

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT ILLINOIS

_____	)	
U.S. Commodity Futures Trading	)	
Commission,	)	
	)	Case No. 1:13-cv-02919
Plaintiff,	)	
	)	
v.	)	
	)	
TUNNEY & ASSOCIATES, P.C. & MICHAEL	)	
TUNNEY,	)	
	)	
Defendants.	)	
_____	)	

**CONSENT ORDER FOR PERMANENT INJUNCTION, CIVIL MONETARY PENALTY AND  
OTHER EQUITABLE RELIEF AGAINST TUNNEY & ASSOCIATES, P.C. &  
MICHAEL TUNNEY**

**I. INTRODUCTION**

On April 18, 2013, Plaintiff Commodity Futures Trading Commission (“Commission” or “CFTC”) filed a Complaint against Defendants Tunney & Associates, P.C. (“T&A”) and Michael Tunney (“Tunney”) (collectively, “Defendants”) seeking injunctive and other equitable relief, as well as the imposition of civil penalties, for violations of the Commission’s Regulations, 17 C.F.R. §§ 1.1 *et seq.* (2013).

**II. CONSENTS AND AGREEMENTS**

To effect settlement of all charges alleged in the Complaint against Defendants T&A and Tunney without a trial on the merits or any further judicial proceedings, Defendants T&A and Tunney:

1. Consent to the entry of this Consent Order for Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief Against Defendants Tunney & Associates, P.C. and Michael Tunney (“Consent Order”);

2. Affirm that they have read and agreed to this 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 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 of the Act, 7 U.S.C. § 13a-1 (2012);

5. Admit the jurisdiction of the Commission over the conduct and transactions at issue in this action pursuant to the Act, 7 U.S.C. §§ 1, *et seq.*;

6. Admit that venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2012);

7. Waive:

(a) any and all claims that they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2013), 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, §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), 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 Consent Order; and

(d) any and all rights of appeal from this action;

8. Consent to the continued jurisdiction of this Court over them for the purpose of implementing and enforcing the terms and conditions of this Consent Order and for any other purpose relevant to this action, even if Defendants now or in the future reside outside the jurisdiction of this Court;

9. Agree that they will not oppose enforcement of this Consent Order by alleging that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure and waive any objection based thereon;

10. 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 Consent Order, or creating or tending to create the impression that the Complaint and/or this 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 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; and

11. Admit to all of the findings made in this Consent Order. Further, Defendants agree and intend that all of the Findings of Fact and Conclusions of Law contained in this Consent Order shall be taken as true and correct and be given preclusive effect, without further proof, in the course of: (a) any current or subsequent bankruptcy proceeding filed by, on behalf of, or against Defendants; (b) any proceeding pursuant to Section 8a of the Act, 7 U.S.C. § 12a (2012),

and/or Part 3 of the Regulations, 17 C.F.R. §§ 3.1 *et seq.* (2013); and/or (c) any proceeding to enforce the terms of this Consent Order.

12. Agree to provide immediate notice to this Court and the Commission by certified mail, in the manner required by paragraph 49 of Part VI of this Consent Order, of any bankruptcy proceeding filed by, on behalf of, or against them, whether inside or outside the United States, and

13. Agree that no provision of this 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.

### III. FINDINGS AND CONCLUSIONS

The Court, being fully advised in the premises, finds that there is good cause for the entry of this Consent Order and that there is no just reason for delay. The Court therefore directs the entry of the following Findings of Fact, Conclusions of Law, permanent injunction and equitable relief pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), as set forth herein.

#### THE PARTIES AGREE AND THE COURT HEREBY FINDS:

##### A. Findings of Fact

###### 1. The Parties To This Consent Order

14. Plaintiff Commodity Futures Trading Commission is an independent federal regulatory agency that is charged by Congress with administering and enforcing the Act, 7 U.S.C. §§ 1 *et seq.* (2012), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2013).

