

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

DAREN L. PALMER and TRIGON GROUP,
INC.,

Defendants.

CIVIL ACTION NO.: 1:09-cv-00076-EJL

**MEMORANDUM IN SUPPORT OF
MOTION TO SHOW CAUSE AS TO
DEFENDANT DAREN L. PALMER**

I.

INTRODUCTION

Plaintiff Commodity Futures Trading Commission (“Commission”) and Court-Appointed Receiver Wayne Klein (“Receiver”) submit this memorandum of law in support of their Joint Motion To Show Cause (“Show Cause Motion”) as to Daren L. Palmer (“Palmer”) as founder and agent of Trigon Group, Inc. (“Trigon”). The Show Cause Motion requests that this Court require Defendant Palmer to show cause why he is not in contempt of the Court’s February 26, 2009 Ex-Parte Statutory Restraining Order To Freeze Assets, Preserve Books and Records, Authorize Expedited Discovery and Appoint a Temporary Receiver (“SRO”) [Docket Entry “D.E.” # 5], and why the Court should not issue an order of contempt, immediate compliance and sanctions against Palmer.

As more fully described below, after being served with the SRO, Defendant Palmer has continued to engage in a game of deception and concealment with the Commission and Receiver. Similar to his conduct prior to the entry of the SRO, Palmer has violated the asset freeze

provisions of the SRO by pledging, assigning, encumbering, and/or transferring assets of the Defendants for his personal benefit. While under oath or otherwise, Palmer has concealed assets and documents of the Defendant Trigon. In addition to withholding material information from the Commission and Receiver, Palmer has failed to provide the accounting required under Part III of the SRO.

The Commission and Receiver believe that absent the relief requested in their Motion, Palmer will continue concealing and/or disposing of assets and documents and will continue to violate the SRO's cooperation provisions.

II.

THE STATUTORY RESTRAINING ORDER

On February 26, 2009, this Court issued an SRO pursuant to Section 6c of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 13a-1. On May 28, 2009, the Court entered a Consent Order of Preliminary Injunction, which, among other things, continued the full force and effect of the SRO pending further order of the Court. D.E. #14. Defendant Palmer was served with the SRO through his attorney, Mitchell Barker, who accepted service on Palmer's behalf on March 5, 2009. See Exhibit ("Ex.") A, Email from Mitchell Barker to Alison Wilson. As a named Defendant, Palmer is subject to the SRO and is required to comply with the SRO.

A. PROVISIONS OF THE SRO THAT WERE VIOLATED

1. Part I: Asset Freeze

In addition to freezing certain assets of the defendants, Part I of the SRO specifically provides that each Defendant is prohibited from directly or indirectly:

transferring, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, dissipating, converting, withdrawing, or otherwise

disposing of any assets, wherever located, including assets held by or on behalf of the defendants within or outside the United States, and including both existing assets and assets acquired after the effective date of this Order.¹

2. Part III: Mandatory Accounting

To ensure the enforceability of the freeze on the Defendants' assets, Part III of the SRO mandates that within thirty business days following service of the order, defendants are to provide the Commission and the Receiver a full accounting of all funds, documents, and assets both within and outside of the United States that are held by them, for their benefit, or under their direct or indirect control; transfer such funds, documents, and assets to the United States; provide the Commission and the Receiver access to all records of the Defendants held by financial institutions located both within and outside the United States; and provide the Commission and Receiver with a complete customer list, including, without limitation, the names, addresses and telephone numbers of all persons who transferred funds to the Defendants from January 1, 1997 to the present.

3. Part IV: Cooperation with the Receiver

Part IV of the SRO sets forth provisions relating to the appointment of the Receiver.

