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

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| **U.S. COMMODITY FUTURES TRADING COMMISSION,** | : | **CIVIL ACTION NO. 1:09-00488-CV-W-DW** |
| **Plaintiff,** | : | |
| **v.** | : | |
| **FIRST CAPITOL FUTURES GROUP a/k/a and d/b/a FIRST CAPITAL GROUP** | : | |
| **and** | : | |
| **DAVID MICHAEL KOGAN.** | : | |
| **Defendants.** | : | |

**ORDER FOR ENTRY OF DEFAULT JUDGMENT, PERMANENT INJUNCTION AND ANCILLARY EQUITABLE RELIEF AGAINST DEFENDANTS FIRST CAPITOL FUTURES GROUP A/K/A AND D/B/A/ FIRST CAPITAL GROUP AND DAVID MICHAEL KOGAN**

On June 26, 2009, Plaintiff Commodity Futures Trading Commission ("CFTC," "Commission" or "Plaintiff") filed its Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties ("Complaint") (DE #1). The Complaint alleges that First Capitol Futures Group a/k/a and d/b/a First Capital Group ("First Capital") and David Michael Kogan ("Kogan") (collectively, "Defendants") fraudulently solicited members of the public to open accounts with First Capital and to trade options on commodity futures contracts ("options") in violation of Section 4c(b) of the Commodity Exchange Act ("Act"), as amended, 7 U.S.C. § 6c(b) (2006), and CFTC Regulations ("Regulations") 33.10(a) and (c) of the, 17 C.F.R. §§ 33.10(a) and (c) (2009). The Complaint further alleges that Kogan is liable as a controlling person under Section 13(b) of the Act, 7 U.S.C. § 13c(b), and that First Capital is liable under

principal-agent theories pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B). The Complaint seeks, *inter alia*, injunctive relief, disgorgement, restitution, and civil monetary penalties.

Defendants' answers or other responsive pleadings were due on or before August 17, 2009. Defendants have failed to file an answer or otherwise defend this action. On December 3, 2009, the CFTC, pursuant to Federal Rule of Civil Procedure 55(a), served and filed its Motion for Clerk's Entry of Default Against Defendants First Capital Futures Group a/k/a and d/b/a First Capital Group and David Michael Kogan (DE #18). The Clerk of the Court subsequently entered the default on December 7, 2009.

The CFTC has submitted its Application for Entry of Default Judgment, Permanent Injunction and Ancillary Equitable Relief Against Defendants First Capitol Futures Group a/k/a and d/b/a First Capital Group and David Michael Kogan ("Application") pursuant to Federal Rule of Civil Procedure 55(b)(2). The Court has considered carefully the Complaint, the allegations of which are well-pleaded and hereby taken as true, the Application, and all oppositions thereto, and being fully advised in the premises hereby

**GRANTS** the CFTC's Application and enters the following findings of fact and conclusions of law finding Defendants liable as to all violations as alleged in the Complaint. Accordingly, the Court now issues the following Order for Entry of Default Judgment, Permanent Injunction, and Ancillary Relief Against Defendants ("Order"), which determines that Defendants have 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), and that Kogan is liable as a controlling person under Section 13(b) of the Act, 7 U.S.C. § 13c(b), and that Defendant First Capital is liable under principal-agent theories pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B).

## FINDINGS OF FACT

### A. Parties

Plaintiff **Commodity Futures Trading Commission** is an independent federal regulatory agency charged by Congress 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.*

Defendant **First Capitol Futures Group, a/k/a and d/b/a First Capital Group** is a California corporation, which is no longer operating. While in business, First Capital maintained its principal place of business at 15303 Ventura Blvd., 9th Floor, Sherman Oaks, California 91403. First Capital has been registered with the Commission as an introducing broker ("IB") from March 27, 2007 to the present.

Defendant **David Michael Kogan** is an individual thought to be residing in Sherman Oaks, California. On March 27, 2007, Kogan became listed as a principal and registered with the CFTC as an associated person ("AP") of First Capital. On September 22, 2008, Kogan withdrew his registration. Kogan is also First Capital's President.

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).

### B. First Capital's Operations

Since at least April of 2007, Kogan, along with other First Capital APs, solicited members of the general public to open accounts to trade options. From August 2007 through August 2008, 58 customer accounts were opened and options trading in those 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.

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.

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.

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

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.

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.

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.

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 types 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.

**2. Misrepresentations and Omissions Concerning the Risk of Trading Options**

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.

3. **Misrepresentations Concerning Positions in Customer Accounts**

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.

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.

**4. Failure to Disclose First Capital's Losing Performance Record**

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.

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. 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, including $2,228,510 charged for commissions and fees. Thus, commissions and fees represent 73% of First Capital customers' total combined losses. 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. 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. The average loss for each of the 56 unprofitable accounts was $54,790, including average commission and fee charges of $39,607 per account.

## CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 55(b)(2) provides that judgment by default may be entered by a district court. The grant or denial of a motion for default judgment lies within the district court's sound discretion. Federal Trade Comm. v. Packers Brand Meats, Inc., 562 F.2d 9, 10 (8th Cir. 1977). Further, if a district court determines that a defendant is in default, then the

factual allegations of the complaint, except those relating to the amount of damages, will be taken as true. See Fed. R. Civ. P. 8(b) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied."); Pope v. United States, 323 U.S. 1, 12 (1944); Benny v. Pipes, 799 F.2d 489, 495 (9th Cir. 1986) (providing that well-pleaded allegations are taken as admitted on default judgment).

Given the procedural posture of this case and based upon the evidence before the Court, the allegations in the Complaint against Defendants should be taken as true for purposes of the CFTC's Application and a default judgment should be entered against Defendants.

**A. Jurisdiction and Venue**

The Act establishes a comprehensive system for regulating the purchase and sale of commodity futures contracts, including the options on commodity futures 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.

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 and Regulations have occurred or are occurring within this District, among other places. Specifically, First Capital and Kogan have fraudulently solicited Missouri residents since 2007.

### B. Defendants Violated Section 4c(b) of the Act and Regulations 33.10(a) and (c)

The Act and Regulations prohibit, among other things, fraudulent conduct with respect to transactions in commodity options. Section 4c(b), 7 U.S.C. § 6c(b), provides that: "No person shall . . . enter into or confirm the execution of any transaction involving any . . . option . . . contrary to any . . . regulation of the Commission." Regulations 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c), provide that:

> It shall be unlawful for any person directly or indirectly—(a) to cheat or defraud or attempt to cheat or defraud any other person … [or] (c) to deceive or attempt to deceive any other person by any means whatsoever 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.

Under these provisions, liability for solicitation fraud involving options is established when a person or entity 1) makes a misrepresentation, misleading statement, or a deceptive omission; 2) with scienter; and 3) the misrepresentation, misleading statement, or a deceptive omission is material. R.J. Fitzgerald, 310 F.3d at 1328; CFTC v. Rosenberger, 85 F. Supp. 2d 424, 446-47 (D.N.J. 2000). As set forth below, these three requirements are satisfied in the case at hand.

#### 1. Kogan and Other First Capital APs Misrepresented and Omitted Facts Regarding Profit Potential and Risks of Trading Options

The CFTC has demonstrated that Kogan and other First Capital APs defrauded customers when they misrepresented the likelihood and extent of profits to be made trading options. "Any guarantee of profit and assurance against loss in the context of futures trading is inherently a fraudulent misrepresentation because investments in futures transactions necessarily depend on speculative predictions about an unpredictable future and risk is unavoidable." CFTC v. Standard Forex, Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,063 at 41,462 (E.D.N.Y. Aug. 9, 1993). The R.J. Fitzgerald court found that promises of 200 or 300 percent profit constituted fraud. 310 F.3d at 1329; see also CFTC v. Commonwealth Fin. Group,

Inc., 874 F. Supp. 1345, 1352 (S.D. Fla. 1994). Here, Kogan and the other First Capital APs repeatedly promised customers that they would at least double or triple their investments in less than a few months. These statements about guaranteed profits are fraudulent misrepresentations.

Second, customers were defrauded when Kogan and the other First Capital APs misrepresented that customers could profit in option trading from well known public information. Claims that customers may capitalize upon these events are misleading and fraudulent because well-developed markets already reflect all publicly available information. Bishop v. First Investors Group of the Palm Beaches, Inc., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,004 at 44,841 (CFTC Mar. 26, 1997). This well-known public information is already factored into the price of a commodity, and hence the price of an option on that commodity. Basic Inc. v. Levinson, 485 U.S. 224, 241-42 (1988) (finding that well-developed markets reflect all publicly available information); see also In re LTV Sec. Litig., 88 F.R.D. 134, 143 (N.D. Tex. 1980) ("The market [acts] as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price."). As a result, Kogan's and other First Capital APs' claims linking profits on options to well-known public information constitute fraud as a matter of law. R.J. Fitzgerald, 310 F.3d at 1330.

Third, Kogan and other First Capital APs regularly urged customers to begin trading immediately or risk missing out on the opportunity to make maximum profits. Such high-pressure sales tactics falsely convey the impression that profits are guaranteed and that the only variable is the amount of the profit to be made by the customer. R.J. Fitzgerald, 310 F.3d at 1329. This type of sales practice is tantamount to a guarantee that violates the Act's anti-fraud provisions. See Commonwealth Fin. Group., 874 F. Supp. at 1353 (combining claims that risks

are subject to certain limitations with "predictions of profit [that] exceed[ed] 'mere optimism'" violated Section 4c(b) of the Act and Regulation 33.10).

Fourth, Kogan and the other First Capital APs deceived certain First Capital customers when they misrepresented to them that option positions had been placed in these customers' accounts accidentally but were profitable. These statements about option positions being mistakenly placed in customer accounts were blatant lies and designed only to coerce customers to make additional trades with First Capital.

Fifth, Kogan and other First Capital APs defrauded customers when they omitted the potential risks of trading options. "It is misleading and deceptive to speak of 'limited risk' without also telling the reasonable listener that the overwhelming bulk of customers lose money." R.J. Fitzgerald, 310 F.3d at 1333; see also Munnell v. Paine Webber Jackson & Curtis, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,313 at 32,862-63 (CFTC Oct. 8, 1986) (internal citation omitted). Kogan and other First Capital APs repeatedly reassured their customers that the risk of loss was minimal, if not nonexistent. For example, Kogan and other First Capital APs told customers the risk of losing money trading options through First Capital was very low because it was "rare" that First Capital's customers lost money. Kogan and the other First Capital APs convinced customers that trading options through First Capital was low risk because their trading strategy diversified customer funds and First Capital had a technique that prevented losses. Such statements convey the false idea that trading options involves little or no risk.

Despite their optimistic representations regarding profits, First Capital APs never disclosed to their prospective customers the firm's losing trading record. As the court noted in R.J. Fitzgerald, these omissions are fraudulent.

> [G]iven the extremely rosy picture painted by [defendants], a reasonable investor surely would want to know, before committing money to a broker ─ that 95% . . . of [the firm's] investors lost money.… [I]t was misleading and deceptive to speak of limited risk … without also telling the reasonable listener that the overwhelming bulk of customers lose money.

310 F.3d at 1332-33. In this case, the evidence shows that the overwhelming number of First Capital customers lost money trading with the firm. In fact, over 97 percent of the customers who opened accounts at First Capital between August 22, 2007 and August 31, 2008 lost some or all of the money they used to purchase these options. Further, the customer account statements demonstrate that no customer doubled or tripled their options investment as Defendants stated they would. The evidence is clear that Kogan and other First Capital AP's made misrepresentations and omissions of material fact.

**2. Kogan and Other First Capital APs Acted with Scienter**

Scienter "refers to a mental state embracing an intent to deceive, manipulate, or defraud." Rosenberger, 85 F. Supp. 2d at 448 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976)). The CFTC "need not show that defendants acted with an evil motive or an intent to injure[;] rather, recklessness is sufficient to satisfy the scienter requirement." Id. (internal quotations and citation omitted); see also Drexel Burnham Lambert, Inc. v. CFTC, 850 F.2d 742, 748 (D.C. Cir. 1988). "Knowledge, of course, exists when one acts in careless disregard of whether his acts amount to cheating . . . . That is, the element of knowledge cannot be precluded by ignorance brought about by willfully or carelessly ignoring the truth." CFTC v. Savage, 611 F.2d 270, 283 (9th Cir. 1979). Even absent direct evidence regarding the intent of a firm's principals and brokers, the Southern District of Florida has held that the scienter requirement is satisfied where the principals and brokers of a firm are aware of the significant losses suffered by their clients. Commonwealth Fin. Group, 874 F. Supp. at 1354-55.

Each of the previously identified fraudulent misrepresentations and omissions demonstrates that Defendants acted with the requisite scienter. Given the firm's losing trading record, Kogan and other First Capital APs obviously knew that the probability of earning enormous profits on options was, to say the least, highly unlikely. They also knew that well known public events would not lead to guaranteed profits because none of their customers had profited from this type of well-known information. In addition, Kogan and other First Capital APs had no basis for telling certain customers that option positions had been mistakenly placed in these customers' accounts and were profitable. Most importantly, Kogan and the other First Capital APs had no reasonable basis to assert that the risk of loss was minimal when 97% percent of customers who opened accounts with First Capital between August 22, 2007 and August 31, 2008 lost all or part of their money. Clearly, Defendants acted with scienter.

**3. Kogan's and Other First Capital APs' Misrepresentations and Omissions Were Material**

A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." R.J. Fitzgerald, 310 F.3d at 1328 (internal quotation omitted); Rosenberger, 85 F. Supp. 2d at 447; see also Commonwealth Fin. Group, 874 F. Supp. at 1353-54. Any fact that enables customers to assess independently the risk inherent in their investment and the likelihood of profit is a material fact. In re Commodities Int'l Corp., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943 at 44,563-64 (CFTC Jan. 14, 1997).

Each of the misrepresentations regarding the profitability of investing in options, the guarantees about well-known public information, the false sense of urgency, positions mistakenly placed in customer accounts, and the omissions regarding the firm's track record made by Kogan and other First Capital APs went to the heart of the customers' decision-making

process. Each misrepresentation and omission directly affected the profitability of the investment or the risk of loss involved with the options trading. Accordingly, the misrepresentations and omissions are material.

**C. Kogan is Liable under the Act as a Controlling Person**

Kogan is liable as a controlling person for the solicitation fraud of other First Capital APs pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b). "A fundamental purpose of section 13(b) is to allow the CFTC to reach behind a corporate entity to the controlling individuals of the corporation and to impose liability for violations of the Act directly on such individuals as well as on the corporation itself." In re JCC, Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,578 (CFTC May 12, 1994), aff'd sub nom. JCC, Inc. v. CFTC, 63 F.3d 1557 (11th Cir. 1995) (finding principals of company liable because they were officers of corporation who were involved in monitoring sales activities). Section 13(b) of the Act establishes that a controlling person is liable for a controlled person's violations if the controlling person "did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation[s]." Section 13(b) of the Act, 7 U.S.C. § 13c(b). Kogan is a controlling person of First Capital and is liable for First Capital's violations because he did not act in good faith and knowingly induced the acts constituting the violations.

Kogan is a controlling person of First Capital. See, e.g., In re Spiegel, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103 at 34,765 n. 4 (CFTC Jan. 12, 1988) (an individual has the requisite degree of control when he or she has "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise."); see also Monieson v. CFTC, 996 F.2d 852, 860 (7th Cir. 1993) ("We emphasize that it is [the

defendant's] power that matters, not whether he exercised it by actually participating in or benefitting from the illegal acts"). Kogan is the only principal listed for First Capital in National Futures Association documents and was also listed as First Capital's President in its incorporation documents. Kogan also exercised control over First Capital as evidenced by the fact that he signed contracts and checks for First Capital.

Kogan failed to act in good faith and knowingly induced First Capital's violations. Kogan failed to act in good faith because he did not maintain a reasonably adequate system of internal supervision and control over the First Capital's APs or "did not enforce with any reasonable diligence such system." Monieson, 996 F.2d at 858. Further, Kogan "knowingly induced" the acts constituting the violations at issue, because he had actual knowledge of them and allowed them to continue. See Spiegel, ¶ 24,103 at 34,767 (to establish the "knowing inducement" element of the controlling-person violation, the CFTC must show that the "the controlling person had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue"). Kogan had actual knowledge of the sales solicitation fraud occurring at First Capital because Kogan himself directly solicited customers using fraudulent statements and worked in tandem with other First Capital APs who made fraudulent sales solicitations to customers. Accordingly, Kogan is liable pursuant to Section 13(a)(2) of the Act as a controlling person.

**D. First Capital is Liable for the Acts of its Employees**

Kogan and other First Capital APs committed the fraudulent acts and omissions described herein within the course and scope of their employment at First Capital. Therefore, First Capital is liable under Section 2(a)(1)(B) of the Act as principal for its agents' violations of the Act and Regulations.

## E. Remedies

### 1. Permanent Injunction

Pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, the CFTC has made a showing that Defendants have engaged in acts and practices that 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). Unless restrained and enjoined by this Court, there is a reasonable likelihood that Defendants will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of the Act and Regulations.

Based on the conduct described above, the Court enters a permanent injunction against Defendants permanently restraining, enjoining, and prohibiting them from engaging, directly or indirectly, in:

a) any act or practice in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006);

b) any act or practice in violation of Regulations 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c) (2009);

c) 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);

d) entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2009)) ("commodity options"), and/or foreign currency (as described in Sections 2(c)(2)(B) and/or 2(c)(2)(C)(i) of the Act as amended by the CRA, to be codified in 7 U.S.C. §§ 2(c)(2)(B) and/or 2(c)(2)(C)(i)) ("forex contracts") for any of their own personal

accounts or for any account in which any Defendant has a direct or indirect interest;

e) having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on any of their behalf;

f) controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, and/or forex contracts;

g) soliciting, receiving or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;

h) 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); and

i) acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2009)), 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), 17 C.F.R. § 4.14(a)(9) (2009).

**2. Restitution**

The Court's authority to order restitution is ancillary to the Court's authority to order injunctive relief under Section 6c of the Act, 7 U.S.C. § 13a-1. This authority is founded on the

well-established legal principle articulated by the Supreme Court in Porter v. Warner Holding Co.:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader power and more flexible character than when a private controversy is at stake. Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case."

Porter, 328 U.S. 395, 398 (1946) (citations omitted).

The Court reaffirmed this principle in Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 296 (1960), where it found that the district court had jurisdiction to order an employer to reimburse employees for lost wages in a suit by the Secretary of Labor to restrain violations of the Fair Labor Standards Act. "'[T]he comprehensiveness of [the court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable reference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" Id. at 291 (quoting Porter, 328 U.S. at 398).

Likewise, district courts have followed these same principles in allowing the CFTC to seek restitution on behalf of defrauded customers. See CFTC v. Comm. Hedge Servs., Inc., 422 F. Supp. 2d 1057, 1060 (D. Neb. 2006) (noting the law is well settled that the court has authority to order restitution under the ancillary relief provision of 7 U.S.C. § 13a-1). This Court has complete authority to issue ancillary equitable relief, including, but not limited to ordering Defendants to make full restitution to every one of their customers who invested funds as a result of violations of the Act and Regulations by Defendants, plus pre- and post-judgment interest.

An award of restitution in this case is appropriate to compensate the victims of Defendants' fraud. Defendants used fraudulent solicitations in enticing members of the public to become investors. These investors relied upon these misrepresentations to their detriment. In total, Defendants' investors lost at least $3,064,061 as a result of Defendants' fraudulent solicitations.

Defendants are therefore held jointly and severally liable for $3,064,061 in restitution. In addition, Defendants are required to pay pre-judgment interest and post-judgment interest on the restitution amount.

**3. Disgorgement of Ill-Gotten Gains**

Disgorgement of Defendants' ill-gotten gains can effectuate the purposes of the Act. See, e.g., CFTC v. British American Options Corp., 788 F.2d 92, 93-94 (2d Cir. 1986) (stating that disgorgement effectuates the protection of the investor, the underlying purpose of the Act). Disgorgement of all profits is appropriate where a company engages in systematic fraudulent conduct. See id. (holding that the CFTC need not show that every dollar flowed from fraudulent conduct because fraud was systematic and pervasive). As such, the amount of money taken by Defendants as part of their systematic fraudulent scheme in the form of commissions and fees (as opposed to trading losses) that were charged to investors—$2,228,510—represents ill-gotten gains to Defendants.

Defendants are therefore held jointly and severally liable for disgorgement in the amount of $2,228,510. In addition, Defendants are required to pay pre-judgment interest and post-judgment interest on the disgorgement amount.

### 4. A Monitor Is Hereby Appointed to Receive Payment by Defendants and Distributions to Investors of Restitution and Disgorgement

To effect payment by Defendants of their restitution and disgorgement obligations set forth above, the Court hereby appoints the National Futures Association ("NFA") as the "Monitor." The Monitor shall collect restitution and disgorgement payments from Defendants 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, he shall not be liable for any action or inaction arising from his appointment as Monitor, other than actions involving fraud.

Defendants shall make their required restitution and disgorgement payments under this Order in the name of "First Capitol Futures Group Settlement Fund" and shall send such restitution and disgorgement payments by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's, 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 the paying Defendant and the name and docket number of the proceeding. The paying Defendant shall simultaneously transmit copies of the cover letter and the form of payment to (a) Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581, and (b) Chief, Office of Cooperative Enforcement, Division of Enforcement, at the same address.

The Monitor shall oversee Defendants' restitution and disgorgement obligations, and shall have the discretion to determine the manner of distribution of funds in an equitable fashion to Defendants' customers identified in the list that shall be provided to the Monitor upon entry of this Order ("Investor List") or may defer distribution until such time as it may deem appropriate. In the event that the amount of restitution and/or disgorgement payments to the Monitor are of a

de minimis nature such that the Monitor determines that the administrative costs of the making a restitution and/or disgorgement distribution to Defendants' customers is impractical, the Monitor may, in its discretion, treat such restitution and/or disgorgement payments as civil monetary penalty payments, which the Monitor shall forward to the Commission following the instructions for civil monetary penalty payments as set forth in Section E.5, below.

Defendants shall execute any documents necessary to release funds that they have in any repository, bank, investment or other financial institution wherever located, in order to make partial or total payment toward their restitution and disgorgement obligations.

To the extent that any funds accrue to the U.S. Treasury as a result of the Defendants' restitution and/or disgorgement obligations, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth in this section E.4.

Pursuant to Fed. R. Civ. P. 71, Defendants' customers are explicitly made intended third-party beneficiaries of this Order and may seek to enforce obedience of this Order to obtain satisfaction of any portion of the restitution and/or disgorgement that has not been paid by Defendants. Omission of any of Defendants' customers from the Investor List should in no way limit the ability of any such customer to seek recovery from Defendants or any other entity or person. Further, the amounts contained in the Investor List should not limit the ability of any of Defendants' customers to prove that a greater amount is owed from Defendants or any other entity or person, and nothing contained in this Order shall be construed to limit or abridge the rights of any of Defendants' customers that exist under state or common law.

**5. Civil Monetary Penalties**

Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1), provides that "the [CFTC] may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the

action to have committed any violation [of the Act] a civil penalty." For the time period at issue in the case at bar, the civil monetary penalty (CMP) shall be "not more than the greater of $130,000 or triple the monetary gain to such person for each such violation." Regulation 143.8(a)(1)(iii), 17 C.F.R. § 143.8(a)(1)(iii).

In determining how extensive the fine for violations of the Act and Regulations ought to be, courts and the CFTC have focused upon the nature of the violations recognizing that

> Civil monetary penalties serve a number of purposes. These penalties signify the importance of particular provisions of the Act and the [CFTC]'s rules, and act to vindicate these provisions in individual cases, particularly where the respondent has committed the violations intentionally. Civil monetary penalties are also exemplary; they remind both the recipient of the penalty and other persons subject to the Act that noncompliance carries a cost. To effect this exemplary purpose, that cost must not be too low or potential violators may be encouraged to engage in illegal conduct.

CFTC v. Emerald Worldwide Holdings, Inc., 2005 WL 1130588, *11 (C.D. Cal. 2005) (citing In re GNP Commodities, Inc., [1990-1992 Transfer Binder] Com. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (CFTC 1992) (citations omitted)).

This case warrants imposition of substantial civil monetary penalties against Defendants. Defendants repeatedly lied to investors and fraudulently solicited at least 58 people to open accounts and invest with Defendants. This fraudulent conduct constitutes serious violations of the Act and Regulations that strike at the core of the CFTC's regulatory system.

Although Defendants made numerous fraudulent representations to each of the investors and potential investors involved here, for purposes of assessing civil monetary penalties, this Court can treat each deceived investor and potential investor as a single violation of Section 4c(b) of the Act and Regulations 33.10(a) and (c),.

Accordingly, Defendants are hereby assessed civil monetary penalties as follows:

First Capitol Futures Group,
a/k/a and d/b/a First Capital Group: $7,540,000.00 ($130,000 * 58 customers)

David Michael Kogan: $7,540,000.00 ($130,000 * 58 customers)

In addition, Defendants are required to pay post-judgment interest on the civil monetary penalty amounts.

Defendants shall pay their civil monetary penalties 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 by Defendants other than by electronic funds transfer, 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: Marie Bateman—AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Boulevard
Oklahoma City, Oklahoma 73169
Telephone: (405) 954-6569

If payment by electronic transfer is chosen, the paying Defendant shall contact Marie Bateman or her successor at the address above to receive payment instructions and shall fully comply with those instructions. Defendants shall accompany payment of the civil monetary penalties with a cover letter that identifies the paying Defendant and the name and docket number of the proceeding. The paying Defendant shall simultaneously transmit copies of the cover letter and the form of payment to: (a) the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581; and (b) the Chief, Office of Cooperative Enforcement, Division of Enforcement, at the same address.

**F. Miscellaneous Provisions**

Satisfaction of Restitution and Disgorgement: Payments by Defendants in satisfaction of their restitution obligation shall also satisfy their disgorgement obligation by the same amount.

Further, Payments by Defendants in satisfaction of their disgorgement obligation shall also satisfy their restitution obligation by the same amount.

Order of Payments: Defendants' obligation to pay restitution, disgorgement and civil monetary penalties are all due and owing as of the date of this Order. Should Defendants, however, not be able to satisfy all these obligations at the same time, any payments from Defendants pursuant to this Order shall first be used to satisfy their restitution obligation. After Defendants' restitution obligation is satisfied fully, then any of Defendants' payments pursuant to this Order shall be applied to satisfaction of their civil monetary penalties.

Partial Payments: Any acceptance by the CFTC and/or Monitor of partial payment of the restitution obligation, the civil monetary penalty obligation and/or disgorgement obligation shall not be deemed to be a waiver of the respective requirement of Defendants to make further payments pursuant to this Order, or a waiver of the CFTC's and/or the Monitor's right to seek to compel payment of any remaining balance.

Equitable Relief: The equitable relief provisions of this Order shall be binding upon Defendants and any person who is acting in the capacity of agent, employee, servant, or attorney of Defendants, and any person acting in active concert or participation with Defendants, who receives actual notice of this Order by personal service or otherwise.

Notices: All notices required to be given to the CFTC or the NFA by any provision in this Order shall be sent certified mail, return receipt requested, as follows:

To the CFTC:

Attention – Director of Enforcement
Commodity Futures Trading Commission
Division of Enforcement
1155 21st Street N.W.
Washington, D.C. 20581

To the NFA:

National Futures Association
300 South Riverside Plaza, Suite 1800
Chicago, Illinois 60606-6615

Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this cause to assure compliance with this Order and for all other purposes related to this action.

Interest: This Court further orders that Defendants' obligation to pay pre-judgment interest on the restitution and disgorgement amounts shall accrue beginning on June 26, 2009 and shall be determined by using the underpayment rate established by the Internal Revenue Service pursuant to 26 U.S.C. § 6621. The Court further orders that Defendants' obligation to pay post-judgment interest on the restitution, disgorgement and civil monetary penalty amounts shall accrue beginning on the date of entry of this Order and shall be determined by using the prevailing Treasury Bill rate prevailing on the date of entry of this Order pursuant to 26 U.S.C. § 1961.

Costs and Fees: Upon application by the CFTC to this Court for its costs and fess in bringing this action, Defendants will be ordered to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2).

Date: February 18, 2010

/s/ Dean Whipple
UNITED STATES DISTRICT JUDGE