

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:
	:
	:
Systems of Success-Window to Profit,	: CFTC Docket No. 00-27
	:
Bernadette Flavell a/k/a Bernadette Viele,	:
	: Administrative Law Judge
Richard Viele,	: Bruce C. Levine
	:
-and-	:
	:
Kevin Kates,	: ORDER MAKING FINDINGS AND
	: IMPOSING REMEDIAL SANCTIONS
	: AS TO RESPONDENT KATES
Respondents.	:
	:

I.

On September 6, 2000 the Commodity Futures Trading Commission (the "Commission") filed a Complaint and Notice of Hearing against Systems of Success-Window to Profit ("SOS"), Bernadette Flavell a/k/a Bernadette Viele ("Flavell"), Richard Viele ("Viele") and Kevin Kates ("Kates") (collectively the "Respondents"). The two-count Complaint alleged that the Respondents violated Sections 4b(a)(i) and (iii) and 4o(1)(A) and (B) of the Commodity Exchange Act, 7 U.S.C. §§ 6b(a)(i) and (iii) and 6o(1)(A) and (B) (1994), as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. No. 106-554 (2000), ("the Act"), and Sections 4.41(a) and (b) of the Commission's Regulations ("Regulations"), 17 C.F.R. §§ 4.41(a) and (b) (2001).

II.

In order to dispose of the allegations and issues raised in the Complaint, Kates has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Without admitting or denying any of the allegations of the Complaint or the findings of fact in the Order Making Findings and Imposing Remedial Sanctions ("Order"), and prior to any adjudication on the merits, Kates acknowledges service of the Order and consents to the use of the findings in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Kates does not consent to the use of the Offer or this Order, or the findings to which he has consented in the Offer, as the sole basis for any other proceeding brought by the Commission other than a proceeding to enforce the terms of this Order. He does not consent to the use of the Offer or this Order, or the findings to

III.

The Commission finds the following:

A. SUMMARY

Kates, a registered associated person (“AP”) of First Financial Trading Limited, Inc., (“First Financial”), at the time a registered introducing broker, defrauded clients and prospective clients through material misrepresentations in newspaper advertisements and written promotional materials regarding SOS’s commodity futures trading systems from September 1996 until April 1997. In addition, Kates made material misrepresentations to his clients and prospective clients about the profit potential and risk associated with futures trading. Kates’s fraudulent solicitations presented performance results for various trading systems as actual performance results when, in fact, all such results were hypothetical. Moreover, Kates failed to provide the required cautionary statement explaining the inherent limitations of hypothetical performance results.

B. SETTLING RESPONDENT

Kevin Kates, who resides in Lighthouse Point, Florida, was registered as an AP and listed as a principal of First Financial from September 14, 1995 to July 30, 1997. He became president of First Financial in July 1996. Kates was registered with the Commission as a CTA, d/b/a Trader Services Co. from May 22, 1996 to December 30, 1998.² He is not currently registered with the Commission in any capacity.

C. FACTS

Between September 1996 and April 1997, Kates fraudulently marketed the SOS commodity futures trading systems. Kates made material misrepresentations in newspaper advertisements and written promotional material regarding profitability and reliability of the various SOS systems. Kates’s fraudulent solicitations included presenting hypothetical trading results as actual trading results and failing to provide the required cautionary statement explaining the inherent limitations of hypothetical performance results. Kates made money from the varying fees charged to his clients for the SOS systems. In addition, Kates traded for his clients using the SOS systems and profited from commissions charged to those clients through First Financial.

which he has consented in his Offer, by any other person or entity in this or any other proceeding. The findings to which he has consented to in the Offer, as contained in this Order, are not binding on any other person or entity named as a respondent or defendant in this or in any other proceeding.

² In December 1998, Kates agreed to withdraw his NFA membership in settlement of an NFA complaint regarding the use of misleading and deceptive promotional material unrelated to SOS. Pursuant to this settlement, Kates may never reapply for NFA membership or associate membership or work in any capacity requiring such membership.