Section C of Part IV of the SRO provides that upon service of the SRO, the Defendants and any other person or entity served with a copy of the SRO, shall immediately or within such time as permitted by the Receiver in writing, deliver over to the Receiver:

- a. Possession and custody of all funds, property, and other assets, owned beneficially or otherwise, wherever situated, of the Defendants, including but not limited to

Pursuant to the terms of the SRO, "assets" means any legal or equitable interest in, right to, or claim to, any real or personal property, including but not limited to: chattels, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts including bank accounts and accounts at financial institutions, credits, receivables, lines of credit, contracts including spot and futures contracts, insurance policies, and all cash, wherever located.

those of Trigon, Inc., Blackrock Limited, LLC, Palmer Trading and Investments, LLC, and Pinnacle Company, LLC;

- b. Possession and custody of documents of the Defendants, including but not limited to, all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), client lists, title documents and other papers;
- c. Possession and custody of all precious metals, other commodities, funds, and other assets being held by or on behalf of the Defendants or on behalf of the Defendants' customers, clients, pool participants or investors;
- d. All keys, computer passwords, entry codes, and combinations to locks necessary to gain or to secure access to any of the assets or documents of the Defendants, including but not limited to, access to the Defendants' residential and business premises, means of communication, accounts, computer systems, or other property; and
- e. Information identifying the accounts, employees, properties or other assets or obligations of the Defendants.

Section D of Part IV of the SRO provides that:

The Defendants and all other persons or entities served with a copy of this order shall cooperate fully with and assist the Receiver. This cooperation and assistance shall include, but not be limited to, providing any information to the Receiver that the Receiver deems necessary to exercising the authority...

B. PALMER IS REQUIRED TO COMPLY WITH THE SRO

The SRO provides that "Defendants" means:

Daren L. Palmer and Trigon Group, Inc. and for all parties includes any person insofar as he or she is acting in the capacity of an officer, agent, servant, employee, or attorney of the Defendants, and any person who receives actual notice of this Order by personal service or otherwise insofar as he or she is acting in concert or participation with Defendants.

Palmer, a founder who was "in control of" Trigon Group, Inc., was served with the SRO through his attorney Mitchell Barker, who accepted service on his behalf on March 5, 2009. See Ex. A; Ex. B, Deposition of Daren Palmer 12:7-9. Despite being served with the Order and clearly having knowledge of the Order, Palmer has violated the asset freeze provisions of the SRO by

pledging, assigning, encumbering, and/or transferring assets of the Defendants for his personal benefit. While under oath or otherwise, Palmer has concealed assets and documents of the Defendant, Trigon. In addition to withholding material information from the Commission and Receiver, Palmer has failed to provide the accounting required under Part III of the SRO. Palmer is a named Defendant and is therefore subject to the SRO and required to comply with the SRO.

III.

VIOLATIONS OF THE SRO

A. VIOLATIONS OF DEFENDANT PALMER

Defendant Palmer has violated Parts I, III, and IV of the SRO. Palmer has violated Part I of the SRO by transferring and concealing assets of Defendant Trigon, obtaining a loan using one of the aforementioned Trigon assets as collateral, and redeeming shares in a real estate investment trust (“REIT”) account started with investor funds. Palmer also has violated Part I of the SRO by concealing and potentially disposing of various physical assets purchased with Trigon assets. Palmer has violated Part III of the SRO by failing to provide to the Commission or the Receiver the required accounting of all assets wherever located, failing to provide the Commission and Receiver a full customer list, and failing to repatriate all assets of the Defendants to the United States. Palmer has violated Part IV of the SRO by concealing and/or withholding material information and documents from the Receiver and for his general lack of cooperation with the Receiver.

1. Palmer Has Concealed and Transferred a Trigon Asset (Southstone Property)

Between 2000 and February of 2008, Palmer did business with a Boise company, Sight & Sound, Inc. (“Sight & Sound”), for various audio/visual projects for himself and family

members, including the design, purchase, and installation of a customized audio-video system to be located in the mansion Palmer was constructing at 330 Sheffield Circle, Idaho Falls, Idaho. Ex. C, Deposition of Shari Lewis 18:16-20; 21:18-22:7; 23:5-25:1; 25:7-11; 96:11-16. At the time Palmer contracted with Sight & Sound, Palmer's only source of compensation was Trigon investor funds. Ex. B at 11:14-13:3, 18:14-21, 118:2-24. From December 6, 2004, until February 12, 2008, Palmer paid Sight & Sound approximately \$450,000 for its services and products including the customized audio-video system, which was never completed. Ex. C at 18:16-20; 25:7-11; 28:19-29, 96:11-16 and Lewis Deposition Exs. 5, 14 attached as Ex. C. Palmer compensated Sight & Sound for its services with funds from both Palmer and Trigon's bank accounts. Id.