15. Defendant **Tunney & Associates, P.C.** is an accounting firm with two locations in Orland Park, Illinois and Hammond, Indiana. T&A was established in 2000 and the company is licensed as a certified public accountant (“CPA”). T&A’s business primarily focuses on

bookkeeping services and tax services. T&A employs six individuals other than Tunney. One other T&A employee holds a CPA license, but Tunney is T&A's only auditor. T&A has never been registered with the Commission in any capacity.

16. Defendant **Michael Tunney** resides in Orland Park, IL. Tunney obtained his CPA license in 1990 and he currently maintains CPA licenses in Illinois and Indiana. Tunney is and was at all times relevant T&A's sole owner responsible for all facets of T&A's operations. Tunney has never been registered with the Commission in any capacity.

**2. A Futures Commission Merchant Retained Defendants to Conduct Yearly Audits and Certify its Financial Results**

17. The Linn Group, Inc. ("TLG"), a brokerage house registered with the Commission as a Futures Commission Merchant ("FCM"), was at all times relevant engaged in the business of receiving money, securities and other property ("funds") from their customers to margin, guarantee, or secure the customers' futures and options trades. To comply with the Regulations, TLG engaged a CPA to conduct yearly audits and certify its financial statements. TLG terminated the services of its prior CPA as of at least December 31, 2007, and retained T&A at or around the same time. After TLG retained T&A, no one at T&A contacted the company's prior auditor to discuss TLG, as required under Generally Accepted Auditing Standards ("GAAS").

18. T&A learned about TLG's interest in its services through Tunney's friend Mr. Y. Mr. Y had previously done work for TLG and TLG's prior auditor, but did not work for T&A, nor did he hold a CPA license.

19. Mr. Y and Tunney agreed that if T&A received the TLG engagement, Mr. Y would perform the majority of the work on the audits in exchange for receiving 70% of T&A's \$18,000 fee from TLG. No one at T&A did anything to assess or ensure Mr. Y's independence before agreeing to allow Mr. Y to perform the majority of the work on TLG's audits on behalf of T&A.

20. Tunney agreed to the arrangement with Mr. Y, in part because Tunney felt that neither T&A nor Tunney was qualified to conduct audits of TLG on their own. Prior to 2008, no one at T&A, including Tunney, had provided audit services to any CFTC registrant for at least the preceding twenty years. In addition, no one at T&A, including Tunney, had provided audit services to any other FCM or entity required to hold segregated accounts for customers. Tunney had no understanding of CFTC Regulations at the time T&A conducted the 2007 through 2010 audits. During that period, Tunney was unfamiliar with the CFTC Regulations related to customer secured and segregated funds, and he did not understand the net capital requirements or net capital computations for an FCM.

21. Tunney failed to take any meaningful steps to educate himself about the CFTC Regulations or risks associated with FCM businesses until he began preparing for TLG's 2011 audit.

22. Mr. Y performed over approximately 90% of the work on TLG's 2007 through 2010 audits, including all fieldwork procedures. Tunney relied on Mr. Y and did not review certain portions of Mr. Y's audits, including areas related to customer secured and segregated accounts and the firm's net capital requirements.

23. Tunney performed TLG's 2011 audit alone because Mr. Y had passed away. Tunney had concerns about conducting the audit without Mr. Y's assistance, but he did not express those concerns to TLG.

### **3. Deficiencies with T&A's Audits**

24. T&A certified TLG's 2007 through 2011 year-end statements and did not indicate any limitations in the audits or that they could not be completed in accordance with GAAS. However, T&A's 2007 through 2010 audits were deficient in several respects and violated GAAS and CFTC Regulation 1.16. Specifically, T&A and Tunney did not have the requisite technical training and proficiency to audit an FCM as required by GAAS General Standard No. 1. Similarly, T&A and Tunney failed to obtain a sufficient understanding of TLG's business, risks, and internal controls to assess the risk of material misstatement of the financial statements as required by Standard of Fieldwork No. 2.