Kates placed advertisements for the SOS trading systems in Investor's Business Daily ("IBD") and shared the attendant costs with SOS. Initially, Kates's telephone number was listed in those advertisements as the contact number. Those advertisements in IBD claimed or implied that SOS's systems had a very high probability of profits and made claims regarding the magnitude of profits. For example, advertisements claimed between 97% and 99% accuracy and several advertisements claimed to "make \$1.2 Million in 1 year." Those advertisements' disclaimer language and warnings, when they did appear at all, were insufficient to adequately caution prospective subscribers about the risks inherent in trading. From at least December 9, 1996 through March 24, 1997, those advertisements failed to include the disclaimer regarding hypothetical results required by Section 4.41(b)(1) of the Regulations. Advertisements for SOS's systems also stated that claimed profit percentages and dollar figures were based on "documented results." These advertisements implied that all of the claims made were substantiated by "actual" or "real" results experienced by actual people when trading according to the SOS systems, but, in fact, they were not. Rather, these "results" were hypothetical.

As part of the marketing scheme, Kates promoted SOS's systems to prospective clients who called in response to the advertisements and to his clients at First Financial. Kates distributed SOS spreadsheets denoting the various systems' track records that falsely presented hypothetical trading as actual, and failed to present trades that had resulted in losses. Some of these track records were labeled "Actual Trading Results for S&P SYS 1." Some of these track records included a summary page that noted "[r]esults are based on actual trades." In addition, some track records included "disclosure" statements that indicated that the track records were based on "past performance." Consistent with the claims made in the SOS advertisements, the track records for the particular systems claimed that virtually all of those systems' trades were profitable.

Kates stated or implied in his solicitation efforts that the track records consisted of actual trades. Kates used the word "results" in titling the track records, without indicating that they were hypothetical or simulated performance results, and sometimes used the term "actual" to describe the trading results. In some materials sent to clients and prospective clients, Kates either failed to include the required cautionary statement regarding the limitations of hypothetical performance results or did not include it on the same page as the track record.

Although the promotional material and track records portrayed a rosy picture of consistent daily and net monthly profits, individuals whose accounts were traded by Kates according to one of SOS's systems lost money in as early as October 1996; and clients never experienced the monthly net profits listed in the track records. The claimed results reflected in the track records varied substantially from Kates's clients' actual results. On dates when some accounts lost money while other accounts made varying amounts of profit, the track record only reflects that there was a winning trade with one specific profit amount listed. When many of Kates's clients suffered trading losses trading according to the SOS system on particular dates, those dates do not appear in the track records.

Kates knew of clients' losses because Kates handled those accounts at First Financial. Therefore, Kates knew that the track records he disseminated to prospective clients did not accurately reflect the performance of the SOS systems.

D. LEGAL DISCUSSION

1. Kates Made Fraudulent Misrepresentations of Material Facts in violation of Sections 4b(a)(i) and (iii) of the Act

Section 4b(a)(i) of the Act provides that it shall be unlawful, in or in connection with a futures contract, for or on behalf of any other person, to willfully cheat or defraud, or to attempt to cheat or defraud, any other person.³ Section 4b(a)(iii) of the Act states that it shall be unlawful, in or in connection with a futures contract, for or on behalf of any other person, to willfully deceive or attempt to deceive such other person by any means in regard to, among others, any act of agency performed with respect to any contract. Establishing a violation of Sections 4b(a)(i) and 4b(a)(iii) requires a showing that a person made misleading representations that were material "in connection with" futures transactions.⁴ Further, an agency relationship between the wrongdoer and the client must be established.⁵

In soliciting prospective clients for SOS's programs, Kates violated Sections 4b(a)(i) and 4b(a)(iii) of the Act because he intended to and did give the misleading impression that SOS was an established trading system that had achieved phenomenal results. In addition, since Kates acted as an AP of First Financial for the accounts and traded for his clients' accounts according to the signals from the SOS systems, his fraud in the promotion of the SOS system relates to, and satisfies, Section 4b's "for or on behalf of" language.

The IBD advertisements disseminated by Kates contained material misrepresentations and omissions regarding the risk of loss and probability of profit associated with trading futures using SOS's system. These advertisements and the promotional materials that Kates disseminated were intended by him to and did give the misleading impression that the claims of past success of the systems were based on actual trading, when they were based only on hypothetical trading results. In providing track records to clients and prospective clients, Kates either implied or stated that these track records consisted of actual results.

³ *Saxe v. E.F. Hutton & Co. Inc.*, 789 F.2d 105, 109 (2d Cir. 1986).

⁴ *R&W Technical Services, Ltd. v. CFTC*, 205 F.3d 165 (5th Cir., Feb. 24, 2000), *cert. denied*, 531 U.S. 817 (Oct. 2, 2000)(fraud in the sale of investment advice is "in connection with" the sale of a commodity futures contract if the fraud relates to the risk of trading and the primary purpose of purchasing the advice is to execute trades); *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103-04 (7th Cir. 1977) ("in or in connection with" requirement should be interpreted flexibly to include deceptive conduct that occurs prior to the opening of a commodity interest account).

⁵ *See Commodity Trend Service, Inc. v. CFTC*, 233 F.3d 981, 992 (7th Cir. 2000) (broker or other agency relationship required to bring conduct under Section 4b's "for or on behalf of" language).

The distinction between actual and hypothetical performance results is material, and the affirmative misrepresentation of hypothetical results as actual trading results constitutes violations of Section 4b(a) of the Act.⁶ “[I]n determining whether to rely on a trading program to guide his decisions to enter and exit the futures market, a reasonable customer would think it material that the trading program at issue had never been tested through actual trading.”⁷

The track records are replete with misrepresentations. The track records either omit dates and trading results entirely or list dates and doctor the corresponding results where clients traded according to SOS’s system and lost money while other clients traded according to SOS’s system and made varying amounts of profit. These facts constitute further evidence that the representations made to clients and prospective clients in the track records were manipulated. Further, Kates knew that his clients were suffering losses which would skew the “actual” track records. Thus, Kates knew that some losing-trade dates were ignored and others were removed from the track records or changed to show a profit rather than an actual loss. Kates also knew that some profitable trades were altered to show an even greater profit than had been obtained by the actual users of SOS’s system. Kates’s failure to disclose this material information violates Section 4b of the Act.

Liability under Section 4b(a) of the Act also requires proof of scienter, i.e., proof that Kates committed the alleged wrongful actions “intentionally or with reckless disregard for [his] duties under the Act.”⁸ Kates engaged in his fraudulent activities in order to convince clients and prospective clients that SOS’s systems were profitable when, in fact, he knew that the opposite was true. Kates used the term “results,” and sometimes “actual results” in the track record he disseminated to clients and prospective clients when he knew that the track record was actually composed of only a selection of trading results. As he traded according to an SOS system, Kates knew that no one traded according to SOS’s systems on every date reflected in the track records. Kates also knew that at least one of his clients suffered significant losses while trading the system that were not reflected at all in the track record. Thus, Kates acted with scienter and, therefore, violated Sections 4b(a)(i) and (iii) of the Act.⁹

⁶ *R&W v. CFTC*, *supra* at 170; *Refco v. Levine*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,488 at 36,115 (CFTC July 11, 1989); *see also CFTC v. Skorupskas*, 605 F.Supp. 923, 933 (E.D. Mich. 1985)(misrepresenting hypothetical performance tables as being actual trading results violated Section 4b of the Act); *Muniz v. Lassila*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,225 at 38,650 (CFTC Jan. 17, 1992)(misrepresenting a theoretical, untested approach to trading as an established, successful trading program is material and was a violation of Section 4b of the Act).

⁷ *Refco v. Levine*, *supra* at 36,115.

⁸ *Hammond v. Smith Barney, Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659, n.21 (CFTC March 1, 1990).