In the late December 2008 to early January 2009 timeframe, Palmer contacted the owners of Sight & Sound, William Lewis and Shari Lewis, regarding a refund of the unused funds paid towards the design and installation of the audio-video system. Ex. C at 28:19 – 29:8; 32:17-33:5. Rather than issue a cash payout of unused funds, Shari Lewis suggested on or about March 9, 2009, that Palmer accept a commercial lot owned by the Lewis Family Properties, LLC ("Lewis Family Properties") located at 2670 South Eagle Road, Meridian, ID ("Southstone property"). Ex. C at 39:21 – 40:15; Deposition Ex. 7 at 4 (attached as Ex. C). Palmer agreed to accept the property as payment, but in a move seemingly designed to hide this transaction from the Receiver, Palmer requested that the Lewis Family Properties transfer the property to Resource Solutions, LLC ("Resource Solutions"), an entity owned and controlled by Stanley Mills ("Mills"), a friend of Palmer. Ex. C at 54:12-18, 55:20-25.

Palmer confided in Mills that he was having financial difficulties during the fall of 2008, which led Mills to lend Palmer \$68,000. Ex. D, Mills Deposition at 10:15-11:5. Palmer

approached Mills in February/March 2009 and asked him to accept the transfer of the Southstone property as security for repayment of the loan. Id. at 35:1-36:15. Palmer told Mills that the property could be sold easily to recoup his money. Concerned about Palmer's recent legal difficulties, Mills questioned Palmer as to whether the property was involved with his business [Trigon] and Palmer assured him that the property was repayment that was owed to him personally from Sight & Sound. Id. Mills agreed that Palmer should arrange for the transfer of the Southstone property to Mills' member-managed limited liability company, Resource Solutions, LLC ("Resource Solutions"). Mills believed that Palmer would work to sell the property quickly within the next eight to ten months so that Mills could get his loan repaid. Id. 46:4-47:2.

Although the Lewis Family Properties was asked by Palmer to transfer the Southstone property to Mills' entity, Resource Solutions, Shari Lewis communicated extensively with Palmer regarding the transfer. Shari Lewis, as the office staff for Sight & Sound, required Palmer to communicate with her regarding the legal implications of the transfer. Ex. C at 34:19-25. She also required Palmer to sign a release authorizing the transfer of property to Resource Solutions. Palmer agreed and signed a release that states:

I am writing to notify all parties that I accept the quit claim deed from Sight and Sound by Design, an Idaho Company as proposed and agreed upon in our discussions. In doing so, this will satisfy any and all returns to Daren and Michelle Palmer.

The quit claim will be made to Resource Solutions, LLC, an Idaho company as per given instructions.

This act will exempt Sight and Sound by Design from any other claim for refund pertaining to the transactions between them and the Palmer's and any parties related thereto.

Ex. C at Ex. 7 at 1. In addition to Palmer's release, Shari Lewis asked that Michelle Palmer,

Daren Palmer's wife, sign a release as well. Shari Lewis received a release purporting to be from Michelle Palmer that stated that: "This act will exempt me from any other claim pertaining to the transaction between Sight and Sound, Inc. and Resource Solutions and any parties related thereto." *Id.* at 2. Michelle Palmer is not responsible for the production of this release or the signature on it. Ex. E, Michelle Palmer Declaration at 2.

Mills' involvement with the transfer was minimal; his only contact with Sight & Sound was *via* email. Ex. D at 40:20-41:2. Lewis Family Properties issued a quitclaim deed on May 4, 2009, for the Southstone property. Ex. C at Ex. 7 at 5-12. Mills did not attend the closing, nor did he receive a copy of the deed. Ex. D at 102:17-103:4.

From the testimony and facts provided above, it is apparent that Palmer, not Mills, arranged for the transfer of the Southstone property from Lewis Family Properties to Resource Solutions, subsequent to this Court's SRO, to satisfy an outstanding debt to Trigon in a manner designed to hide this transaction from the Receiver. Although this transfer occurred a little over a week before Daren Palmer's deposition, Palmer claimed falsely during his deposition that he had no other assets in which he held a beneficial interest or any other land holdings other than those outlined by attorneys for the SEC and the Commission. Ex. B at 68:18-20; 116:17-18. Palmer also claimed falsely that he had not transferred any other assets, than those outlined by attorneys for the SEC and the Commission, since February 26, 2009. Ex. B at 70:12-14.

2. Palmer Has Concealed a Loan He Arranged on the Southstone Property

Palmer violated Part I of the SRO by arranging for and concealing a loan on the aforementioned Southstone Property, then directing the proceeds of that loan for his own benefit. Even prior to the property's transfer to Resource Solutions on May 4, 2009, Palmer signaled his intent to use the property as collateral for a loan. Palmer informed Mills that the property had

been appraised for \$128,000, \$60,000 more than the \$68,000 that Palmer owed Mills. See Ex. D at 23:22-24:7, 46:4-47:2. During the process of transferring the Southstone property to Resource Solutions, Palmer, on April 27, 2009, emailed Shari Lewis requesting that she notify him when the quitclaim deed was recorded, “so I can begin working on obtaining some funding from it.” Ex. C at Ex. 7 at 3. Mills, however, was not approached by Palmer regarding the use of the Southstone property as loan collateral until the end of May 2009. Ex. D at 49: 4-24. At that time, Palmer explained that he would like to borrow some money using the land so that he could have money for living expenses and to work with. Mills agreed, but informed Palmer that he did not have any time to secure the financing; accordingly, Palmer “arranged everything.” Id. at 49:4-24. Palmer coordinated with hard money lender, Beacon Light Capital LLC (“Beacon Light”), to obtain a loan for \$62,000 on June 5, 2009, using the Southstone property as collateral. Id. at 24:5-14 and Ex. 7.

Apart from one conversation with Beacon Light the day before closing, Mills did not participate in any of the events leading up to the loan. Mills had had no prior contact or business with Beacon Light, nor did he know how Palmer selected the lender. Id. at 50:6-19. Palmer had been contacted by the principal of Beacon Light, David Eldredge, Jr. (“Eldredge”), based upon a referral and spoke with Eldredge approximately six to seven times during the process of securing the loan. Ex. F, Deposition of David Eldredge at 9:4-14; 12:4-23. Palmer negotiated the terms of the loan: a deed instead of a personal guaranty, 90 day repayment, \$7,691.06 in closing costs, 15.990% interest rate. Ex. F at 14:10-15; 18:6-11; 30:8-11. Due to Palmer’s level of involvement, Eldredge believed that Palmer was affiliated with Resource Solutions and only learned otherwise after the title report performed by Alliance Title & Escrow Corporation (“Alliance Title”). Ex. F 13:18-23.

After securing the loan for \$62,000, Palmer, not Mills, directed the transfer of all of the loans proceeds, thereby violating the Court's Statutory Restraining Order. Palmer directed Alliance Title to wire \$24,000 to Southern Cross Partners in Florida, and \$6,900 to SAC Financial Group in Massachusetts. Ex. D at Ex. 9, 10:4. Alliance Title wired the remaining funds to Resource Solutions (less \$7,691.06 closing costs) totaling \$23,408.94, which Palmer then requested Mills to direct to a number of other individuals and entities. Id. at 55:20-21; 60:3-14 and Exs. 8,9. During a telephone conversation with Mills on June 8, 2009, Palmer asked that Mills give: \$10,000 cash to Palmer, a \$1,000 cashier's check to Egan Metcalf Leavitt, and a \$2,500 cashier's check to the law office of Mitchell Barker, Palmer's attorney. Id. at 60:15-61:5 and Ex. 11. Mills deposited the remaining \$9,808.94 into a money market account for the purpose of using the funds to make the monthly interest payments on the loan to Beacon Light. Towards the end of June 2009, Palmer requested that Mills withdraw an additional \$5000 from this money market account for Palmer's use. Mills refused. Id. at 64:18-65:10.

Although in the midst of negotiating a loan on the Southstone property for his benefit, Palmer, when asked at his deposition whether he had any loans, denied that he did. Ex. B at 17:14-21. As of this date, neither the Commission nor the Receiver have determined all of the uses for the wires and checks discussed above; however, Palmer's use of Trigon's asset, the Southstone property, to borrow \$62,000 violates the provisions of the SRO.

3. Palmer Has Concealed and Transferred Trigon Assets in Form of REIT Withdrawal

In addition to arranging for the transfer of a Trigon asset and using that asset to obtain a \$62,000 loan, Palmer violated the SRO by concealing his investment in a real estate investment

trust (“REIT”) at Dividend Capital Realty Trust Inc. (“TRT”) and forging his wife’s signature on a share redemption request in order to obtain a cash redemption of the REIT shares.

On March 20, 2007, Palmer and his wife, Michelle, invested \$5000 in TRT by purchasing 500 shares. Ex. G, Declaration of M. Kirk Scott to SEC at ¶ 3. As noted above, in 2007, the Palmers’ sole source of income during this time was from investor funds for Trigon or related entities. The Palmers participated in TRT’s dividend reinvestment plan, in which their annual dividend of 60 cents per share was reinvested and used to purchase additional TRT shares. Ex. G at ¶7.

On or about April 27, 2009, The Bank of New York, TRT’s transfer agent, received a written request signed by Daren and Michelle Palmer asking for a full redemption of their 567.80211 TRT shares. Id. at ¶9. As per Michelle Palmer’s declaration to the SEC, Michelle Palmer did not sign her name to or authorize her signature on this request for the redemption of TRT shares. Ex. H, Declaration of Michelle Palmer at ¶ 3. The Bank of New York and TRT had no knowledge of this Court’s SRO and honored the Palmers’ request for redemption, in part, on June 30, 2009. Ex. G at ¶10. Because Palmer’s request for redemption exceeded the Redemption Cap set out by TRT’s Second Amended Restated Share Redemption Program, TRT redeemed only 22.9% of the Palmers’ shares at 95% of the par value for a payout of \$1,229.26 on or about June 30, 2009. Id. at ¶10-11. The check was delivered to the address provided on the Non-Qualified Redemption of Shares Form and cashed on July 13, 2009 at a Wal-Mart branch located at 500 South Utah Avenue, Idaho Falls, ID 83402. Ex. H at Ex. B. The check was purportedly signed by both Daren and Michelle Palmer; Michelle Palmer did not sign or authorize anyone to sign the check on her behalf. Ex. H at ¶ 5

At deposition, Palmer concealed both the existence of this REIT investment and his ongoing efforts to redeem its shares. Ex. B at 68:18-20; 70:12-14.

4. Palmer has Concealed Various Physical Assets Purchased with Investor Funds

Palmer also violated the SRO by concealing household items, of varying degrees of value, from the Commission and the Receiver. In the January/February 2009 timeframe, an acquaintance and neighbor of Palmer, L. Kris Munk (“Munk”), was approached by Palmer, who asked whether he could store household items should Palmer have to sell his house. Ex. I, Declaration of L. Kris Munk. Munk, who lived down the street from Palmer at the time, agreed. On or about May 28, 2009, Palmer transferred numerous items to a shop building on one of Munk’s properties. Munk had no knowledge of the building’s contents and left the building unlocked so that Palmer could access his belongings at any time. The existence and location of these belongings were not disclosed to either the Receiver or the Commission, even in response to direct questions at Palmer’s deposition. Ex. B at 68:18-20. Accordingly, Palmer violated the terms of the Court’s SRO by concealing these items.

5. Palmer has Failed to Provide the Mandatory Accounting and Customer List

In violation of the specific directives of Part III of the SRO, Palmer has failed to provide the Commission and the Receiver a full accounting of all funds, documents, and assets both within and outside of the United States that are held by Defendants, for their benefit, or under their direct or indirect control; transfer such funds, documents, and assets to the United States; and provide the Commission and Receiver with a complete customer list, including, without limitation, the names, addresses and telephone numbers of all persons who transferred funds to the Defendants from January 1, 1997, to the present. By failing to identify customers and assets,

Palmer is directly violating the terms of the SRO and undermining the Receiver and the Commission's core obligations under the SRO.

IV.

ARGUMENT

A. The Commission Has Established a Prima Facie Case of Civil Contempt

Civil contempt is an action designed to obtain compliance with judicial decrees or to compensate for damages sustained as a result of noncompliance. See Shillitani v. U.S., 384 U.S. 364, 370 (1966); McComb v. Jacksonville Paper Co., 336 U.S. 187 (1948). Unlike criminal contempt proceedings, the party petitioning the court for civil contempt does not have to establish that the respondent intended to violate, or willfully violated, the order. See McComb, 336 U.S. at 191; N.L.R.B. v. Ironworkers Local 433, 169 F.3d 1217, 1222 (9th Cir. 1999). Indeed, “[s]ince the purpose is remedial, it matters not with what intent the defendant did the prohibited act” at all. McComb, 336 U.S. at 191. In order to fulfill the burden of proof for a showing of civil contempt, the petitioning party must prove by clear and convincing evidence that the respondent violated a prior court order. See Vertex Distrib. Inc. v. Falcon Foam Plastics, 689 F.2d 885, 889 (9th Cir. 1982); Matter of Battaglia, 653 F.2d 419, 422 (9th Cir. 1981). Here, based upon the overwhelming evidence discussed above, the Commission and Receiver have established by clear and convincing evidence a prima facie case of civil contempt.

Part III of the SRO requires Palmer to provide an accurate accounting of assets. Failure to fully comply with an order to provide an accounting is a proper basis for a civil contempt order. SEC v. Bankers Alliance Corp., 881 F. Supp. 673, 678-79 (D.D.C. 1995) (imposing civil contempt sanctions that included fines and incarceration against the defendants for failing to

provide an accounting of assets pursuant to a preliminary injunction order); CFTC v.

Skorupskas, 605 F. Supp. 923, 945 (E.D. Mich. 1985) (incarceration contingent on failure to identify bank accounts within prescribed time). Palmer has failed to provide an accounting of assets and is therefore in contempt of court.

Part I of the SRO prohibits Defendants from concealing, pledging, assigning, encumbering, transferring, withdrawing or otherwise disposing of assets. Since this Court entered the SRO, Defendant Palmer has violated Part I of the SRO by concealing assets of the Defendants, such as the REIT account held in the name of Daren and Michelle Palmer and the household items removed and stored with Palmer's neighbor, L. Chris Munk. In addition, Palmer has violated Part I by assigning a Trigon asset, unused monies held by Sight & Sound which were refunded via a real property transfer, to his friend's entity. Palmer also violated Part I of the SRO by subsequently using that real property to borrow money. See Skorupskas, 605 F. Supp. at 944 (failing to disclose to Receiver location of funds constitutes contempt of SRO).

Part IV of the SRO requires the Defendants to deliver to the Receiver's possession and custody of all assets and documents of the Defendants, and cooperate fully with and assist the Receiver. Defendant Palmer has failed to cooperate fully with and assist the Receiver. Defendant Palmer has shown a general lack of cooperation with the Receiver, and continues to disclose material information only after authorities learn of it from other sources. Palmer has not provided any information relating to the location of assets and documents of the Defendants nor has he delivered all assets and documents of the Defendants to the Receiver's possession. See Skorupskas, 605 F. Supp. at 944 (failing to disclose to Receiver location of funds constitutes contempt of SRO); Cf. CFTC v. Wellington Precious Metals, Inc. et al., No. 85-3565-CIV-ATKINS (S.D. Fla. Mar. 14, 1990), aff'd, 950 F.2d 1525 (11th Cir. 1992), cert. denied, 113 S.

Ct. 66 (1992) (Court imposed contempt sanctions for failure to comply with order directing that disgorgement funds be transferred to a receiver).

B. The Burden Lies with Defendant Palmer to Excuse His Noncompliance with This Court's Orders

It is well-settled that once a prima facie case of civil contempt has been shown, as here, the burden shifts to the contemnor to produce evidence excusing his violation of a court order. See United States v. Rylander, 460 U.S. 752, 756 (1983); Battaglia, 653 F.2d 419 at 422. Where the respondent fails to put forth a sufficient defense, the court may grant whatever remedial relief it deems necessary to effect compliance with its order. See McComb, 336 U.S. at 193; Battaglia, 653 F.2d at 422. The contemnor's burden is substantial, however, and cannot be met with mere assertions of inability to comply. See Rylander, 103 S.Ct. at 1552. Rather, the contemnor must present evidence that shows "categorically and in detail" the reason for the inability to comply. Federal Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1241 (9th Cir. 1999) quoting Nat'l Labor Relations Bd. v. Trans Ocean Export Packing, Inc., 473 F.2d 612, 616 (9th Cir.1973)).

The Commission and the Receiver have provided clear and convincing evidence that Palmer violated this Court's Statutory Restraining Order. The burden now lies with Palmer to prove that he is unable to comply. Absent a sufficient showing to justify noncompliance, Defendant Palmer should be found in contempt of this Court's SRO.

C. Compensatory and Coercive Sanctions Are Appropriate

This Court has authority to impose both compensatory and coercive sanctions against Defendant Palmer for his violations of the SRO. Courts have inherent power to use civil contempt to coerce compliance with a court order. See Bankers Alliance Corp., 881 F. Supp. at 678-79; 18 U.S.C. § 401(3) (2001). That power includes imposing fines, conditional

incarceration, and compensating a party for losses sustained as a result of another's non-compliance. See Hicks v. Feiock, 485 U.S. 624, 631-632 (1988); Rylander, 460 U.S. at 761; McComb, 336 U.S. at 191. Compensation may include not only damages resulting directly from the contemptuous conduct, but also expenses incurred in prosecuting a civil contempt action, including reasonable attorney's fees. Perry v. O'Donnell, 759 F.2d 702, 704-05 (9th Cir. 1985) (a court may award attorney's fees and expenses to the prevailing party in civil contempt actions without a showing of willfulness); Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc., 793 F.2d 1529, 1534 (11th Cir. 1986) (compensation awarded, including costs and attorney's fees, and prospective fines ordered); CFTC v. Premex, Inc., 655 F.2d 779, 785-786 (7th Cir. 1984) (award of attorneys fees and costs to CFTC in contempt proceeding).

Defendant Palmer's failure to comply with the provisions of the SRO frustrates the Commission and Receiver's efforts to account for funds and eventually return investor funds. Defendant Palmer's failure to comply with the SRO has caused the Receiver to incur additional expenses in conducting his investigation in this case. Plaintiff respectfully requests that this Court find Defendant Palmer in contempt of the SRO, direct him to comply with the SRO and sanction him in a manner that will ensure his prompt and complete compliance. Plaintiff also requests the Court direct Defendant Palmer to pay attorney's fees and expenses incurred by the Commission and Receiver in connection with its attempts to obtain required documents and in connection with this proceeding.

V.

CONCLUSION

For the foregoing reasons, the Commission and Receiver respectfully request that the Court require Defendant Palmer to Show Cause why he is not in contempt of this Court's SRO

and why this Court should not (1) issue an order of contempt, (2) require Defendant Palmer to comply immediately with this Court's SRO, and (3) sanction Defendant Palmer with costs, attorney's fees, and fines and/or with incarceration of Defendant Palmer for contempt of court.

Respectfully submitted:

PLAINTIFF UNITED STATES COMMODITY
FUTURES TRADING COMMISSION

With

RECEIVER, WAYNE KLEIN

By: S/Alison B. Wilson

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Dated: August 26, 2009

By: S/Wayne Klein

Wayne Klein
Receiver
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299 South Main, Suite 1300
Salt Lake City, UT 84111

Dated: August 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2009 a true and correct copy of **Plaintiff Commission and Court-Appointed Receiver's Memorandum of Law in Support of Motion To Show Cause as to Defendant Daren L. Palmer** was served by ECF and US mail, postage pre-paid, on the following persons:

By: S/Alison B. Wilson
Alison B. Wilson