25. T&A and Tunney also did not exercise due professional care as required by GAAS General Standard No. 3. Specifically, Tunney did not possess the level of knowledge, skill and ability necessary to evaluate the audit evidence obtained by Mr. Y as related to material, critical audit areas such as the computation of minimum capital requirements and customer segregation requirements. Tunney also did not conduct any planning procedures, material fieldwork and, he did not review Mr. Y's work to any meaningful degree as required by GAAS General Standard No. 3 and GAAS Standard of Fieldwork No. 1 for the 2007 through 2010 audits.

26. For the 2011 audit, Tunney's audit plan failed to include audit procedures designed to test applicable accounts and assertions of TLG, including the accounting system, internal controls, and procedures for safeguarding customer and firm assets. Tunney further failed to achieve the primary objectives of the audit plan by failing to test assertions the procedures were designed to test as required by GAAS General Standard No. 3 and Standard of Fieldwork No. 1.

T&A and Tunney also failed to obtain sufficient appropriate audit evidence and to maintain work-papers and audit documentation as required by Standard of Fieldwork No. 3.

27. T&A's audits also violated CFTC Regulation 1.16. First, Defendants could not establish that their audits addressed the risks particular to an FCM client, or included appropriate tests of TLG's accounting system, internal accounting controls, and procedures for safeguarding customer and firm assets. For example, Defendants failed to demonstrate that T&A's audits evaluated TLG's daily or monthly net capital computations or the daily computations to determine the amount of funds that should be held in secured or segregated accounts. In addition, the scopes of T&A's audits for the years 2007 through 2011 were insufficient to provide reasonable assurance that any material inadequacies existing at the date of the examination would be discovered. Finally, T&A also could not show that it obtained appropriate audit evidence, which precluded the auditor's ability to opine on, among other things, the company's internal controls, statement of computation of the minimum capital requirements and daily computations of segregation and secured amount requirements. For example, Defendants did not establish that T&A's audits confirmed any customer account balances and Tunney relied on insufficient evidence provided by TLG to reach his opinions.

28. During the time T&A served as TLG's CPA, TLG engaged in a number of compliance violations of the Act and Regulations that could have been discovered and/or prevented by a GAAS compliant audit that included review of, among other things, the company's internal controls. For example, TLG deposited and held non-customer and proprietary funds in a customer omnibus trading account from 2007 to 2011 in violation of the Regulations. TLG also failed to timely obtain customer segregation and secured acknowledgement letters from banks for at least nine bank accounts containing TLG's customers' funds between November 2007 and June 2012 as CFTC Regulations require.



Moreover, T&A's audits should have discovered that TLG's then-CFO did not understand the applicable requirements under the Act and Regulations for which he had responsibility to ensure compliance.

#### **4. Notice of Material Inadequacies**

29. For TLG's 2007 year-end certified statement dated March 25, 2008, T&A found "a matter involving the internal control structure including procedures for safeguarding customer and firm assets that we consider to be material weaknesses" related to a deficiency in the secured amount of customer funds held in a 30.7 account.

30. Under the Regulations, TLG was required to submit facsimile notice of the material inadequacy to the CFTC within twenty-four (24) hours, and within forty-eight hours after providing such notice to file a written report reflecting what steps have been taken to correct the material inadequacy. Instead, TLG submitted notice to the CFTC of that material inadequacy on April 11, 2008. Although required by CFTC Regulation 1.16(e)(2), no one at T&A notified the CFTC of the material inadequacy at any time.

31. For TLG's 2010 year-end certified statement dated March 28, 2011, T&A identified another material inadequacy in that "the firm accounting procedures were inadequate as they did not provide for the proper payable to customers on the firms [sic] balance sheet."

32. TLG only provided written notification of the material inadequacy to the Commission on August 31, 2011. No one at T&A notified the CFTC of the material inadequacy at any time.

