

2. Between August 2007 and August 2008, First Capital customers lost more than \$3 million, total, of which more than \$2.2 million was commissions and fees on options trades.

3. First Capital and Kogan have engaged in or are engaging in acts and practices that violate the options-fraud provision of the Commodity Exchange Act (“Act”), Section 4c(b), 7 U.S.C. § 6c(b) (2006), and CFTC Regulations (“Regulations”) 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c) (2009).

4. First Capital is further liable for the acts of its employees pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B).

5. From March 21, 2007 to September 22, 2008, Kogan was identified in Commission registration documents as a principal of First Capital, and controlled the operations of First Capital and its associated persons (“APs”). Kogan did not act in good faith or knowingly induced, directly or indirectly, the acts constituting First Capital’s violations of the Act and Regulations. Kogan is thus liable for First Capital’s violations as a controlling person pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b).

6. Accordingly, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, the Commission brings this action to enjoin Defendants’ unlawful acts and practices and to compel Defendants’ compliance with the above-referenced provisions of the Act and Regulations. In addition, the Commission seeks civil monetary penalties, restitution to customers for losses proximately caused by Defendants’ fraud, disgorgement of Defendants’ ill-gotten gains, rescission, pre- and post-judgment interest, and such other relief as the Court may deem necessary or appropriate.

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

II. JURISDICTION AND VENUE

8. The Act establishes a comprehensive system for regulating the purchase and sale of commodity futures contracts, including the options offered by First Capital. The Court possesses jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, 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 against such person to enjoin such practice or to enforce compliance with the Act.

9. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), because Defendants transacted business in this District and/or because violations of the Act have occurred or are occurring within this District, among other places. Specifically, First Capital and Kogan have fraudulently solicited Missouri residents since 2007.

III. REGULATORY BACKGROUND

10. The Act and Regulations establish various classifications of Commission registrants.

11. An Introducing Broker (“IB”) is any person who is “engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market . . . who does not accept any money, securities, or property . . . to margin, guarantee, or secure any trades or contracts that result or may result therefrom.” Section 1a(23) of the Act, 7 U.S.C. § 1a(23).

12. Any natural person associated with an IB or Futures Commission Merchant (“FCM”), who (i) solicits or accepts customers’ or options customers’ orders or (ii) supervises

any person or persons so engaged, must register as an AP of that IB or FCM. Regulations 1.3(aa)(1) and (2), and 3.12(a), 17 C.F.R. §§ 1.3(aa)(1) and (2), and 3.12(a).

IV. THE PARTIES

13. Plaintiff **Commodity Futures Trading Commission** is an independent federal regulatory agency charged with administering and enforcing provisions of the Act, 7 U.S.C. §§ 1 *et seq.*, and the Regulations, 17 C.F.R. §§ 1.1 *et seq.* Plaintiff maintains a permanent office in this judicial district at Two Emanuel Cleaver II Blvd., Suite 300, Kansas City, MO 64112.

14. Defendant **First Capital Futures Group, a/k/a and d/b/a First Capital Group**, is a California corporation with its principal place of business at 15303 Ventura Blvd., 9th Floor, Sherman Oaks, California 91403. In the spring of 2008, First Capital opened a branch office in Aventura, Florida, from which it also solicited clients. First Capital has been registered with the Commission as an IB from March 27, 2007 to the present.

15. Defendant **David Michael Kogan** is an individual thought to be residing at 13331 Moorpark Street, Apt. 111, Sherman Oaks, CA 91423. On March 27, 2007, Kogan became listed as a principal and registered as an AP of First Capital. On September 22, 2008, Kogan withdrew his registration. Kogan is also First Capital's President.

16. Kogan was registered previously as an AP of several other IBs: (1) American National Trading Corp ("American") (September 1997 – June 2001); (2) Morgan Commodities Corp. (August 2001 – October 2003); (3) Chase Commodities Corp. ("Chase") (August 2003 – September 2004); (4) The Rockwell Corporation (September 2004 – July 2006); and (5) Paramount Futures Group (June 2006 – January 2007).

V. FACTUAL STATEMENT

A. **First Capital's Operations**

17. Since at least April 2007, Kogan, along with other First Capital APs, solicited members of the general public to open accounts to trade options.

18. From August 2007 through August 2008, 58 customer accounts were opened and options trading in these accounts resulted in more than \$3 million in customer losses, of which more than \$2.2 million was commissions and fees for First Capital and its APs.

19. Kogan signed contracts, acted as the remitter of checks on behalf of First Capital and acted as its agent for service of process. As First Capital's President and principal, Kogan directly or indirectly controlled First Capital and its APs, knew about their fraudulent sales solicitations, and did not prevent or correct them.

B. **Misrepresentations Regarding the Profit Potential of Options**

20. To induce customers to trade, Kogan, as well as other First Capital APs, misrepresented the risks and rewards of trading options. In telephone calls to potential customers, First Capital APs engaged in fraudulent sales solicitations by knowingly misrepresenting and failing to disclose material facts concerning, among other things: (i) the profit potential of options; (ii) the risk involved in trading options; (iii) positions placed in customer accounts; and (iv) the poor performance record of First Capital customers trading options.

21. Kogan, as well as other First Capital APs, systematically misrepresented to customers the profitability involved with trading options. Kogan and the First Capital APs misrepresented the risk and profit potential of options trading, including the profit potential from trading on well-known public information that is already factored in by the relevant commodity markets, to entice customers to trade through First Capital.

22. For example, Kogan, as well as other First Capital APs, repeatedly informed their customers that they would make substantial amounts of money in a very short time by trading options. These statements included the following:

- Kogan told a customer that \$120,000 would be turned into \$850,000 overnight by making an “in and out” options trade;
- that customers would make \$12,000-\$15,000 every week or two trading options with First Capital;
- that customers could expect to make between \$30,000 and \$50,000 a month trading options with First Capital;
- that \$15,000 could be turned into \$50,000 by trading options; and
- a First Capital AP (“AP2”) said he could turn a customer’s \$10,000 into \$70,000 by trading cotton options.

23. Kogan, as well as other First Capital APs, also sometimes advised their customers to trade options based primarily upon well-known public information. Well-known public information is already factored into the price of the underlying commodity. Nevertheless, Kogan, as well as other First Capital APs, referred to well-known public information as the primary, if not the sole, basis to trade options. For example:

- that natural gas options were valuable because a pipe line blew up and oil was going to go sky high; and
- that, according to AP2, cotton options were going to “explode” in early 2008 because of the very bad weather, which was affecting the cotton crops.

24. Kogan, as well as other First Capital APs, commonly told customers that they needed to invest immediately or they would lose the chance for high profits on their initial

investments. By using this high-pressure tactic, Kogan, as well as other First Capital APs, gave the impression that profits were certain or guaranteed, the only variables being timing and the amount of profit to be made. Among these type of representations:

- that Kogan's customers needed to make trading decisions quickly or they would lose out on opportunities to make a great deal of money;
- that one of Kogan's customers had to provide him with additional funds for options trading within 48 hours or "forfeit" his initial investment of \$3,000; and
- that a customer had to send \$32,000 to First Capital by overnight mail in order to make a trade.

C. Misrepresentations and Omissions Concerning the Risk of Options Trading

25. Kogan, as well as other First Capital APs, also routinely failed to disclose adequately the risk of loss inherent in trading options. For example, Kogan, as well as other First Capital APs, made statements to customers that:

- First Capital customers would make back 100% of their initial investments;
- options contracts recommended by First Capital were "sure fire winner[s];"
- the way Kogan traded guaranteed that a customer would not lose his money and would get his money back;
- because of Kogan's extensive knowledge of seasonal trends, natural gas options were "very low risk" trades;
- it was "rare" that First Capital would lose a customer's principal and that First Capital's customers made money; and
- First Capital had a technique for buying and selling options that would prevent its customers from losing money.

D. Misrepresentations Concerning Positions in Customer Accounts

26. Kogan and other First Capital APs also made misrepresentations to some customers regarding the existence of certain positions in their accounts. For example, First Capital APs made statements to customers that:

- 30 positions had been “ordered in error” and that the customer could purchase all 30 or any number of those positions, but that if no additional purchases were made, then the return on current positions would be “much less;”
- a First Capital AP (“AP4”) told a customer that a “mistake” had been made and positions had “accidentally” been put into the customer’s account, but that, according to him, the “mistake” had already earned the customer \$4,000 overnight; and
- AP3 told a customer that a trade for 125 Canadian dollar options had been “accidentally” executed instead of a trade for 25 Canadian dollar options, meaning that, according to AP3, the customer would have to provide to First Capital additional funds totaling \$72,000.

27. These positions never existed in the First Capital customer accounts and these trades did not occur as represented to the customers by Kogan and other First Capital APs.

E. Failure to Disclose First Capital's Losing Performance Record

28. Although Kogan and other First Capital APs urged prospective customers to invest immediately with promises of large profits with little or no risk, they never disclosed that the firm's investment strategy had been a failure resulting in millions of dollars in customer losses. In fact, many First Capital customers were told that their accounts were making money when they actually were losing money. Despite these mounting losses, Kogan and other First Capital APs continued to solicit new customers by highlighting profits without disclosing the fact that an overwhelming majority of First Capital customers lose most, if not all, of their investment. For example:

- Kogan represented that he had "made millionaires out of several customers;"
- Kogan represented that he had a lot of experience in the commodity markets and a lot of customers who were making money with him; and
- AP3 and AP4 each represented that they had a track record of success and that First Capital's customers were making money.

29. Between August 22, 2007 and August 31, 2008, First Capital opened 58 new customer accounts and all of these accounts traded only options. All 58 accounts were either closed or transferred out of First Capital as of September 30, 2008.

30. These 58 accounts were open for an average of 175 days. The composite net-out-of-pocket ("NOP") for the 58 accounts is a net loss of \$3,064,061. The least successful customer had an NOP loss of \$508,749 while the most profitable customer experienced an NOP gain of only \$3,546, with both of these amounts inclusive of all commissions and fees charged.

31. Fifty-six of the 58 accounts (97%) lost money trading options through First Capital. These 56 accounts had an NOP loss of \$3,068,261, including \$2,218,014 in

commissions and fees charged. Of the two accounts that had gains while open, the combined NOP was a net profit of \$4,200, including \$10,496 in commissions and fees charged.

32. The average loss for each of the 56 unprofitable accounts was \$54,790, including average commission and fee charges of \$39,607 per account.

33. The total combined loss for the 58 First Capital customer accounts was \$3,064,061, including \$2,228,510 charged for commissions and fees. Thus, commissions and fees represent 73% of First Capital customers' total combined losses.

VI. VIOLATIONS OF THE COMMODITY EXCHANGE ACT

COUNT ONE: OPTIONS FRAUD

Violations of Section 4c(b) of the Act and Regulations 33.10(a) and (c)

34. Paragraphs 1 through 33 are realleged and incorporated herein by reference.

35. Section 4c(b) of the Act, 7 U.S.C. § 6c(b), makes it unlawful to

offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under th[e] Act which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

36. Regulations 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c), make it

unlawful for any person directly or indirectly—(a) [t]o cheat or defraud or attempt to cheat or defraud any other person; [or] (c) [t]o deceive or attempt to deceive any other person by any means whatsoever in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.

37. Kogan, as well as other First Capital APs, knew or recklessly disregarded the fact that representations described in paragraphs 20 through 33 were false and misleading. Further,

Kogan, as well as other First Capital APs, knew that their telephone sales solicitations failed to disclose to customers material facts necessary to make their other statements not misleading.

38. As described above, Kogan, as well as other First Capital APs, in or in connection with offers to enter into, the entry into, the confirmation of the execution of and the maintenance of options transactions cheated or defrauded or attempted to cheat or defraud customers, and deceived or attempted to deceive customers, by knowingly misrepresenting and failing to disclose material facts, concerning, among other things, the likelihood that a customer would realize large profits from trading options; the risk involved in trading options; and the poor performance record of First Capital customers trading options, in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulations 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c).

39. The foregoing acts, misrepresentations, omissions, and failures of Kogan, as well as other First Capital APs, occurred within the scope of their employment with First Capital; therefore, First Capital is liable for these acts pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B).

40. Kogan, as First Capital's President and principal, directly or indirectly controlled the First Capital and its APs, and did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violations alleged as to First Capital and its APs. Kogan, therefore, is a controlling person and is liable for these acts pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b).

41. Each material misrepresentation and omission of First Capital and its APs, including, but not limited to, those specifically alleged herein, is a separate and distinct violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulations 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c).

VII. RELIEF REQUESTED

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

- a) an order finding that First Capital and Kogan violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulations 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c);
- b) An order of permanent injunction prohibiting Defendants and any of their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with any Defendant, including any successor thereof, from engaging, directly or indirectly:
 - (i) in conduct in violation of Section 4c(b) of the Act, 7 U.S.C. 6c(b), and Regulations 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c);
and
 - (ii) in any activity related to trading in any commodity, as that term is defined in Section 1a(4) of the Act, 7 U.S.C. § 1a(4) (2006) (“commodity interest”), including but not limited to, the following:
 - (aa) trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29) (2006);
 - (bb) entering into any commodity interest transactions for his own personal account, for any account in which he has a direct or indirect interest and/or having any commodity interests traded on his behalf;

- (cc) engaging in, controlling or directing the trading for any commodity interest account for or on behalf of any other person or entity, whether by power of attorney or otherwise;
 - (dd) soliciting, receiving, or accepting any funds in connection with the purchase or sale of any commodity interest contract;
 - (ee) applying for registration or claiming exemption from registration with the CFTC in any capacity, and engaging in any activity requiring such registration or exemption from registration with the CFTC, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2009), or acting as a principal, agent, or any other officer or employee of any person registered, exempted from registration or required to be registered with the CFTC, except as provided for in Regulation 4.14(a)(9); and
 - (ff) engaging in any business activities related to commodity interest trading;
- c) an order directing First Capital and Kogan, as well as any other person or entity associated with them, including any successor thereof, to disgorge, pursuant to such procedure as the Court may order, all benefits received from the acts or practices that constitute violations of the Act or Regulations, as described herein, and interest thereon from the date of such violations;

- d) an order directing First Capital and Kogan, as well as any other person or entity associated with them, including any successor thereof, to make full restitution, pursuant to such procedure as the Court may order, to every customer whose funds were received by them as a result of acts and practices which constituted violations of the Act and Regulations, as described herein, and interest thereon from the date of such violations;
- e) an order directing Defendants and any successors thereof, to rescind, pursuant to such procedures as the Court may order, all contracts and agreements, whether implied or express, entered into between them and any of the customers whose funds were received by them as a result of the acts and practices, which constituted violations of the Act, as described herein;
- f) an order directing each defendant to pay a civil monetary penalty for each violation of the Act and Regulations described herein, plus post-judgment interest, in the amount of the higher of: \$140,000 for each violation of the Act and Regulations committed on or after October 23, 2008, \$130,000 for each violation of the Act committed on or between October 23, 2004; or triple the monetary gain to each defendant for each violation of the Act and Regulations described herein;
- g) An order requiring Defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2) (2006); and
- h) such other and further remedial ancillary relief as the Court may deem appropriate.

Dated this 26th day of June, 2009.

Respectfully submitted by,



Lo Motenburg

Jennifer J. Chapin

Commodity Futures Trading Commission

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Western District of Missouri.

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**Plaintiff U.S. Commodity Futures Trading
(s): Commission**

County of Residence: Jackson

County Where Claim For Relief Arose: Jackson

Plaintiff's Atty(s):

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**Defendant First Capitol Futures Group a/k/a
(s): d/b/a First Capital Group ; David
Michael Kogan**

County of Residence: Outside State of Missouri

Defendant's Atty(s):

II. Basis of Jurisdiction:

1. U.S. Gov't Plaintiff

III. Citizenship of Principal
Parties (Diversity Cases Only)

Plaintiff:- N/A
Defendant:- N/A

IV. Origin : **1. Original Proceeding**

V. Nature of Suit: **850 Securities / Commodities / Exchange**

VI.Cause of Action: **7 U.S.C. section 1 et. seq. (Commodity Futures Options Fraud)**

VII. Requested in Complaint

Class Action:
Dollar Demand:
Jury Demand: **No**

Signature: Jennifer J. Chapin

Date: 06/26/2009

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Revised: 05/09/06