

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 16-24022-CIV-ALTONAGA/O'Sullivan

**U.S. COMMODITY FUTURES TRADING
COMMISSION,**

Plaintiff,

vs.

K.B. CONCEPTS GROUP, LLC, *et al.*,

Defendants.

ORDER

THIS CAUSE came before the Court on Plaintiff, the U.S. Commodity Futures Trading Commission's Motion . . . for an Order of Final Default Judgment [ECF No. 41]. Clerk's Defaults [ECF Nos. 37–38] were entered against Defendants on March 15, 2017, and, pursuant to the Court's instructions (*see* Order Striking; Order ("Order to File") [ECF No. 40]), the Commission then filed a Notice of Joint Liability [ECF No. 39] and the Motion. The Court has carefully considered the Motion, the record, and applicable law.

I. BACKGROUND

A. Statutory Framework

The Commodity Exchange Act, 7 U.S.C. sections 1 *et seq.*, gives the Commission jurisdiction over any "agreement, contract, or transaction in any commodity that is . . . entered into, or offered to (even if not entered into with) [a non-eligible contract participant] . . . on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis." 7 U.S.C. § 2(c)(2)(D) (alterations

added). As relevant here, under the Act, an “eligible contract participant” is an individual with amounts invested on a discretionary basis which, in the aggregate, exceed (1) \$10 million, or (2) \$5 million if the individual “enters into the transaction to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred by the individual.” *Id.* § 1a(18)(xi). Section 6(a) makes it unlawful for any person deal in any transaction anywhere in the United States related to the purchase or sale of a commodity for future delivery unless that transaction is conducted on or subject to the rules of a board of trade designated by the Commission as a contract market. *See id.* § 6(a).

For present purposes, a “futures commission merchant” is “an individual, association, partnership, corporation, or trust . . . engaged in soliciting or in accepting orders for . . . any agreement, contract, or transaction described in [certain sections of the Act] . . . and [who] accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.” *Id.* § 1a(28) (alterations added). Under the Act, futures commission merchants must register with the Commission as such. *See id.* § 6d(a)(1).

B. Factual Background

From at least September 2012 through at least February 2013 (the “Relevant Period”), Defendant, K.B. Concepts, doing business as Apex Advisors, LLC, offered to enter into, executed, and confirmed the execution of financed precious metal transactions with customers who were not eligible contract persons. (*See* Complaint [ECF No. 1] ¶ 20). Defendant, Kelvin Burgos, acted as Apex’s president and managing member, and was responsible for overseeing its day-to-day operations. (*See id.* ¶ 12). Apex’s employees solicited investments in financed

precious metal transactions purportedly executed through Hunter Wise Commodities, LLC. (*See id.* ¶ 20).

Hunter Wise held itself out as a precious metals wholesaler and clearing firm and allegedly confirmed the execution of customer off-exchange retail commodity transactions. (*See id.* ¶ 13). Hunter Wise purported to offer, enter into, and confirm the execution of retail commodity transactions involving gold, silver, platinum, palladium, and copper throughout the United States using a network of telemarketers like Apex. (*See id.* ¶ 14).¹

Apex employees operated almost exclusively over the telephone and solicited customers interested in purchasing metal. (*See id.* ¶ 21). To effect a transaction, customers had to deposit a percentage of the total metal value and arrange for a loan for the remaining amount, with Hunter Wise providing the financing. (*See id.* ¶ 21). After customers placed the money with Apex, Apex placed an order with Hunter Wise to purchase the metal and transmitted the funds to Hunter Wise. (*See id.* ¶ 22). Apex charged customers commissions and fees for interest and processing purchases, which Hunter provided to Apex after receiving the funds from the customers. (*See id.* ¶ 23). These commissions and fees flowed through a bank account in Apex's name which was established and controlled by Burgos. (*See id.* ¶ 24). Burgos was signatory on Apex's bank accounts and entered into agreements with Hunter Wise on Apex's behalf. (*See id.* ¶ 27).

Between September 2012 and February 2013, Apex collected approximately \$456, 997 from at least 10 customers. (*See id.* ¶ 26). Around \$156,783 was paid to Apex in the form of commissions, interest charges, and other fees, \$121,591.10 of which represent commissions paid

¹ On February 19, 2014, the U.S. District Court for the Southern District of Florida found Hunter Wise and other defendants violated section 6(a) of the Commodity Exchange Act by trading in off-exchange retail commodity transactions. (*See Compl.* ¶ 15); *see also CFTC v. Hunter Wise Commodities, LLC*, 1 F. Supp. 3d 1311, 1320–22 (S.D. Fla. 2014).

to K.B. Concepts for trades purportedly undertaken on behalf of those 10 customers. (*See id.*; *see also* Mot. 13). K.B. Concepts returned approximately \$33,310.34 of the \$156,783 sum to one of the 10 customers. (*See* Mot. 13).

Apex and Hunter Wise never bought, sold, or otherwise transferred any metals for these transactions. (*See* Compl. ¶ 27). The transactions were not made subject to the rules of any board of trade, exchange, or contract market. (*See id.*). There were no deliveries of precious metals to any Apex customers. (*See id.* ¶ 25).

C. Procedural History

On September 20, 2016, the Commission filed the Complaint against Defendants, seeking an injunction, disgorgement, a civil monetary penalty, and other equitable relief under the Commodity Exchange Act. Defendants filed an Answer on December 5, 2016. Upon withdrawal of Defendants' counsel in February 2017 (*see* Order [ECF No. 28]), K.B. Concepts failed to obtain replacement counsel and Burgos failed to advise whether he was proceeding *pro se* or seeking replacement counsel, and so the Court struck the Answer [ECF No. 24]. (*See* Order ("Order Striking" [ECF No. 33])). Pursuant to the Court's instructions, the Commission initiated default proceedings and filed the Motion. (*See* Order Striking; Order to File).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 55, the Court is authorized to enter a final judgment of default against a party who has failed to plead in response to a complaint. *See* FED. R. CIV. P. 55(b)(2). But a defendant's default "does not in itself warrant . . . entering a default judgment." *Goldman v. HSBC Bank USA, Nat'l Ass'n*, No. 13-81271-CIV, 2015 WL 1782241, at *1 (S.D. Fla. Mar. 24, 2015) (alteration in original; internal quotation marks omitted) (quoting *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)). By

defaulting, a defendant only admits a plaintiff's well-pleaded allegations of fact; it does not admit facts which are not well-pleaded or conclusions of law. *See id.* "[B]efore entering a default judgment for damages, the district court must ensure that the well-pleaded allegations in the complaint . . . actually state a substantive cause of action and that there is a substantive, sufficient basis in the pleadings for the particular relief sought." *Hayes v. Asset Acceptance*, No. 13-81143-CIV, 2014 WL 1767106, at *1 (S.D. Fla. May 2, 2014) (alterations added; internal quotation marks omitted) (quoting *Tyco Fire & Sec., LLC v. Alcocer*, 218 F. App'x 860, 863 (11th Cir. 2007) (per curiam)).

III. FINDINGS OF FACT

A. K.B. Concepts Acted as an Unregistered Futures Commission Merchant

During the Relevant Period, K.B. Concepts, through its managers, employees, and agents, acted as a futures commission merchant under 7 U.S.C. section 1a(28), by soliciting and accepting orders for agreements, contracts, or transactions in retail commodity transactions. In connection with these transactions, K.B. Concepts accepted approximately \$456,977 from customers. During the Relevant Period, K.B. Concepts failed to register as a futures commission merchant, as required by section 6d(a)(1).

B. Burgos Acted as the Controlling Person of K.B. Concepts

At all times during the Relevant Period, Burgos was the managing member, president, and controlling person of K.B. Concepts. He exercised control over the day-to-day operations of K.B. Concepts, was a signatory on K.B. Concepts's bank accounts, and entered into agreements with Hunter Wise on K.B. Concepts's behalf.

IV. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

The Court has jurisdiction over the conduct and transactions at issue in this case under 7 U.S.C. sections 2(c)(2) and 13a-1. The Commission has jurisdiction over “any agreement, contract, or transaction in any commodity” that is entered into with, or offered to, a non-eligible contract person on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis (“retail commodity transactions”). 7 U.S.C. § 2(c)(2)(D). Section 13a-1(a) of the Act authorizes the Commission to seek injunctive relief against any person whenever it shall appear to the Commission that such 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 thereunder. *See id.* § 13a-1(a).

Venue properly lies with the Court because certain of the transactions, acts or practices, and courses of business alleged to have violated the Act occurred within this District. *See id.* § 13a-1(e).

B. Defendants Violated 7 U.S.C. Sections 6(a) and 6d(a)

Subject to certain exceptions that are not applicable here, retail commodity transactions are subject to 7 U.S.C. section 6(a), “as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery.” *Id.* § 2(c)(2)(D)(iii). Section 6(a) makes it unlawful for any person to offer to enter into, execute, confirm the execution of, or conduct any business anywhere in the United States for the purpose of soliciting, accepting any order for, or otherwise dealing in any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery unless the transaction is conducted on or subject to the rules of a

board of trade that has been designated or registered by the Commission as a contract market. *See id.* § 6(a).

Section 6d(a)(1) makes it unlawful to be a futures commission merchant unless a person has registered with the Commission as such. *See id.* § 6d(a)(1). A futures commission merchant is “an individual, association, partnership, corporation, or trust . . . engaged in soliciting or in accepting orders for . . . any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act. . . .” *Id.* § 1a(28) (alterations added).

As described in the Complaint (*see* Compl. ¶¶ 20–29), Defendants violated section 6(a), by offering to enter into, and entering into, retail commodity transactions that were not conducted on a Commission-designated contract market. Further, K.B. Concepts violated section 6d(a) by acting as a futures commission merchant without being so registered with the Commission.

C. Burgos is Liable for K.B. Concepts’s Violations Pursuant to 7 U.S.C. Section 13c(b)

Section 13c(b) makes any person who “directly or indirectly[] controls any person who has violated any provision . . . liable for such violation in any action brought by the Commission to the same extent as [the] controlled person.” 7 U.S.C. § 13c(b) (alterations added). Burgos was K.B. Concepts’s managing member and president (*see* Compl. ¶ 12); he controlled day-to-day operations, was a signatory on K.B. Concepts’s bank accounts, and entered into agreements with Hunter Wise on behalf of K.B. Concepts (*see id.* ¶ 27). Given his role with the company, Burgos directly or indirectly controlled K.B. Concepts and did not act in good faith, or knowingly induced, directly or indirectly, the acts constituting K.B. Concepts’s violations of sections 6(a) and 6d(a)(1). Burgos is therefore liable for each of K.B. Concepts’s violations. *See* 7 U.S.C. § 13c(b).

D. K.B. Concepts is Liable for its Employees' Violations Under 7 U.S.C. Section 2(a)(1)(B) and 17 C.F.R. Section 1.2

Section 2(a)(1)(B) of the Act makes individuals, associations, partnerships, corporations, or trusts liable for the acts, omissions, or failures of any official, agent, or other person acting on their behalf. *See id.* 2(a)(1)(B). Additionally, section 1.2 of the Code of Federal Regulations provides the act or omission of any official, agent, or other person acting within the scope of employment on behalf of an individual or corporation shall be deemed the act or omission of the individual or corporation as well as the agent. *See* 17 C.F.R. § 1.2.

Employees of K.B. Concepts, including Burgos, committed the acts alleged in the Complaint within the course and scope of their employment with K.B. Concepts. As a result, K.B. Concepts is liable under section 2(a)(1)(B) and 17 C.F.R. section 1.2 for the employees' acts in violation of sections 6(a) and 6d(a)(1), as described above.

V. RELIEF

The Commission seeks an injunction, disgorgement, a civil monetary penalty, and other equitable relief under the Commodity Exchange Act.

1. Permanent Injunction

To issue a permanent injunction prohibiting future violations of the Act, a court must find (1) illegal activity has occurred and (2) there is a reasonable likelihood it will be repeated. *See CFTC v. Inv'rs Freedom Club, Inc.*, No. 8:03CV54T16TGW, 2005 WL 940897, at *1 (M.D. Fla. Apr. 4, 2005) (citing *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982)) (other citations omitted). By defaulting, Defendants have admitted the well-pleaded allegations of the Complaint, *see Goldman*, 2015 WL 1782241, at *1, and so the first element is satisfied.

In determining the likelihood illegal activity will be repeated, courts in the Eleventh Circuit consider a number of factors including: "the egregiousness of the defendant's actions, the

isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood defendant's occupation will present opportunities for future violations." *Carriba Air*, 681 F.2d at 1322 (quoting *S.E.C. v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)).

Here, Defendants' actions were egregious. Apex collected approximately \$456, 997 from at least 10 customers by inducing them to purchase metals that were never delivered and indeed, never bought, sold or otherwise transferred in connection to the Apex transactions. (*See* Compl. ¶¶ 26–27); *see also SEC v. Perez*, No. 09-CV-21977, 2011 WL 5597331, at *2 (S.D. Fla. Nov. 17, 2011) (citation omitted) (considering significant financial loss to third parties in determining whether a violation was egregious). Defendants' actions were not isolated incidents — they were not limited to a single transaction or to a single transaction per customer, and occurred over a months-long period. (*See id.* ¶¶ 1, 26); *cf. SEC v. Globus Grp., Inc.*, 117 F. Supp. 2d 1345, 1347 (S.D. Fla. 2000) (denying injunctive relief in part because violations occurring over period of about one month were deemed isolated). By virtue of defaulting, Defendants admit the violations involved scienter (*see* Compl. ¶¶ 37–38, 43–44), but they have never explicitly recognized the wrongful nature of their actions or assured against future violations; their Answer, now stricken by the Court, denied all allegations and shifted blame to Hunter Wise (*see generally* Answer).

Taken together, these circumstances indicate there is a reasonable likelihood Defendants will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of sections 6(a) and 6d(a). Accordingly, an injunction is appropriate.

2. Disgorgement

In addition to a permanent injunction, the Commission requests the Court disgorge Defendants' profits from the violations and require payment of the \$121,591.10 sum obtained by K.B. Concepts connected with the transactions, plus post-judgment interest. (*See* Mot. 24–26).

Disgorgement is an equitable remedy designed “to deprive a wrongdoer of his unjust enrichment” and “deter others from violating the securities laws.” *SEC v. Phoenix Telecom, L.L.C.*, 231 F. Supp. 2d 1223, 1225 (N.D. Ga. 2001) (*Blatt*, 583 F.2d at 1335). The Commission must first produce “a reasonable approximation of a defendant’s ill-gotten gains,” *CFTC v. Amerman*, 645 F. App’x 938, 943 (11th Cir. 2016) (citing *SEC v. Calvo*, 378 F.3d 1211, 1217), which must be “causally related to the wrongdoing,” *CFTC v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir. 1999) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)). The burden then shifts to the defendant to show the Commission’s estimate is not a reasonable approximation. *See Amerman*, 645 F. App’x at 943 (citing *Calvo*, 378 F.3d at 1217). “Any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.” *Id.* (internal quotation marks and citation omitted)

The Commission has provided a definite amount of unjust enrichment on the part of Defendants. From a review of the retail client transactions record, a futures trading investigator employed by the Commission was able to conclude \$121,591.10 in commissions were paid to K.B. Concepts for the trades. (*See* Declaration of Michael Loconte [ECF No. 41-1] ¶ 17). The Commission has met its initial burden to provide a reasonable amount of Defendants’ ill-gotten gains, and although it is uncertain whether the \$33,310.34 returned to one customer was taken from this \$121,591.10 sum (*see id.* ¶ 16), Defendants have not demonstrated the \$121,591.10

figure to be unreasonable. Accordingly, the Court finds disgorgement in this amount is warranted.

3. Civil Monetary Penalty

In addition to a permanent injunction and disgorgement, the Commission seeks a \$364,773.30 civil penalty — three times the monetary gain to Defendants earned through their commissions. (*See* Mot. 26–27).

Upon a “proper showing” by the Commission, the Court may impose a civil penalty for violations of the Act “in the amount of not more than the greater of \$100,000 or triple the monetary gain” for each violation. 7 U.S.C. § 13a-1(d)(1)(A). Courts assessing a civil monetary penalty should consider: the relationship of the violation to the regulatory purposes of the Act; whether the violations involved core provisions of the Act; whether a defendant had scienter; the consequences of the violation; the financial benefits to a defendant; and any harm to customers or the market. *See CFTC v. Gutterman*, No. 12-21047-CIV, 2012 WL 2413082, at *10 (S.D. Fla. June 26, 2012) (citations omitted). “Civil monetary penalties should ‘reflect the abstract or general seriousness of each violation and should be sufficiently high to deter future violations,’ which means that civil monetary penalties should make it financially detrimental to a defendant to fail to comply with the Act and Regulations so that the defendant would rather comply than risk violations.” *Id.* (citation omitted).

Defendants repeatedly violated the Act by collecting approximately \$456,977 from at least ten customers over multiple transactions with each customer. (*See* Mot. 27). By virtue of defaulting, Defendants admit the violations involved scienter (*see* Compl. ¶¶ 37–38, 43–44), and admit Defendants both reaped financial benefit and caused harm to customers who paid money but never received deliveries related to these transactions (*see id.* ¶¶ 26–27). Considering the

seriousness of these violations and the lack of any mitigating circumstances, a civil monetary penalty of \$364,773.30 is warranted. *See CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1345–46 (11th Cir. 2008) (citing *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1571 (11th Cir. 1995)) (considering seriousness of allegations and aggravating and mitigating circumstances).

VI. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED the Motion . . . for an Order of Final Default Judgment [ECF No. 41] is **GRANTED** as follows:

A. Permanent Injunction

1. There being no just cause for delay, the Clerk of the Court is hereby directed to enter this Order of Default Final Judgment, Permanent Injunction, Civil Monetary Penalties, and Other Equitable Relief Against Defendants, K.B. Concepts Group LLC d/b/a Apex Asset Advisors LLC and Kelvin Burgos, forthwith and without further notice.
2. Based upon the foregoing conduct, pursuant to 7 U.S.C. section 13a-1, Defendants are permanently restrained, enjoined and prohibited from directly or indirectly offering to enter into, executing, confirming the execution of, or conducting any office or business anywhere in the United States for the purpose of soliciting, accepting any order for, or otherwise dealing in any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery unless the transaction is conducted on or subject to the rules of a board of trade that has been designated or registered by the Commission as a contract market in violation of 7 U.S.C. section 6(a).

3. Based upon and in connection with the foregoing conduct, pursuant to 7 U.S.C. section 13a-1, Defendants are permanently restrained, enjoined and prohibited from directly or indirectly acting as a futures commission merchant without being so registered with the Commission in violation of 7 U.S.C. section 6d(a).
4. Defendants are also permanently restrained, enjoined and prohibited from directly or indirectly:
 - a. Trading on or subject to the rules of any registered entity (as that term is defined in 7 U.S.C. section 1a(40));
 - b. Entering into any transactions involving “commodity interests” (as that term is defined in 17 C.F.R. section 1.3(yy) for their own account or for any account in which they either have a direct or indirect interest;
 - c. Having any commodity interests traded on their behalf;
 - d. 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 interests;
 - e. Soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity interests;
 - f. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission except as provided for in 17 C.F.R. section 4.14(a)(9); and/or
 - g. Acting as a principal (as that term is defined in 17 C.F.R. section 3.1(a)), agent, or any other officer or employee of any person (as that term is defined

in 7 U.S.C. section 1a(38) registered, exempted from registration, or required to be registered with the Commission except as provided for in 17 C.F.R. section 4.14(a)(9).

B. Disgorgement

5. Defendants shall pay, jointly and severally, disgorgement in the amount of \$121,591.10 within ten (10) days of entry of this Order (“Disgorgement Obligation”), and post-judgment interest on the Disgorgement Obligation shall accrue commencing on the date of the entry of this Order and shall be determined using the Treasury Bill rate prevailing on the date of the entry of this Order pursuant to 28 U.S.C. section 1961.
6. To effect payment of the Disgorgement Obligation and the distribution of any disgorgement payments to K.B. Concepts’s customers, the Court appoints Melanie Damian, Esq., as Monitor (the “Monitor”).² The Monitor shall collect disgorgement payments from Defendants and make distributions as set forth below. The Monitor shall not be liable for any action or inaction arising from the Monitor’s appointment, other than actions involving fraud.
7. Defendants shall make Disgorgement Obligation payments under this Order to the Monitor in the name “K.B. Concepts, LLC Fund” and shall send such Disgorgement Obligation payments by electronic funds transfer, or by U.S. postal money order,

² As referenced above, on December 5, 2012, the Commission filed a civil enforcement action in the U.S. District Court for the Southern District of Florida against Hunter Wise and various other entities and individuals. *See CFTC v. Hunter Wise Commodities, LLC*, Case No. 12-cv-81311-DMM (S.D. Fla.) (the “Hunter Wise Litigation”). On February 22, 2013, the court in that case appointed Ms. Damian as the Special Monitor and Corporate Manager in the Hunter Wise Litigation. (*See Hunter Wise Litig., Order [ECF No. 77]*). On May 16, 2014, the Court appointed Ms. Damian Equity Receiver for the Hunter Wise entity defendants. (*See Hunter Wise Litig., Order [ECF No. 306]*). In connection with her duties in that matter, Ms. Damian has implemented a Claims Administration Process and Distribution Plan for all customers and creditors of Hunter Wise, among other entities.

certified check, bank cashier's check, or bank money order, to the Monitor, at the office of Damian & Valori LLP, 1000 Brickell Avenue, Suite1020, Miami, Florida 33131, under a cover letter that identifies Defendants and the name and docket number of this proceeding. Defendants shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581.

8. The Monitor shall oversee the Disgorgement Obligation and shall have the discretion to determine the manner of distribution of such funds in an equitable fashion to K.B. Concepts's customers through the Claims Administration Process and Distribution Plan approved and implemented in the Hunter Wise Litigation or may defer distribution until such time as the Monitor deems appropriate. In the event the amount of Disgorgement Obligation payments to the Monitor is of a *de minimis* nature such that the Monitor determines the administrative cost of making a distribution to eligible customers is impractical, the Monitor may, in her discretion, treat such disgorgement payments as civil monetary penalty payments, which the Monitor shall forward to the Commission following the instructions for civil monetary penalty payments set forth below.
9. Defendants shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify K.B. Concepts's customers to whom the Monitor, in her sole discretion, may determine to include in any plan for distribution of any Disgorgement Obligation payments. Defendants shall execute any documents necessary to release funds they have in any

repository, bank, investment, or other financial institution, wherever located, in order to make partial or total payment toward the Disgorgement Obligation.

10. At the beginning of each calendar year, the Monitor shall provide the Commission with a report detailing the disbursement of funds to K.B. Concepts customers during the previous year. The Monitor shall transmit this report under a cover letter that identifies the name and docket number of this proceeding to the Chief Financial Officer, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581.
11. The amounts payable to each customer shall not limit the ability of that customer from proving a greater amount is owed from Defendants or any other person or entity, and nothing herein shall be construed in any way to limit or abridge the rights of any customer existing under state or common law.
12. Under Rule 71 of the Federal Rules of Civil Procedure, each customer of K.B. Concepts who suffered a loss is explicitly made an intended third-party beneficiary of this Order and may seek to enforce obedience of this Order to obtain satisfaction of any portion of the Disgorgement Obligation that has not been paid by Defendants, to ensure continued compliance with any provision of this Order, and to hold Defendants in contempt for any violations of any provision of this Order.
13. To the extent any funds accrue to the U.S. Treasury for satisfaction of Defendants' Disgorgement Obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth above.

C. Civil Monetary Penalty

14. Defendants shall pay, jointly and severally, a civil monetary penalty \$364,773.30 within ten (10) days of the date of entry of this Order (“CMP Obligation”), plus post-judgment interest. Post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. section 1961.
15. Defendants shall pay their CMP Obligation by electronic funds transfer, U.S. postal money order, certified check, bank cashier’s check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the U.S. Commodity Futures Trading Commission and sent to the address below:

U.S. Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivables
DOT/FAA/MMAC/AMZ-341
CFTC/CPSC/SEC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-7262
Fax: (405) 954-1620
nikki.gibson@faa.gov

16. If payment by electronic funds transfer is chosen, Defendants shall contact Nikki Gibson or her successor at the address above to receive payment instructions and shall fully comply with those instructions. Defendants shall accompany payment of the CMP Obligation with a cover letter that identifies them and the name and docket number of this proceeding. Defendants shall simultaneously transmit copies of the

cover letter and the form of payment to the Chief Financial Officer, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

D. Provisions Relating to Monetary Sanctions

17. Partial Satisfaction: Any acceptance by the Commission or the Monitor of partial payment of Defendants' Disgorgement Obligation or CMP Obligation shall not be deemed a waiver of Defendants' obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
18. Any payments received from Defendants pursuant to this Order shall be applied first to satisfy the Disgorgement Obligation.

E. Miscellaneous Provisions

19. Notice: All notices required to be given by any provision in this Order shall be sent by certified mail, return receipt requested as follows, and all such notices shall reference the name and docket number of this action.

Notice to Commission:

Director
Division of Enforcement
U.S. Commodity Futures Trading Commission
1155 21st Street, NW
Washington, D.C. 20581


Notice to Monitor:

Melanie Damian, Esq.
Damian & Valori LLP
1000 Brickell Avenue, Suite 1020
Miami, Florida 33131

20. Change of Address/Phone: Until such time as Defendants satisfy in full their Disgorgement and CMP Obligations as set forth in this Order, Defendants shall provide the Commission and the Monitor with written notice by certified mail of any change to their telephone number(s) and/or mailing address(es) within ten (10) calendar days of the change.
21. Invalidation: If any provision of this Order or if the application of any provision or circumstance is held invalid, the remainder of the Order and the application of its provisions to any other person or circumstance shall not be affected by the holding.
22. Injunctive or Equitable Relief Provisions: The injunctive and equitable relief provisions of this Order shall be binding upon Defendants, upon any person under their authority or control, and upon any person who receives actual notice of this Order by personal service, e-mail, facsimile, or otherwise, insofar as he or she is acting in active concert or participation with Defendants.
23. Continuing Jurisdiction of this Court: The Court shall retain jurisdiction of this action to ensure compliance with this Order and for all other purposes related to this action, including any motion by Defendants to modify or for relief from the terms of this Order.
24. Copies of this Order may be served by any means, including U.S. Mail, facsimile transmission, e-mail, United Parcel Service, and Federal Express, upon Defendants and any other entity or person that may be subject to any provision of this Order.
25. The Clerk is directed to mark this case as CLOSED.

Case No. 16-24022-CIV-ALTONAGA/O'Sullivan

DONE AND ORDERED in Miami, Florida, this 8th day of May, 2017.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record