### **B. Conclusions of Law**

#### **1. Jurisdiction and Venue**

33. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), which provides that whenever it shall appear to the Commission that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of

any provision of the Act or any rule, regulation, or order promulgated thereunder, the Commission may bring an action in the proper district court of the United States against such person to enjoin such act or practice, or to enforce compliance with the Act, or any rule, regulation or order thereunder.

34. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2012), because Defendants reside in this jurisdiction and the acts and practices in violation of the Act occurred within this District.

## **2. Failure to Conduct Audits in Accordance with GAAS and the Regulations**

35. By the conduct described in paragraphs 1 through 32 above, Defendants failed to conduct audits in accordance with GAAS and the Regulations, by among other things: (i) failing to ensure that T&A and Tunney had the proper technical training and proficiency to conduct an audit of an FCM; (ii) failing to appropriately plan, perform, and supervise the audits; (iii) failing to exercise due professional care in the performance of the audits; and (iv) failing to obtain and maintain sufficient audit evidence in violation of Regulation 1.16(d)(1), 17 C.F.R. § 1.16(d)(1) (2013).

36. Tunney controlled T&A, directly or indirectly, and did not act in good faith or knowingly induced, directly or indirectly, T&A's act or acts in violation of the Regulations; therefore, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2012), Tunney is liable for T&A's violations of Regulation 1.16(d)(1), 17 C.F.R. § 1.16(d)(1) (2013).

37. The foregoing acts, omissions, and failures of Tunney occurred within the scope of his employment, office, or agency with T&A; therefore, 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 (2013), T&A is liable for Tunney's acts, omissions, and failures in violation of Regulation 1.16(d)(1), 17 C.F.R. § 1.16(d)(1) (2013).

38. Unless restrained and enjoined by this Court, there is a reasonable likelihood that the Defendants will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of the Regulations.

### **3. Failure to Report Material Inadequacies**

39. By the conduct described in paragraphs 1 through 32 above, Defendants failed to notify the Commission of material inadequacies T&A identified in certified financial statements dated March 2008 and March 2011 in violation of Regulation 1.16(e)(2), 17 C.F.R. § 1.16(e)(2) (2013).

40. Tunney controlled T&A, directly or indirectly, and did not act in good faith or knowingly induced, directly or indirectly, T&A's act or acts in violation of the Regulations; therefore, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2012), Tunney is liable for T&A's violations of Regulation 1.16(e)(2), 17 C.F.R. § 1.16(e)(2) (2013).

41. The foregoing acts, omissions, and failures of Tunney occurred within the scope of his employment, office, or agency with T&A; therefore, 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 (2013), T&A is liable for Tunney's acts, omissions, and failures in violation of Regulation 1.16(e)(2), 17 C.F.R. § 1.16(e)(2) (2013).

42. Unless restrained and enjoined by this Court, there is a reasonable likelihood that the Defendants will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of the Regulations.

#### **IV. PERMANENT INJUNCTION**

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

43. Based upon and in connection with the foregoing conduct, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), Defendants T&A and Tunney are permanently restrained, enjoined and prohibited from directly or indirectly:

- a. Conducting audits in violation of GAAS or the Regulations, in violation of Regulation 1.16(d)(1), 17 C.F.R. § 1.16(d)(1) (2013).
- b. Failing to report material inadequacies to the Commission when required to do so, in violation of Regulation 1.16(e)(2), 17 C.F.R. § 1.16(e)(2) (2013).

44. Defendants are also permanently restrained, enjoined and prohibited from directly or indirectly appearing or practicing before the Commission pursuant to Part 14 of the Regulations, 17 C.F.R. §§ 14.1 *et seq.* (2013).

#### **V. CIVIL MONETARY PENALTY**

45. Defendants T&A and Tunney shall, jointly and severally, pay a civil monetary penalty in the amount of one hundred thousand dollars \$100,000 (“CMP Obligation”), plus post-judgment interest. If the CMP Obligation is not paid in full within ten (10) days of the date of entry of this Consent Order, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Consent Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Consent Order pursuant to 28 U.S.C. § 1961 (2006).

46. Defendants shall pay their CMP 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:

Commodity Futures Trading Commission  
Division of Enforcement  
ATTN: Accounts Receivables – AMZ 340  
E-mail Box: 9-AMC-AMZ-AR-CFTC  
DOT/FAA/MMAC  
6500 S. MacArthur Blvd.  
Oklahoma City, OK 73169  
Telephone: (405) 954-7262

If payment by electronic funds transfer is chosen, Defendants shall contact Nikki Gibson or her successor at the address above to receive payment instructions and shall fully comply with those instructions. Defendants shall accompany payment of the CMP 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.

**A. Provisions Related to Monetary Sanctions**

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

**B. Cooperation**

48. Defendants shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, and any other governmental agency in this action, and in any investigation, civil litigation, or administrative matter related to the subject matter of this action or any current or future Commission investigation related thereto.

## VI. MISCELLANEOUS PROVISIONS

49. Notice: All notices required to be given by any provision in this Consent Order shall be sent certified mail, return receipt requested, as follows:

Notice to Commission:

Rosemary Hollinger  
Deputy Director  
525 West Monroe, Suite 1100  
Chicago, Illinois 60661

Notice to Defendants T&A and Tunney:

C/O Thomas F. Falkenberg  
Williams Montgomery & John  
233 South Wacker Drive, Suite 6100  
Chicago, Illinois 60606

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

50. Change of Address/Phone: Until such time as Defendants satisfy in full their CMP Obligation as set forth in this Consent Order, Defendants shall provide written notice to the Commission by certified mail of any change to their telephone number(s) and mailing address within ten (10) calendar days of the change.

51. Entire Agreement and Amendments: This 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 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.

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

53. **Waiver:** The failure of any party to this Consent Order at any time to require performance of any provision of this Consent Order shall in no manner affect the right of the party at a later time to enforce the same or any other provision of this Consent Order. No waiver in one or more instances of the breach of any provision contained in this 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 Consent Order.

54. **Continuing Jurisdiction of this Court:** This Court shall retain jurisdiction of this action to ensure compliance with this Consent Order and for all other purposes related to this action, including any motion by Defendants to modify or for relief from the terms of this Consent Order.

55. **Injunctive and Equitable Relief Provisions:** The injunctive and equitable relief provisions of this Consent Order shall be binding upon Defendants, upon any person under their authority or control, and upon any person who receives actual notice of this Consent Order, by personal service, e-mail, facsimile or otherwise insofar as he or she is acting in active concert or participation with Defendants.

56. **Authority:** T&A hereby warrants that this Consent Order has been duly authorized by T&A and that Tunney has been duly empowered to sign and submit this Consent Order on behalf of T&A

57. **Counterparts and Facsimile Execution:** This 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 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 Consent Order.

58. Defendants understand that the terms of the Consent Order are enforceable through contempt proceedings, and that, in any such proceedings they may not challenge the validity of this Consent Order.

There being no just reason for delay, the Clerk of the Court is hereby directed to enter this *Consent Order for Permanent Injunction, Civil Monetary Penalty, and Other Equitable Relief Against Tunney & Associates, P.C. & Michael Tunney.*

**IT IS SO ORDERED** on this 28<sup>th</sup> day of April, 2014.

  
SHARON JOHNSON COLEMAN



CONSENTED TO AND APPROVED BY:

\_\_\_\_\_  
**Michael Tunney**

Date:

\_\_\_\_\_  
**Michael Tunney, Principal, Tunney & Associates, P.C.**

Date:

Approved as to form:

\_\_\_\_\_  
Thomas Falkenberg  
*Attorney for Tunney & Associates, P.C. and Michael Tunney*  
Williams Montgomery & John  
233 South Wacker Drive, Suite 6100  
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Date:

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Date: