.3(a)(2)(ii) by acting as
4 APs of Denari without being registered as APs of a CPO.

5 92. Denari violated 7 U.S.C. § 6k(2) in that, acting as a CPO, it allowed Capson and Sarkar
6 to act as its APs when it knew or should have known that Capson and Sarkar were not registered as APs.

7 93. The foregoing acts, omissions, and failures occurred within the scope of Capson's and
8 Sarkar's employment or office with Denari. Therefore, Denari is liable for their acts, omissions, and
9 failures in violation of 7 U.S.C. § 6k(2) and 17 C.F.R. § 5.3(a)(2)(ii), pursuant to 7 U.S.C. § 2(a)(1)(B)
10 and 17 C.F.R. § 1.2.

11 94. Each act by Capson and Sarkar of soliciting funds, securities, or property for participation
12 in a commodity pool while being associated with Denari as a partner, officer, employee, consultant, or
13 agent without being registered as an AP of a CPO, and each act by Denari of allowing Capson and
14 Sarkar to be associated with it in such a capacity when Denari knew or should have known Capson and
15 Sarkar were not registered as APs, is alleged as a separate and distinct violation of 7 U.S.C. § 6k(2).

16 COUNT V

17 **COMMINGLING OF POOL FUNDS**

18 **AND FAILURE TO RECEIVE POOL FUNDS IN POOLS' NAME**

19 **VIOLATIONS OF REGULATION 4.20, 17 C.F.R. § 4.20 (2019)**

20 95. The allegations set forth in paragraphs 1 through 56 are re-alleged and incorporated herein by
21 reference.

22 96. 17 C.F.R. § 5.4 states that Part 4 of the Regulations, 17 C.F.R. pt. 4 (2019), applies to any
23 person required to register as a CPO pursuant to Part 5 of the Regulations, 17 C.F.R. pt. 5 (2019),
24 relating to forex transactions.

25 97. With certain exemptions not applicable here, 17 C.F.R. § 4.20(a) requires that a CPO
26 must operate its commodity pool as an entity cognizable as a legal entity separate from its operator.

1 98. 17 C.F.R. § 4.20(b) prohibits CPOs, whether registered or not, from receiving pool
2 participants' funds in any name other than that of the pool.

3 99. 17 C.F.R. § 4.20(c) prohibits a CPO, whether registered or not, from commingling the
4 property of any pool it operates with the property of any other person.

5 100. Denari, while acting as a CPO, failed to operate its commodity pool as an entity
6 cognizable as a legal entity separate from its operator, failed to receive pool participants' funds in the
7 name of the Pool when they deposited funds into Denari's bank and trading accounts, and commingled
8 the property of the Pool and pool participants' funds with property of Defendants and others.

9 101. By reason of the foregoing, Denari violated 17 C.F.R. § 4.20(a)-(c).

10 102. Defendants Capson and Sarkar control Denari directly or indirectly, and did not act in
11 good faith or knowingly induced, directly or indirectly, Denari's conduct alleged in this Count.
12 Therefore, under 7 U.S.C. § 13c(b), Capson and Sarkar are liable for Denari's violations of 17 C.F.R.
13 § 4.20(a)-(c).

14 103. Each act of improperly receiving pool participants' funds and commingling the property
15 of the Denari pool with non-pool property, including but not limited to those specifically alleged herein,
16 is alleged as a separate and distinct violation of 17 C.F.R. § 4.20(b)-(c).

17 **COUNT VI**

18 **FAILURE TO PROVIDE POOL DISCLOSURES**

19 **VIOLATIONS OF REGULATIONS 4.21, 4.24, AND 4.25, 17 C.F.R. §§ 4.21, 4.24, 4.25 (2019)**

20 104. The allegations set forth in paragraphs 1 through 56 are re-alleged and incorporated herein by
21 reference.

22 105. 17 C.F.R. § 4.21 provides that

23 each commodity pool operator registered or required to be registered under the
24 Act must deliver or cause to be delivered to a prospective participant in a pool
25 that it operates or intends to operate a Disclosure Document for the pool prepared
26 in accordance with §§ 4.24 and 4.25 by no later than the time it delivers to the
prospective participant a subscription agreement for the pool

1 106. Regulation 4.24 outlines in detail twenty-three types of general disclosures required for
2 pools. Regulation 4.25 outlines in detail the performance disclosures required for pools, including
3 performance disclosures for different points in time of the pool’s operating history.

4 107. Denari did not provide any actual or prospective pool participants with pool disclosure
5 documents in the form specified in 17 C.F.R. §§ 4.24, 4.25. Specifically, Denari failed to provide
6 prospective pool participants with a pool disclosure document in the form specified in Regulations 4.24
7 and 4.25. Denari therefore violated 17 C.F.R. §§ 4.21, 4.24, 4.25.

8 108. Defendants Capson and Sarkar control Denari directly or indirectly, and did not act in
9 good faith or knowingly induced, directly or indirectly, Denari’s conduct alleged in this Court.
10 Therefore, under 7 U.S.C. § 13c(b), Capson and Sarkar are liable for Denari’s violations of 17 C.F.R.
11 §§ 4.21, 4.24 and 4.25.

12 109. Each failure to furnish the required disclosure documents with the required content to
13 prospective pool participants and pool participants, including but not limited to those specifically alleged
14 herein, is alleged as a separate and distinct violation of 17 C.F.R. § 4.21, 4.24 and 4.25.

15 **COUNT VII**

16 **MISREPRESENTATIONS TO NFA**

17 **VIOLATIONS OF SECTION 9(a)(4) OF THE ACT, 7 U.S.C. § 13(a)(4) (2012)**

18 110. The allegations set forth in paragraphs 1 through 56 are re-alleged and incorporated herein by
19 reference.

20 111. 7 U.S.C. § 13(a)(4) makes it unlawful for any person willfully to falsify, conceal, or
21 cover up by trick, scheme or artifice a material fact, or to make any false, fictitious, or fraudulent
22 statements or representations, or to make or use any false writing or document knowing the same to
23 contain any false, fictitious, or fraudulent statement or entry to a registered entity, board of trade, swap
24 data repository, or futures association designated or registered under the Act and acting in furtherance of
25 its official duties under the Act.
26

1 112. Capson violated 7 U.S.C. § 13(a)(4) by willfully making false, fictitious, or fraudulent
2 statements or representations to NFA, a futures association registered under the Act, in connection with
3 an examination that NFA conducted of Denari beginning in July 2019 in furtherance of NFA's official
4 duties under the Act.

5 113. Specifically, during the examination, Capson falsely represented to NFA staff that Denari
6 has been trading forex with its own proprietary funds since 2015, and that Denari did not trade forex for
7 any third party participants until after Denari became registered with the CFTC on May 1, 2019.

8 114. Capson's representations were false. Denari has been operating a forex pool and trading
9 for third party participants since at least 2012.

10 115. The foregoing acts, omissions, and failures occurred within the scope of Capson's
11 employment or office with Denari. Therefore, Denari is liable for his acts, omissions, and failures in
12 violation of 7 U.S.C. § 13(a)(4), pursuant to 7 U.S.C. § 2(a)(1)(B) and 17 C.F.R. § 1.2.

13 116. Each act of willful concealment and/or false, fictitious, or fraudulent statement Capson
14 made to NFA, a futures association registered under the Act, in connection with NFA's examination of
15 Denari commencing in July of 2019, conducted in furtherance of NFA's official duties under the Act,
16 including, but not limited to, those specifically alleged herein, is alleged as a separate and distinct
17 violation of 7 U.S.C. § 13(a)(4).

18 **VII. RELIEF REQUESTED**

19 **WHEREFORE**, the Commission respectfully requests that the Court, as authorized by Section 6c of the
20 Act, 7 U.S.C. § 13a-1 (2012), and pursuant to the Court's own equitable powers, enter:

21 (a) An order finding that Defendants violated Sections 4b(a)(2)(A) and (C), 4b(a)(2)(B), 4o(1),
22 4m(1), 4k(2), and 2(c)(2)(C)(iii)(I)(cc) of the Act, 7 U.S.C. §§ 6b(a)(2)(A), (C), 6(b)(2)(B), 6o(1), 6m(1),
23 6(k)(2), 2(c)(2)(C)(iii)(I)(cc) (2012), and Commission Regulations 4.20(a)-(c), 4.21, 4.24, 4.25, 5.2(b)(1)-(3),
24 and 5.3(a)(2)(i)-(ii), 17 C.F.R. §§ 4.20(a)-(c), 4.21, 4.24, 4.25, 5.2(b)(1)-(3), 5.3(a)(2)(i)-(ii) (2019), and an order
25 finding that Defendants Capson and Denari violated Section 9(a)(4) of the Act, 7 U.S.C. § 13(a)(4) (2012).

1 (b) An order of permanent injunction prohibiting Defendants and any of their affiliates, agents,
2 servants, employees, successors, assigns, attorneys, and persons in active concert or participation with
3 Defendants, from directly or indirectly:

- 4 (i) engaging in conduct in violation of 7 U.S.C. §§ 6b(a)(2)(A), (C), 6(b)(2)(B), 6o(1),
5 6m(1), 6(k)(2), and 2(c)(2)(C)(iii)(I)(cc) and 17 C.F.R. §§ 4.20(a)-(c), 4.21, 4.24,
6 4.25, 5.2(b)(1)-(3), and 5.3(a)(2)(i)-(ii);
- 7 (ii) trading on or subject to the rules of any registered entity (as that term is defined in Section
8 1a of the Act, 7 U.S.C. § 1a (2012));
- 9 (iii) entering into any transactions involving “commodity interests” (as that term is defined in
10 Commission Regulation 1.3, 17 C.F.R. § 1.3 (2019)), for Defendants’ own accounts or
11 for any account in which they have a direct or indirect interest;
- 12 (iv) having any commodity interests traded on Defendants’ behalf;
- 13 (v) controlling or directing the trading for or on behalf of any other person or entity, whether by
14 power of attorney or otherwise, in any account involving commodity interests;
- 15 (vi) soliciting, receiving, or accepting any funds from any person for the purpose of purchasing
16 or selling any commodity interests;
- 17 (vii) applying for registration or claiming exemption from registration with the
18 Commission in any capacity, and engaging in any activity requiring such registration
19 or exemption from registration with the Commission, except as provided for in
20 Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2019);
- 21 (viii) acting as a principal (as that term is defined in Commission Regulation 3.1(a),
22 17 C.F.R. § 3.1(a) (2019)), agent or any other officer or employee of any person
23 registered, exempted from registration or required to be registered with the
24 Commission except as provided for in Regulation 4.14(a)(9);
- 25
26

1 (c) An order of permanent injunction additionally prohibiting Defendants Capson and Denari and
2 any of their affiliates, agents, servants, employees, successors, assigns, attorneys, and persons in active concert or
3 participation with them, from directly or indirectly engaging in conduct in violation of 7 U.S.C. §§ 13(a)(4);

4 (d) An order requiring Defendants and any third party transferee and/or successors thereof, to
5 disgorge to any officer appointed or directed by the Court all benefits received including, but not limited
6 to, salaries, commissions, loans, fees, revenues and trading profits derived, directly or indirectly, from
7 acts or practices which constitute violations of the Act and Regulations as described herein, including
8 pre-judgment and post-judgment interest;

9 (e) An order directing Defendants and any successors thereof, to rescind, pursuant to such
10 procedures as the Court may order, all contracts and agreements, whether implied or express, entered
11 into between them and any of the pool participants whose funds were received by them as a result of the
12 acts and practices that constituted violations of the Act and Regulations, as described herein;

13 (f) An order requiring Defendants to make restitution by making whole each and every pool
14 participant whose funds were received or utilized by them in violation of the provisions of the Act and
15 Regulations as described herein, including pre-judgment interest;

16 (g) An order directing Defendants to pay civil monetary penalties, to be assessed by the
17 Court, in an amount not more than the penalty prescribed by Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-
18 1(d)(1) (2012), as adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act
19 Improvements Act of 2015, Pub. L. 114–74, 129 Stat. 584 (2015), title VII, Section 701, *see*
20 Commission Regulation 143.8, 17 C.F.R. § 143.8 (2019) for each violation of the Act, as described
21 herein;

22 (h) An order requiring Defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920
23 and 2412(a)(2) (2006); and

24 (i) Such other and further relief as the Court deems proper.
25
26

1 Date: November 5, 2019

COMMODITY FUTURES TRADING
COMMISSION

2 By: Attorneys for Plaintiff

3
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