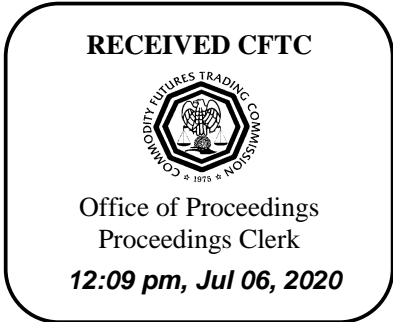


**UNITED STATES OF AMERICA**  
**Before the**  
**COMMODITY FUTURES TRADING COMMISSION**



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)  
**In the Matter of:** )  
)  
**Foremost Trading LLC,** )  
)  
)  
)  
**Respondent.** )  
\_\_\_\_\_)

**CFTC Docket No.:** 20-21

**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”) has reason to believe that from in or about February 1, 2014 to at least August 31, 2016 (“Relevant Period”), Foremost Trading LLC (“Foremost” or “Respondent”), in part by and through the acts of one of its principals, violated Sections 4b(a)(1)(A) and (C), 4c(a)(1)-(2), 4c(b), and 4o(1)(A) and (B) of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 6b(1)(A), (C); 6c(a)(1)-(2); 6c(b); 6o(1)(A), (B) (2018), and Commission Regulations (“Regulations”) 1.38(a), 33.10(a) and(c), 155.4(b)(2), 166.3, 17 C.F.R. §§1.38(a); 33.10(a), (c); 155.4(b)(2); 166.3 (2019). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondent 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, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondent consents 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> Respondent consents to the use of the findings and conclusions 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. Respondent does not consent, however, to the use of this Order, or the findings or conclusions herein, as the sole basis for any other

## II. FINDINGS

The Commission finds the following:

### A. SUMMARY

Foremost is a registered Introducing Broker (“IB”) that is managed by Mark Miller (“Miller”) and other Miller family members. Miller was an Associated Person (“AP”) of Foremost who had a power of attorney over several proprietary accounts owned in whole or in part by one or more of Miller and other family members (collectively, “Miller family accounts”), as well as certain Foremost customers.

During the Relevant Period, Foremost, by and through Miller, abused the power of attorney over at least one customer’s accounts (“Customer A”) and defrauded Customer A by engaging in unauthorized trading and misappropriation to benefit Foremost, Miller, and his family members. The unauthorized trading in futures and options involved the use of fictitious sales. This misconduct caused over seven hundred thousand dollars in harm to Customer A. Finally, Foremost also failed to diligently supervise Miller’s handling of customer accounts, which allowed the fraud to continue for years.

### B. RESPONDENT

**Foremost Trading LLC** is a registered IB located in Geneva, Illinois. Foremost has three principals and managers, Miller and two other family members.

### C. FACTS

During the Relevant Period, Foremost, by and through Miller, defrauded Customer A through multiple fraudulent trading schemes in futures and options to benefit Foremost, Miller, and his family members. First, Foremost misappropriated Customer A’s funds by making round-turn unauthorized and fictitious trades to steal funds from Customer A’s account. Second, Foremost defrauded Customer A by causing Customer A to trade against Miller family accounts—through unauthorized and fictitious trades—to establish positions in futures and options in Miller family accounts at prices and quantities that were favorable to Miller. Third, Foremost reported fraudulent errors to Customer A’s FCM to misappropriate Customer A’s funds for Respondent. Finally, Foremost failed to supervise Miller’s trading of customer accounts, which allowed Customer A to be defrauded for over four years.

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proceeding brought by the Commission or to which the Commission is a party, other than a proceeding in bankruptcy or receivership or a proceeding to enforce the terms of this Order. Respondent does 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.

**1. Foremost, by and through Miller, Defrauded Customer A Through Unauthorized Trading and Reporting Fraudulent Errors.**

***a. Miller Used Round-Turn Unauthorized Fictitious Trades To Take Money out of Customer A's Accounts.***

During the Relevant Period Foremost, by and through Miller, orchestrated at least forty five round-turn unauthorized fictitious trades between accounts Miller traded, which resulted in a loss to Customer A of more than \$100,000. In these transactions, Miller placed a limit order to buy or sell a specific quantity of futures or options contracts in a Miller family account. Following that order, Miller placed an aggressive order (i.e., an order that crosses the bid-ask spread) in Customer A's account to trade against the limit order at the identical price, e.g., a limit order to buy would be matched with an aggressive order to sell. After the orders were matched, Miller later reversed the process by entering into offsetting transactions to close out the position in both accounts. Miller knew that he was trading Miller family accounts against Customer A's accounts. He chose specific markets, typically options contracts that were illiquid but sometimes futures contracts, where he believed he could trade in this manner and make a few ticks easily. He purposely traded in this manner to avoid the risks and price competition incident to the market.

***b. Miller Placed Unauthorized Fictitious Trades To Gain an Uncompetitive and Advantageous Position in the Market to the Detriment of Its Customer.***

Miller also engaged in other unauthorized fictitious trades between Customer A's accounts and Miller family accounts. These trades allowed Miller to establish a futures or options position in Miller family accounts without competitive execution and in many cases for a much better price than would have otherwise been obtainable.

During the Relevant Period, Miller engaged in this type of unauthorized fictitious trading almost 500 times, the vast majority of which involved aggressively trading Customer A's accounts against Miller family accounts. Like the round-turn unauthorized fictitious trades, Miller knew that he was trading between the Miller family accounts in a manner to avoid the risks and price competition incident to the market.

***c. Foremost Reported Fraudulent Errors To Misappropriate Funds from Customer A.***

Finally, Foremost misappropriated funds from Customer A by reporting fraudulent errors to Customer A's FCM, requesting that trades be moved. Certain of these fraudulent errors involved the FCM taking winning trades out of Customer A's accounts and placing them in a Foremost account. In some instances, Foremost reported the "error" hours after Miller allegedly made the purported error trade and when the results of the trade were clear. Notably, Foremost rarely reported errors that benefitted Customer A. Using these fraudulent errors, Respondent misappropriated approximately \$157,000 from Customer A.

## **2. Foremost Failed To Supervise Miller’s Handling of Accounts, Which Allowed Miller’s Fraudulent Schemes To Continue for Years.**

During the Relevant Period, Foremost had no policy to review the trading in discretionary accounts and proprietary accounts for unauthorized or fictitious trades. Moreover, Foremost never reviewed Miller’s trading where he took opposite sides of a trade in discretionary and proprietary accounts. Any diligent review of Miller’s trading of various proprietary accounts in conjunction with his trading of customer accounts would have revealed his unauthorized fictitious trades with Customer A. However, Foremost’s principal in charge of compliance was unaware of these trades until after the investigation into this misconduct began.

Foremost also did not have any formal policy or procedure that ensured reported trade errors were genuine errors. Foremost’s principal in charge of compliance testified that when he learned of an error from Miller, he looked to see if the trade that was supposed to be an error made sense in the context of trading of the accounts, and that he took Miller’s word that the trade errors were true errors. Foremost did not typically let its customer know about the errors. As found above, certain of Miller’s reported errors were fraudulent and resulted in misappropriation to Customer A’s account.

### **III.**

#### **LEGAL DISCUSSION**

##### **A. Foremost Committed Fraud in Violation of Sections 4b(a)(1)(a) and (c), 4c(b), and 4o(1)(A) and (B) of the Act, and Regulation 33.10(a) and (c).**

Foremost’s unauthorized trading and misappropriation, by and through Miller, violated Sections 4b(a)(1)(A) and (C), 4c(b), and 4o(1)(A) and (B) of the Act, 7 U.S.C. §§ 6b(1)(A), (C); 6c(b); 6o(1)(A), (B) (2018), and Regulation 33.10(a) and (c), 17 C.F.R. § 33.10(a), (c) (2019).

Section 4b(a) of the Act makes it unlawful for

any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person . . . (A) to cheat or defraud or attempt to cheat or defraud the other person; or (C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for the other person.

Section 4c(b) of the Act and Regulation 33.10, as relevant here, makes the same conduct unlawful in connection with options. Section 4o(1)(A) and (B) of the Act makes the conduct at issue here unlawful for a commodity trading advisor (“CTA”) or an AP of a

CTA.<sup>2</sup>

Scienter is needed to establish violations of Sections 4b, 4c(b), and 4o(1)(A) of the Act and Regulation 33.10 and requires that an individual's acts be performed "with knowledge of their nature and character."<sup>3</sup> *Wasnick v. Refco, Inc.*, 911 F.2d 345, 348 (9th Cir. 1990) (internal quotation marks and citation omitted). The scienter element is established when the Commission shows that a respondent "intended to defraud, manipulate, or deceive, or if [the Respondent's] conduct represents an extreme departure from the standards of ordinary care." *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002). Respondents need not have had evil motive or affirmative intent to injure their customer; it is enough that they acted deliberately, knowing their acts were unauthorized or contrary to instructions. *Haltmier v. CFTC*, 554 F.2d 556, 560-62 (2d Cir. 1977).

### **1. Foremost Committed Fraud by Misappropriating Funds from Customer A's Trading Accounts.**

Misappropriation constitutes "willful and blatant" fraudulent activity that violates the anti-fraud provisions of the Act. *CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d 676, 687 (D. Md. 2000), *aff'd in relevant part, vacated in part sub nom. CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002); *see also In re Slusser*, CFTC No. 94-14, 1999 WL 507574, at\*12 (July 19, 1999) (respondents violated Section 4b of the Act by surreptitiously retaining money in their own bank accounts that should have been traded on behalf of customers), *aff'd in relevant part sub nom. Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000).

Foremost engaged in misappropriation in violation of Sections 4b(a)(1)(A) and (C), 4c(b), and 4o(1)(A) and (B) of the Act and Regulation 33.10(a) and (c). Foremost, by and through Miller, intentionally structured the round-turn fictitious trades to steal money from Customer A's account. Further, Miller knowingly reported false "trade errors" to Customer A's FCM for the purpose of taking winning trades out of Customer A's account to the benefit of Respondent.

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<sup>2</sup> Foremost, although not registered as a CTA, was required to comply with Section 4o of the Act. Foremost acted as a CTA, by way of Miller advising Foremost customers as to the value or advisability of trading in futures and options. *See* Section 1(a)(12) of the Act, 7 U.S.C. § 1a(12) (2018). As an IB, Foremost, however, was exempt from CTA registration because the trading advice was issued solely in connection with Miller's employment as an AP and Foremost's business as an IB. *See* Regulation 4.14(a)(3), and (6); 17 C.F.R. § 4.14(3), (6) (2019). Section 4o(1)(A) and (B) applies to all CTAs and APs of CTAs, whether registered, required to be registered, or exempted from registration. Regulation 4.15, 17 C.F.R. § 4.15 (2019); *In re R & W Technical Servs., Ltd.*, CFTC Docket No. 96-3, 1999 WL 152619, at \*25 (March 16, 1999) (finding an unregistered CTA who sold trading systems to the public violated Section 4o(1) of the Act), *aff'd in relevant part, R & W Technical Services, Ltd. v. CFTC*, 205 F.3d 165, 170 (5th Cir. 2000) (prohibiting fraud by an unregistered CTA who sold trading systems to the public); *Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981, 993-94 (7th Cir. 2000) (holding that CTAs who are not required to be registered are still subject to the prohibition on fraud in Section 6o).

<sup>3</sup> The Commission is not required, however, to prove scienter to establish a violation of Section 4o(1)(B). *In re Kolter*, CFTC No. 93-19, 1994 WL 621595, at \*7 (Nov. 8, 1994), *citing Messer v. E.F. Hutton & Co.*, 847 F.2d 673 (11th Cir. 1988).

## **2. Foremost Committed Fraud by Executing Unauthorized Trades in Customer A Accounts.**

Unauthorized trading falls within the Act's anti-fraud prohibition when trades are executed without the account owner's permission or contrary to the account owner's trading instructions. *See In re Interstate Securities Corp.*, CFTC No. 87-19, 1992 WL 121897 (June 1, 1992) (determining there was unauthorized trading when respondent placed certain trades because they were not consistent with the customer's trading goals); *Cange v. Stotler, Inc.*, 826 F.2d 581, 589 (7th Cir. 1987) ("Commodity Exchange Act prohibits the cheating or defrauding of investors, 7 U.S.C. § 6b, and the knowing and deliberate execution of unauthorized trades, even if not done out of an evil motive or intent to injure the customer, violates that prohibition."). Even when a trader is generally authorized to trade a particular contract, such authorization does not extend to trades structured to create a loss. *CFTC v. Li*, No. 15-cv-5839, 2016 WL 8256392, at \*5 (N.D. Ill. Dec. 9, 2016) (finding that while the trader was generally permitted to trade Eurodollar futures for a certain account, "she was not authorized to engage in trades which were structured to create a loss for [that account].").

Foremost, by and through Miller, engaged in unauthorized trading in violation Sections 4b(a)(1)(A) and(C), 4c(b), 4o(1)(A) and (B) of the Act, and Regulation 33.10(a) and (c). Customer A did not authorize Miller to do round-turn trades to send money out of his accounts and into Miller family accounts. Nor did Customer A authorize Miller to use his account to establish advantageous positions in Miller family accounts. Miller had a power of attorney over the accounts, but Customer A did not authorize Miller to structure trades to create a loss or a disadvantageous market position. Finally, Miller knew that the trading was structured in ways to create losses or disadvantageous positions and that Customer A had not authorized trading in this manner.

### **B. Foremost, as an IB, Traded Opposite Its Customer Without Prior Consent, in Violation of Regulation 155.4(b)(2).**

Foremost violated Regulation 155.4(b)(2), 17 C.F.R. § 155.4b(2) (2019), because the fictitious trades between Miller family accounts and Customer A were unauthorized. Regulation 155.4(b)(2) states that:

No introducing broker or any of its affiliated persons shall...[k]nowingly take, directly or indirectly, the other side of any order another person revealed to the introducing broker or any of its affiliated persons by reason of their relationship to such other person, except with such other persons's prior consent and in conformity with contract market rules approved by or certified by the Commission.

Foremost is a registered IB. Customer A never provided his prior consent to Foremost or Miller taking the other side of his orders. As a result, the unauthorized fictitious trades between Miller family accounts and Customer A violated Regulation 155.4(b)(2).

**C. Foremost Engaged in Fictitious Sales and Noncompetitive Trades in Violation of Section 4c(a)(1)-(2) of the Act and Regulation 1.38(a).**

**1. The Trades Between the Miller Family Accounts and Customer Accounts were Fictitious and Violated Section 4c(a)(1)-(2) of the Act.**

All trades orchestrated by Miller between the Miller family accounts and Customer A's accounts were fictitious in violation of Section 4c(a)(1)-(2) of the Act, 7 U.S.C. § 6c(a)(1)-(2) (2018). That section of the Act prohibits any person to enter into a transaction that "is, is of the character of, or is commonly known to the trade as, a 'wash sale' or 'accommodation trade' or is a fictitious sale." Section 4c(a)(1)-(2) of the Act. The central characteristic of the general category of fictitious sales is the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk or price competition incident to such a market. *See In re Fisher*, CFTC No. 93-2, 2004 WL 584216, at \*3 n.11 (Mar. 24, 2004); *In re Thomas Collins*, No. 94-13, 1997 WL 761927 (Dec. 10, 1997); *In re Harold Collins*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,902 (CFTC Apr. 14, 1988).

Section 4c(a)(1)-(2) of the Act broadly prohibits fictitious sales intended to avoid the risks and price competition of the open market. *See* S. Rep No. 93-1131, 93d Cong., 2d Sess. 16-17 (1974); *see also Merrill Lynch Futures, Inc. v. Kelley*, 585 F. Supp. 1245, 1251 n. 3 (S.D.N.Y. 1984) (stating Section 4c(a) was generally intended to prevent collusive trades conducted away from the pits). *See Thomas Collins*, 1997 WL 761927, at \*3; *Harold Collins*, ¶ 22,982 at 31,903. A fictitious sale is a general category that includes at a minimum the unlawful practices specifically enumerated in 4c(a)(2), as well as prearranged trading. *See Thomas Collins*, 1997 WL 761927, at \*3; *Harold Collins*, ¶ 22,982 at 31,903; *In re Gimbel*, CFTC No. 84-20, 1988 WL 232267 (Apr. 14, 1988), *aff'd as to liability*, 872 F.2d 196 (7th Cir. 1989).

In this case, Foremost, by and through Miller, knowingly made fictitious sales in the form of the trades between customer accounts and Miller family accounts. Miller knew that when he placed orders in Customer A's account, those orders would trade with orders that he had placed on the opposite side of the market belonging to a Miller family account. In the case of the round-turn fictitious trading, Miller purposefully selected markets that were relatively illiquid, typically an option contract or a futures contract in a relatively illiquid month, so that he could execute the round-turn trades smoothly. Miller executed each of these trades to avoid the risks and price competition of the open market. Accordingly, these trades constituted fictitious sales, and Foremost violated Section 4c(a)(1)-(2).

**2. The Unauthorized Trades Were Noncompetitive in Violation of Commission Regulation 1.38(a).**

Foremost's unauthorized fictitious sales also violated Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2019), which requires that all purchases and sales of commodity futures be executed "openly and competitively." "The purpose of this requirement is to ensure that all trades are executed at competitive prices and directed into a centralized marketplace to participate in the competitive determination of the price of futures contracts." *In re Absa Bank, Ltd.*, CFTC No.

14-30, 2014 WL 4793544, at \*3 (CFTC Sept. 25, 2014) (consent order). Noncompetitive trades are generally transacted in accordance with express or implied agreements or understandings between and among the traders. *Gilchrist*, 1991 WL 83518, at \*8. Noncompetitive trades are also a type of fictitious sale, because they negate the risk incidental to an open and competitive market. *Fisher*, 2004 WL 584216, at \*3 n.11. Trades can be noncompetitive even though they are executed in the pit. *In re Buckwalter*, 1991 WL 83522, at \*21 (citing *Laiken v. Dep't of Agriculture*, 345 F.2d 784, 785 (2d Cir. 1965)). Prearranged trading is a form of anti-competitive trading that violates Regulation 1.38(a). *Gimbel*, 1988 WL 232267, at \*1.

Foremost, by and through Miller, knew it was executing trades between customer accounts and Miller Family accounts. Miller knew the trades were not subject to competitive forces of the market because he knew they would trade with orders Miller had already submitted. As set forth above, such conduct negates the risk incident to the market, and therefore this trading activity violated Regulation 1.38.

**D. Foremost Failed To Supervise Miller's Handling of Accounts in Violation of Regulation 166.3.**

Foremost failed to supervise Miller's handling of accounts because both the unauthorized fictitious trades should have been detected by a diligent system and Foremost had an inadequate system relating to its investigation of error reports. Regulation 166.3, 17 C.F.R. § 166.3 (2019), states as follows:

Each Commission registrant, except an associated person who has no supervisory duties, must diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant.

Regulation 166.3 imposes on registrants an affirmative duty to supervise their partners, employees, and agents diligently by establishing, implementing, and executing adequate supervisory structures and compliance programs. "The duty to supervise . . . include[s] the broader goals of detection and deterrence of possible wrongdoing by [a registrant's] agents." *Lobb v. J.T. McKerr & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568, at 33,444 (CFTC Dec. 14, 1989). "In appropriate circumstances, a showing that the registrant lacks an adequate supervisory system can be sufficient to establish a breach of duty under Rule 166.3." *In re Thomas Collins*, CFTC No. 94-13, 1997 WL 761927, at \*10. A violation under Regulation 166.3 is an independent violation for which no underlying violation is necessary. *Id.*

A violation of Regulation 166.3 is demonstrated by showing either that: (1) the registrant's supervisory system was generally inadequate; or (2) the registrant failed to perform its supervisory duties diligently. *In re Murlas Commodities*, CFTC No. 85-29, 1995 WL



523563, at \*9 (Sept. 1, 1995); *In re GNP Commodities, Inc.*, CFTC No. 89-1, 1992 WL 201158, at \*18 (Aug. 11, 1992) (providing that, even if an adequate supervisory system is in place, Regulation 166.3 can still be violated if the supervisory system is not diligently administered), *aff'd as modified sub nom Monieson v. CFTC*, 996 F. 2d 852 (7th Cir. 1993); *In re Paragon Futures Assoc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266, at 38,850 (CFTC Apr. 1, 1992) (“The focus of any proceeding to determine whether Rule 166.3 has been violated will be on whether [a] review [has] occurred and, if it did, whether it was ‘diligent.’”); *Samson Refining Co. v. Drexel Burnham Lambert, Inc.*, CFTC No. 82-R448, at \*11 (Feb. 16, 1990) (noting that, under Regulation 166.3, an FCM has a “duty to develop procedures for the detection and deterrence of possible wrongdoing by its agents”) (internal quotation omitted). Evidence of violations that “should be detected by a diligent system of supervision, either because of the nature of the violations or because the violations have occurred repeatedly,” is probative of a failure to supervise. *In re Paragon Futures Assoc.*, Comm. Fut. L. Rep. (CCH) at ¶ 38,850.

As detailed above, Foremost had no policy of reviewing the trading in proprietary and non-customer accounts. And Foremost never reviewed Miller’s trading in accounts over which he had discretion alongside the proprietary accounts in which Miller had an interest. Any reasonable review of trading in Miller’s accounts would have revealed the repeated intentional round-turn unauthorized fictitious trades that stole money from Customer A and the other unauthorized fictitious trades with Customer A’s accounts. Further, Foremost had no written policies or procedures that covered the investigation of possible trade errors. Foremost’s only investigation of a possible trade error involved seeing if the trade made sense in the context of the accounts and believing Miller. Foremost’s compliance officer knew that some of the trade error moves would be detrimental to Customer A but implemented them anyway. This resulted in misappropriation in customer accounts.

#### **E. Foremost Is Liable for Miller’s Conduct.**

Foremost is liable for Miller’s conduct. Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2018), and Regulation 1.2, 17 C.F.R. § 1.2 (2019), provide that “[t]he act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust.” Pursuant to Section 2(a)(1)(B) of the Act and Commission Regulation 1.2, strict liability is imposed on principals for the actions of their agents. *See, e.g., Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986); *Dohmen-Ramirez v. CFTC*, 837 F.2d 847, 857-58 (9th Cir. 1988); *CFTC v. Byrnes*, 58 F. Supp. 3d 319, 324 (S.D.N.Y. 2014).

Miller, an employee of Foremost, engaged in the conduct described herein within the course and scope of his employment with Foremost; therefore, pursuant to Section 2(a)(1)(B) of the Act and Regulation 1.2, Foremost is liable for the acts, omissions, and failures of Miller in violation of the provisions of the Act and Regulations cited above.

#### IV.

#### FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, Respondent violated Sections 4b(a)(1)(A) and (C), 4c(a)(1)-(2), 4c(b), and 4o(1)(A) and (B) of the Act, 7 U.S.C. §§ 6b(1)(A), (C); 6c(a)(1)-(2); 6c(b); 6o(1)(A), (B) (2018), and Regulations 1.38(a), 33.10(a) and (c), 155.4(b)(2), and 166.3, 17 C.F.R. 1.38(a); 33.10(a), (c); 155.4(b)(2) 166.3 (2019).

#### V.

#### OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it, without admitting or denying the findings and conclusions herein:

- A. Acknowledges service of this Order;
- B. Admits 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. Waives:
  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 it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2018), and 28 U.S.C. § 2412 (2018), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2019), relating to, or arising from, this proceeding;
  7. Any and all claims that it 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 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. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent 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 Respondent violated Sections 4b(a)(1)(A) and (C), 4c(a)(1)-(2), 4c(b), and 4o(1)(A) and (B) of the Act, 7 U.S.C. §§ 6b(1)(A), (C); 6c(a)(1)-(2); 6c(b); 6o(1)(A), (B) (2018), and Regulations 1.38(a), 33.10(a) and (c), 155.4(b)(2), and 166.3, 17 C.F.R. 1.38(a); 33.10(a), (c); 155.4(b)(2); 166.3 (2019);
  2. Orders Respondent to cease and desist from violating Sections 4b(a)(1)(A) and (C), 4c(a)(1)-(2), 4c(b), and 4o(1)(A) and (B) of the Act, and Regulations 1.38(a), 33.10(a) and (c), 155.4(b)(2), 166.3;
  3. Orders Respondent to pay restitution in the amount of seven hundred and twenty three thousand and thirteen dollars (\$723,013), plus post-judgment interest; provided, however, that the restitution will be offset by any restitution payment made by Miller or any restitution payment made pursuant to the CME’s settlement announced on July 2, 2020 (“CME Settlement”);
  4. Orders Respondent to pay a civil monetary penalty in the amount of two hundred thousand dollars (\$200,000) (“CMP Obligation”), plus post-judgment interest;
  5. Appoints the National Futures Association (“NFA”) as Monitor in this matter;
  6. Orders Respondent and its 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. Respondent and its successors and assigns, shall cease and desist from violating Sections 4b(a)(1)(A) and(C), 4c(a)(1)-(2), 4c(b), and 4o(1)(A) and (B) of the Act, 7 U.S.C. §§ 6b(1)(A), (C); 6c(a)(1)-(2); 6c(b); 6o(1)(A), (B) (2018), and Regulations 1.38(a), 33.10(a) and (c), 155.4(b)(2), and 166.3, 17 C.F.R. 1.38(a); 33.10(a), (c), 155.4(b)(2); 166.3 (2019).

- B. Respondent shall pay restitution in the amount of seven hundred and twenty three thousand and thirteen dollars (\$723,013) (“Restitution Obligation”), jointly and severally with Miller, who is a Respondent in a separate Commission Order also to be issued today and is ordered therein to pay the same amount of restitution, also on a joint and several basis. Foremost shall receive a dollar for dollar credit for any payments made by Miller. If the Restitution Obligation is not paid immediately, then post-judgment interest shall accrue on the Restitution 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 (2018).

The Restitution Obligation will be offset by the amount of any restitution payment made pursuant to the CME Settlement. Respondent shall offer proof of any payment pursuant to the CME Settlement, including the amount the amount by which the Restitution Obligation is to be reduced, within ten days of making such a payment to:

Charles Marvine  
Deputy Director, Division of Enforcement  
Commodity Futures Trading Commission  
4900 Main Street, Suite 500  
Kansas City, MO 64112

To effect payment by Respondent and the distribution of restitution to Respondent’s customers, the Commission appoints the NFA as “Monitor.” The Monitor shall receive payments of the Restitution Obligation and any post-judgment interest from Respondent 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.

Respondent shall make its payments of the Restitution Obligation and any post-judgment interest under this Order in the name of the “Foremost and Mark Miller 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 Respondent and the name and docket number of this proceeding. Respondent 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.

The Monitor shall oversee Respondent’s Restitution Obligation and shall have the discretion to determine the manner of distribution of funds in an equitable fashion to Respondent’s customers or may defer distribution until such time as the Monitor may deem appropriate. In the event that the amount of payments of the Restitution 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 Respondent's Restitution Obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth in this Order.

- C. Respondent shall pay a civil monetary penalty in the amount of two hundred thousand dollars (\$200,000). If the CMP Obligation is not paid immediately, then post-judgment interest shall accrue on the CMP 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 (2018).
- D. Respondent shall satisfy its CMP Obligation by making payment in full within one year of the entry of this Order. Payments shall be deemed made on the date they are received by the Commission. Post-judgment interest will be waived for any amounts paid in compliance with the above deadline.

Respondent shall pay its 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  
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, Respondent shall contact Marie Thorne or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligations with a cover letter that identifies Respondent and the name and docket number of this proceeding. Respondent 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.

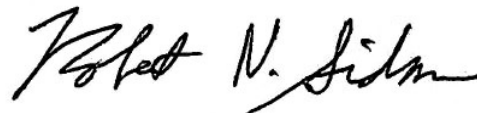
- E. Additionally, Respondent, and its successors and assigns, shall comply with the following conditions and undertakings set forth in the Offer:
  - 1. Public Statements: Respondent agrees that neither it nor any of its successors and assigns, or agents or employees under its authority or control, 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 Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondent and its successors and assigns shall comply with this agreement, and shall undertake all steps necessary to ensure that all of its agents and/or employees under its authority or control understand and comply with this agreement.

2. Cooperation with Monitor: Respondent shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify Respondent's customers, whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any restitution payments. Respondent shall execute any documents necessary to release funds that they in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment toward the Restitution Obligation.
- F. **Partial Satisfaction**: Respondent understands and agrees that any acceptance by the Commission or the Monitor of any partial payment of Respondent's Restitution Obligation or Respondent's CMP Obligation shall not be deemed a waiver of its 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.
- G. **Change of Address/Phone**: Until such time as Respondent satisfies in full its Restitution Obligation and CMP Obligation as set forth in this Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten calendar days of the change.

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

By the Commission



Robert N. Sidman  
Deputy Secretary of the Commission  
Commodity Futures Trading Commission

Dated: July 6, 2020