⁹ *In the Matter of JCC, Inc. et al.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,080 at 41,576-77 (CFTC May 12, 1994), *aff’d sub nom. JCC Inc. v. CFTC*, 63 F.3d 1557 (11th Cir. 1995); *Refco v. Levine*, *supra* at 36,115.

2. Kates, While Acting as a CTA, Violated Section 4o(1)(A) and (B) of the Act and Section 4.41(a) and (b) of the Regulations

a. Violations of Section 4o(1) of the Act

Section 4o(1) of the Act prohibits a CTA from, by use of the mails or any means or instrumentality of interstate commerce, (A) employing any device, scheme, or artifice to defraud any client or prospective client, or from (B) engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. Section 4o prohibits both registered and unregistered CTAs from defrauding their clients.¹⁰

Under Section 1a(5) of the Act, to establish that someone is a CTA, it must be shown that the person (1) advised another about the value or advisability of trading in futures contracts, (2) either directly or through publications, writings or electronic media, (3) for compensation or profit.¹¹

Kates's activities plainly fit within the Commission's definition of a CTA. Kates directly advised others as to the advisability of trading futures through the use of SOS's systems. In addition, Kates made SOS's advice available directly, through telephone hotlines and through trading his clients' accounts according to SOS's systems, and did so for compensation or profit based on fees and commissions charged to his clients.

While acting as a CTA, Kates violated Section 4o(1) of the Act and Regulation 4.41(a) by the same conduct that violated Section 4b(a) of the Act.¹² Specifically, Kates defrauded clients and prospective clients through the mails or other means of interstate commerce. The Commission has consistently held that misrepresentations of hypothetical trading results as actual trading results violate Section 4o of the Act.¹³ These are the same misrepresentations made by Kates in his creation and dissemination of SOS's track record. Therefore, Kates is liable for violating Section 4o of the Act.

¹⁰ *CFTC v. Savage*, *supra* at 270 (court held that it is clear that persons required to be registered are subject to Section 4o even if they are not registered).

¹¹ One of the exclusions from this definition includes magazine or newspaper articles that "dispense investment advice," and is designed to protect incidental publishers of advice but not publishers who specifically concentrate on commodities advice. *R&W v. CFTC*, *supra*, at 172-173. This exclusion is not applicable here.

¹² *CFTC v. Skorupskas*, 605 F. Supp. 923, 932-33 (E.D. Mich. 1985)(the same conduct that violates Section 4b can violate Section 4o(1)).

¹³ *Id.*, at 933; *In re Armstrong* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,332 at 42,612 (CFTC March 13, 1995); *Maynard v. Cycle System Index, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,429 at 26,068-69 (CFTC April 30, 1982).

b. Violations of Section 4.41(a) and (b) of the Regulations

Section 4.41(a) of the Regulations prohibits a CTA from advertising in a manner which (1) employs any “device, scheme or artifice to defraud any ... client or prospective ... client” or (2) involves any “transaction, practice or course of business which operates as a fraud or deceit upon any ... client or any prospective ... client.” The Commission has held that Section 4.41(a) of the Regulations is violated when advertisements depict hypothetical trading results as actual trading results.¹⁴ The SOS advertisements incorporating the purported results of trading according to SOS’s signals that violate Sections 4b(a) and 40(1) of the Act also violate Section 4.41(a) of the Regulations.

Regulation 4.41(b)(1) specifically requires that any advertisement presenting hypothetical performance results of a CTA must prominently display a cautionary statement alerting clients and prospective clients to the limitations inherent in hypothetical performance results. The Section 4.41(b)(1) disclaimer serves to “alert clients to the limited predictive value” of hypothetical performance results, and the failure to include the cautionary statement in advertisements touting hypothetical performance results violates Section 4.41(b).¹⁵

While Kates attached general warnings to the track records that he supplied to clients and prospective clients, these warnings did not inform clients and prospective clients that the results were hypothetical and of limited predictive value and did not conform to the warnings specifically required by Regulation 4.41(b)(1). Kates, therefore, is liable for violating Section 4.41(b).

IV.

OFFER OF SETTLEMENT

Kates has submitted an Offer in which he neither admits nor denies the allegations in the Complaint or the findings in the Order. Subject to the foregoing, Kates acknowledges service of the Complaint and of this Order and admits the jurisdiction of the Commission with respect to the matters set forth in the Complaint and the Order. Kates waives: (1) a hearing and all posthearing procedures; (2) judicial review by any court; (3) any objection to the staff’s participation in the Commission’s consideration of the Offer; (4) all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-232, 110 Stat. 862-863, and Part 148 of the Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2001), relating to, or arising from, this action, and any right under the Equal Access to Justice Act to seek costs, fees, or other expenses relating to, or arising from, this proceeding; and (5) any claim of Double Jeopardy based upon the institution of this

¹⁴ *In re Armstrong*, *supra* ¶ 26,332 at 42,611-112.

¹⁵ *Id.* ¶ 26,332 at 42,612; *CFTC v. Skorupskas*, *supra*, at 933, n.21.

proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief.

Kates stipulates that the record basis on which this Order is entered consists solely of the Complaint and the Order and the findings to which he has consented in the Offer, which are incorporated in this Order. Kates consents to the Commission's entry of this Order, which makes findings as set forth herein, and orders that Kates:

- 1) cease and desist from violating the provisions of the Act and the Regulations that he has been found to have violated;
- 2) comply with the undertakings as set forth in the Offer and incorporated in this Order;
- 3) pay a contingent civil monetary penalty ("CMP") of up to \$75,000 pursuant to a ten-year payment plan; and
- 4) be permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined by Section 1a(29) of the Act, and be refused all privileges by all registered entities beginning on the third Monday after the date of this Order.

V.

FINDINGS OF VIOLATIONS

Solely on the basis of Kates's consent evidenced in the Offer, without admitting or denying any of the allegations of the Complaint or the findings in this Order, and prior to any adjudication on the merits, the Commission finds that Kates violated Sections 4b(a)(i) and (iii) and 4o(1)(A) and (B) of the Act, 7 U.S.C. §§ 6b(a)(i) and (iii) and 6o(1)(A) and (B) (1994), and Sections 4.41(a) and (b) of the Regulations, 17 C.F.R. §§ 4.41(a) and (b) (2001).

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Kates shall cease and desist from violating Sections 4b(a)(i) and (iii) and 4o(1)(A) and (B) of the Act, 7 U.S.C. §§ 6b(a)(i) and (iii) and 6o(1)(A) and (B) (1994), and Sections 4.41(a) and (b) of the Regulations, 17 C.F.R. §§ 4.41(a) and (b) (2001);
- B. Kates shall be permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined by Section 1(a)(29) of

the Act, and all registered entities shall refuse Kates all privileges thereon beginning on the third Monday after the date of this Order;

- C. Kates shall pay a CMP in an amount of up to \$75,000, pursuant to a ten-year payment plan, as provided in subparagraph D below. Kates shall make an annual civil monetary penalty payment ("Annual CMP Payment"), as calculated by a monitor designated by the Commission (the "Monitor"),¹⁶ on or before July 31 of each calendar year, starting in calendar year 2002 and continuing for ten years until 2011 (or until the civil monetary penalty is paid in full, if that happens first).¹⁷ Kates shall make each such Annual CMP Payment by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, or her successor, Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Kates and the name and docket number of the proceeding; Kates shall simultaneously transmit a copy of the cover letter and the form of payment to the Monitor and to the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581;
- D. The amount of Kates's Annual CMP Payment, to be made pursuant to subparagraph C above, shall consist of a portion of: (1) the adjusted gross income (as defined by the Internal Revenue Code) earned or received by Kates during the course of the preceding calendar year, plus (2) all other net cash receipts, net cash entitlements or net proceeds of non-cash assets (collectively "Net Cash Receipts") received by Kates during the course of the preceding calendar year. The Annual CMP Payment will be determined as follows:

¹⁶ Kates agrees that the National Futures Association is hereby designated as the Monitor for a period of ten years commencing as of the date of the entry of the Order. Notice to the Monitor shall be made to Daniel A. Driscoll, Esq., Executive Vice President, Compliance, or his successor, at the following address: National Futures Association, 200 West Madison Street, Chicago, IL 60606.

¹⁷ Kates's ten-year CMP period shall run from January 1, 2002 through December 31, 2011. Annual CMP payments for a calendar year shall take place by July 31 of the following year. Therefore, the final Annual CMP payment, for the year 2011, will be due on or before July 31, 2012. For ten years, based on the information contained in Kates's sworn financial statements, Kates's tax returns and other financial statements and records provided to the Monitor, the Monitor shall calculate the total amount of the civil monetary penalty to be paid by Kates for that year. On or before June 30 of each year and starting in the calendar year 2003 and concluding in the calendar year 2012, the Monitor shall send written notice to Kates with instructions to pay by no later than July 31 of that year the amount of the civil monetary penalty pursuant to the payment instructions provided in subparagraph D above.

Where Adjusted Gross Income Plus Net Cash Receipts Total:	Percent of Total to be Paid by Kates is:
Up to \$25,000	0%
\$25,000 to \$50,000	20% of the amount above \$25,000
\$50,000-\$100,000	\$5,000 (=20% of the amount above \$25,000) <u>PLUS</u> 30% of the amount above \$50,000
Above \$100,000	\$5,000 (=20% of the amount above \$25,000) <u>PLUS</u> \$15,000 (=30% of the amount above \$50,000) <u>PLUS</u> 40% of the amount above \$100,000;

- E. In the event that Kates does not make payments as directed in paragraphs C and D, *supra*, the Commission may bring a proceeding or an action to enforce compliance with this Order and at its option may seek payment of the unpaid Annual CMP Payments, or immediate payment of the entire amount of civil monetary penalty required by paragraphs C and D, *supra*. The only issue that Kates may raise in defense of such enforcement action is whether he has made the Annual CMP Payments as directed by the Monitor. Any action or proceeding brought by the Commission compelling payment of the Annual CMP Payments, due and owing pursuant to paragraphs C and D, *supra*, or any portion thereof, or any acceptance by the Commission of partial payment of the Annual CMP Payments made by Kates, shall not be deemed a waiver of Kates's obligation to make further payments pursuant to the payment plans, or a waiver of the Commission's right to seek to compel payment of the remaining balance of the civil monetary penalty assessed against Kates;
- F. The Commission notes that an order requiring immediate payment of a civil monetary penalty against Kates would be appropriate in this case, but does not impose it based upon Kates's financial condition. Kates acknowledges that the Commission's acceptance of the Offer is conditioned upon the accuracy and completeness of the sworn Financial Statements and other evidence he has provided regarding his financial condition. Kates consents that if at any time following the entry of this Order, the Division of Enforcement (the "Division") obtains information indicating that representations concerning his financial condition was fraudulent, misleading, inaccurate, or incomplete in any material respect at

the time it was made, the Division may, at any time following the entry of the Order, petition the Commission to: (1) reopen this matter to consider whether Kates provided accurate and complete financial information at the time such representations were made; (2) require immediate payment of the full amount of the civil monetary penalty, required by paragraphs C and D, *supra*; and (3) seek any additional remedies that the Commission would be authorized to impose in this proceeding if Kates's Offer had not been accepted. No other issues shall be considered in connection with this petition other than whether the financial information provided by Kates was fraudulent, misleading, inaccurate, or incomplete in any material respect, and whether any additional remedies should be imposed. Kates may not, by way of defense to any such petition, contest the validity of, or the findings in, the Order, assert that payment of a civil monetary penalty should not be ordered, or contest the amount of the civil monetary penalty to be paid. If in such proceeding, the Division petitions for, and the Commission orders, payment of less than the full amount of the civil monetary penalty, such petition shall not be deemed a waiver of Kates's obligation to pay the remaining balance of the civil monetary penalty assessed against Kates pursuant to the payment plans.

- G. Kates shall comply with his undertakings as set forth in Section III of the Offer, as follows:
1. Kates shall provide his sworn financial statement to the Monitor on June 30 and December 31 of each calendar year, starting June 30, 2002 and continuing through and including June 30, 2011. The financial statement shall provide:
 - (a) a true and complete itemization of all of Kates's rights, title and interest in (or claimed in) any asset, wherever, however and by whomever held;
 - (b) an itemization, description and explanation of all transfers of assets with a value of \$1,000 or more made by or on behalf of Kates over the preceding six-month interval; and
 - (c) a detailed description of the source and amount of all of Kates's income or earnings over the preceding six-month interval, however generated.
 2. Kates shall also provide the Monitor with complete copies of his signed federal income tax return (for the previous calendar year), including all schedules and attachments thereto (e.g., IRS Forms W-2) and Forms 1099, as well as any filings he is required to submit to any state tax or revenue authority, on or before June 30 of each calendar year, or as soon thereafter as the same are filed,

beginning in 2002 and ending in 2011. If Kates moves his residence or business at any time, he shall provide written notice of his new address to the Monitor and the Commission within ten (10) days thereof. If, during the same time period, Kates elects to file a joint tax return, he shall provide all documents called for by in this subparagraph, including the signed and filed joint tax return, plus a draft individual tax return prepared on IRS form 1040 containing a certification by a licensed certified public accountant that the "Income" section (currently lines 7-22 of the form 1040) truly, accurately, and completely reflects all of his income, that the "Adjusted Gross Income" section (currently lines 23-33 of the form 1040) truly, accurately, and completely identifies all deductions that he has a right to claim, and that the deductions contained in the "Adjusted Gross Income" section are equal to or less than 50% of the deductions that he is entitled to claim on the joint tax return; provided, however, that Kates may claim 100% of the deductions contained in the "Adjusted Gross Income" section that are solely his. Such individual tax return shall include all schedules and attachments thereto (e.g., IRS Forms W-2) and Forms 1099, as well as any filings required to be submitted to any state tax or revenue authority;

3. Kates shall cooperate fully and expeditiously with the Monitor and the Commission in carrying out all aspects of his Annual CMP Payments. He shall cooperate fully with the Monitor and the Commission in explaining his financial income and earnings, status of assets, financial statements, asset transfers, tax returns, and shall provide any information concerning him as may be required by the Commission. Furthermore, Kates shall provide such additional information and documents with respect thereto as may be requested by the Monitor or the Commission;
4. Kates shall not transfer or cause others to transfer funds or other property to the custody, possession, or control of any member of Kates's family or any other person for the purpose of concealing such funds or property from the Monitor or the Commission;
5. Kates shall cooperate fully with the Division's litigation against all other respondents in this litigation including, but not limited to, meeting with Division attorneys, providing documents as are necessary to Division attorneys and testifying truthfully, accurately and completely on behalf of the Division at any hearing or other proceedings related to this litigation and not asserting privileges under the Fifth Amendment of the United States Constitution;

6. Kates shall never apply for registration or seek exemption from registration with the Commission in any capacity and shall never engage in any activity requiring such registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. § 4.14(a)(9) (2001), or act as a principal, agent, officer or employee of any person registered, required to be registered, or exempted from registration, unless such exemption is pursuant to Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. § 4.14(a)(9) (2001); and
7. Neither Kates, nor any of his agents or employees under his authority or control, shall take any action or make any public statements denying, directly or indirectly, any allegation in the Complaint or findings or conclusions in the Order, or creating, or tending to create, the impression that the Complaint or Order is without a factual basis; provided, however, that nothing in this provision shall affect Kates's (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party.

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

BY THE COMMISSION.

Dated: June 17, 2002

Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission