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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES COMMODITY  
FUTURES TRADING  
COMMISSION,

Plaintiff,

v.

DIRECT INVESTMENT  
PRODUCTS, INC., and  
ALEXANDER GLYTENKO,

Defendants.

Case No. 13-cv-02887-BAS(MDD)

**ORDER GRANTING MOTION  
FOR DEFAULT JUDGMENT**

(ECF No. 86)

Plaintiff United States Commodity Futures Trading Commission (“Commission”) commenced this action on December 5, 2013 by filing a complaint against Defendants Direct Investment Products, Inc. (“DIP”) and Alexander Glytenko (“Glytenko”). The Commission contends DIP and Glytenko violated the Commodity Exchange Act (“Act”) in the course of perpetrating a fraudulent investment scheme targeting residents of various countries formerly part of the Soviet Union. (*See* ECF No. 1.)

Pending before the Court is the Commission’s Motion for Default Judgment against DIP and Glytenko. (ECF No. 86.) The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R.

1 7.1(d)(1). For the reasons set forth below, the Court **GRANTS** the Commission's  
2 motion, permanently enjoining both Defendants from engaging in further violations  
3 of the Act, banning them from future trading or registration, and ordering payment of  
4 restitution and civil monetary penalties.

5 **I. BACKGROUND**

6 Because of the entry of default, the following well-pleaded allegations from  
7 the complaint are deemed admitted. *See TeleVideo Systems, Inc. v. Heidenthal*, 826  
8 F.2d 915, 917 (9th Cir. 1987); *see also DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847,  
9 854 (9th Cir. 2007).

10 Defendant DIP is a California corporation with its principal place of business  
11 in Carlsbad, California. (ECF No. 1 ("Compl.") at ¶ 12.) "DIP has been registered  
12 with the Commission as a Commodity Trading Advisor ["CTA"] and as a  
13 Commodity Pool Operator ["CPO"] since April 2007." (*Id.*) Defendant Glytenko  
14 "is the Chief Executive Officer and a controlling person of DIP." (*Id.* at ¶ 13, Ex. 1  
15 at ¶ 30.) Since March 2007, Glytenko has been a Principal and a registered  
16 Associated Person ("AP") of DIP. (*Id.*) Glytenko has also been a Principal and  
17 registered AP of Institutional Capital Management, LLC, another registered CPO,  
18 since March 2007. (*Id.*)

19 From roughly 2005 through 2010, DIP and Glytenko defrauded 761 residents  
20 of Russia and various republics of the former Soviet Union out of \$3.9 million. (*Id.*  
21 at ¶ 14.) Defendants DIP and Glytenko convinced these individuals to participate in  
22 a commodity pool known as DIP Capital Partners (the "Pool"), which "traded in  
23 futures and options on commodities, indices, currencies, treasury bonds and notes,  
24 and metals." (*Id.*) Glytenko created and directed DIP Consulting in order to attract  
25 individuals to participate in the Pool. (*Id.* at ¶ 15.)

26 **A. "Educational Seminars"**

27 DIP Consulting conducted "educational seminars" in cities throughout the  
28 former Soviet Union, where it presented promotional materials about DIP, the Pool,

1 and funds being traded on behalf of the Pool. (*Id.* at ¶16.) Glytenko, directly or  
2 through DIP, provided material used in and approved of the promotional materials,  
3 in addition to participating directly in these seminars. (*Id.* at ¶ 17.) The information  
4 provided at these seminars misrepresented and omitted material facts about the Pool’s  
5 record, in order to induce participants’ investment. (*Id.* at ¶ 18.) In particular,  
6 Defendants provided the participants with three charts, each of which portrayed the  
7 Pool or its constituent funds as profitable.<sup>1</sup> (*Id.* at ¶¶ 18–20.) Based on the charts  
8 provided, participants were led to believe the Pool realized annual profits of up to  
9 nearly 50% during the period from 2003 to 2008. (*Id.* at ¶ 18.)

10 Despite Defendants’ sunny representations about the Pool’s profitability from  
11 2003 to 2008, the reality was that the Pool had not even existed until 2005. (*Id.* at ¶  
12 21.) Further, according to financial statements filed with the National Futures  
13 Association, the ICF Fund constituent of the Pool actually experienced losses, rather  
14 than gains, in 2007 and 2008. (*Id.* at ¶ 22.) Additionally, none of the performance  
15 figures on the charts presented at the meeting reflected actual trading done by the  
16 Pool. (*Id.* at ¶23.) In fact, the figures reflected the *theoretical* performance of DIP’s  
17 proprietary trading strategy (“DI-Portfolio”). (*Id.*) Defendants, however, failed to  
18 provide any disclaimer with the charts to inform prospective participants that the  
19 performance presented was theoretical, rather than actual. (*Id.*)

20 **B. www.Di-Holding.com**

21 From approximately 2005 to 2010, Defendants DIP and Glytenko maintained  
22 www.di-holding.com. (*Id.* at ¶ 26.) Through a password-protected portal on the  
23 website, Defendants provided Pool participants with ongoing daily access to  
24 information about the performance of the Pool and its net asset value. (*Id.*)  
25 Defendant Glytenko created and provided various information posted on the website,

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26  
27 <sup>1</sup> One chart represented annual profits and profit growth for the Pool  
28 between 2003 and 2008. (Compl. at ¶ 18.) A second and third made the same  
representations regarding two of the Pool’s funds—the DI-Growth and ICF Funds—  
between 2004 and 2008. (*Id.* at ¶¶ 19–20.)

1 as well as reviewed and verified information prior to its posting. (*Id.*)

2 The information posted on the password-protected portion of the website  
3 included charts showing profitable returns for the DI-Portfolio strategy going back as  
4 far as 2002. (*Id.* at ¶ 27.) Contrary to the representations in these charts, however,  
5 the Pool was not profitable in 2002, 2003 or 2004, since the Pool did not even exist  
6 until 2005. (*Id.* at ¶ 28.) Moreover, the performance figures represented theoretical  
7 performance of the DI-Portfolio strategy, rather than actual trading. (*Id.*) Defendants  
8 failed to include any disclaimer on these charts informing prospective participants  
9 that the performance represented was only theoretical. (*Id.*)

10 In addition to the charts, Defendants also provided information on the  
11 protected portion of the website regarding the Pool's net asset value. (*Id.* at ¶ 29.)  
12 Defendants learned in or about late 2008 that one of the funds in which the Pool was  
13 invested had sustained substantial losses, which would have a significant impact on  
14 the net asset value of the Pool. (*Id.*) However, Defendants failed for several months  
15 thereafter to update the Pool's net asset value calculation or to inform the participants  
16 of the losses. (*Id.*) Rather, Defendants continued to provide participants with false  
17 net asset value calculations for several months, even redeeming some participants'  
18 interests in the Pool based on the false calculations. (*Id.*)

19 **C. Glytenko's \$464,000 Personal Loan**

20 As a result of losses incurred by the Pool in late 2008, Defendants instituted a  
21 freeze on the participants' withdrawal of funds from the Pool. (*Id.* at ¶ 32.) During  
22 the freeze, in November 2009, Glytenko made a loan of \$464,000 to himself from the  
23 participants' funds. (*Id.* at ¶ 33.) Under the terms of the loan, the sole restraint on  
24 Glytenko's use of the funds was a requirement for repayment within 5 years. (*Id.*)  
25 The participants remain unable to withdraw their funds from the Pool. (*Id.* at ¶ 34.)

26 **D. Procedural History**

27 The Commission completed service of the summons and complaint on  
28 Defendants on March 3, 2014. (ECF Nos. 25, 26.) Defendants failed to answer or

1 otherwise respond. On the Commission's request, the Clerk of the Court entered  
2 Defendants' default on May 9, 2014. (ECF No. 75.)

3 The Commission now moves for default judgment and requests a permanent  
4 injunction, restitution in the amount of the participants' losses, and significant civil  
5 monetary penalties. (ECF No. 86-1 ("Mot.") at 35, 39–41.) Specifically, the  
6 Commission requests default judgment that Defendants violated Section  
7 4b(a)(1)(A)–(C) of the Act, 7 U.S.C. § 6b(a)(1)(A)–(C), as amended; Section 4o, 7  
8 U.S.C. §6o; and Commission Regulation 4.41(b), 17 C.F.R. § 4.41(b). (Mot. at 18–  
9 30.) To remedy these violations, the Commission requests the following:

- 10 • a permanent injunction barring Defendants from engaging in any further  
11 violations of the Act and imposing trading and registration bans against  
12 Defendants;
- 13 • restitution of \$2,459,633; and
- 14 • a civil monetary penalty of \$1,392,000.

15 (Mot. at 37:15–39:8; 41:18; 43:13.)

## 16 **II. STATEMENT OF LAW**

17 Federal Rule of Civil Procedure 55(b)(2) governs applications for default  
18 judgment. *See* Fed. R. Civ. Pro. 55(b)(2). Default judgment is available as long as  
19 the plaintiff establishes that: (1) the defendants have been served with the summons  
20 and complaint, and default was entered for their failure to appear; (2) the defendant  
21 is neither a minor nor an incompetent person; (3) the defendant is not in military  
22 service or otherwise subject to the Soldiers and Sailors Relief Act of 1940; and (4) if  
23 the defendant has appeared in the action, that the defendant was provided with notice  
24 of the application for default judgment at least three days prior to the hearing. *Id.*

25 Entry of default judgment is left to the trial court's sound discretion. *See*  
26 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Thus, a defendant's default  
27 does not automatically entitle the plaintiff to court-ordered judgment. *See id.* In the  
28 Ninth Circuit, courts consider the following factors in deciding whether to enter

1 default judgment:

2 (1) the possibility of prejudice to the plaintiff, (2) the merits of  
3 plaintiff's substantive claim, (3) the sufficiency of the complaint, (4)  
4 the sum of money at stake in the action; (5) the possibility of a dispute  
5 concerning material facts; (6) whether the default was due to excusable  
neglect, and (7) the strong policy underlying the Federal Rules of Civil  
Procedure favoring decisions on the merits.

6 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986).

7 “The general rule . . . is that upon default the factual allegations of the  
8 complaint, except those relating to the amount of damages, will be taken as true.”  
9 *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977) (citing *Pope v. United*  
10 *States*, 323 U.S. 1, 12 (1944)). The court may conduct a hearing to fix the amount of  
11 damages. Fed. R. Civ. Pro. 55(b)(2). However, where the amount of damages  
12 claimed is a liquidated sum or capable of mathematical calculation, the court may  
13 enter a default judgment without a hearing. *Davis v. Fendler*, 650 F.2d 1154, 1161  
14 (9th Cir. 1981) (citation omitted).

### 15 III. DISCUSSION

#### 16 A. Jurisdiction and Venue

17 The Court has jurisdiction over this matter pursuant to Section 6c of the Act.  
18 See 7 U.S.C. §§ 13a-1. Section 6c(a) authorizes the Commission to seek injunctive  
19 relief in federal district court against any person who appears to have engaged, or be  
20 about to engage, in any violation of the Act or “any rule, regulation, or order  
21 thereunder.” 7 U.S.C. § 13a-1(a). Under Section 6c(e), venue is appropriate in the  
22 district “wherein the defendant is found or is an inhabitant or transacts business[,] or  
23 in the district where the act or practice occurred, is occurring, or is about to occur.”  
24 7 U.S.C. § 13a-1(e).

25 At the time the Complaint was filed in this case, Defendant DIP's principal  
26 place of business and Defendant Glytenko's last known address were in the Southern  
27 District of California. (Compl. at ¶¶ 12–13.) Thus, this Court has authority to decide  
28 the matter.

1           **B.     *Eitel* Analysis**

2           As a threshold matter, the Commission has established that both Defendants  
3 have been served with the summons and complaint, have failed to appear, and are not  
4 disqualified on the basis of age, incompetency, or military service. *See* Fed. R. Civ.  
5 Pro. 55(b)(2). However, as a defendant’s default does not automatically entitle the  
6 plaintiff to court-ordered judgment, the Court examines the *Eitel* factors to determine  
7 whether default judgment is appropriate. *See Eitel*, 782 F.2d 1470.

8                   **1.     Prejudice to Plaintiff**

9           The first *Eitel* factor considers whether the plaintiff will suffer prejudice if  
10 default judgment is not entered. A plaintiff will suffer prejudice if, absent default  
11 judgment, the plaintiff would “be denied the right to judicial resolution of the claims  
12 presented, and would be without other recourse for recovery.” *Elektra Entm’t Grp.*  
13 *v. Crawford*, 226 F.R.D. 388, 392 (C.D. Cal. 2005). Defendants have failed to take  
14 any action with respect to the Commission’s complaint, and the Commission is  
15 without any other recourse for recovery. Thus, the Court finds that denial of default  
16 judgment would be prejudicial to the Commission.

17                   **2.     Merits of Plaintiff’s Substantive Claims and Sufficiency of**  
18                   **Complaint**

19           In order to obtain default judgment, the plaintiff must state a claim upon which  
20 it can recover. *See Abney v. Alameida*, 334 F. Supp. 2d 1221, 1235 (S.D. Cal. 2004)  
21 (denying a motion for default judgment where the claim was legally insufficient).  
22 While the court takes the “well-pleaded factual allegations” of the complaint as true,  
23 a “defendant is not held to admit facts that are not well-pleaded or to admit  
24 conclusions of law.” *DirectTV, Inc.*, 503 F.3d at 854 (citations omitted). The Court  
25 examines each of the Commission’s claims to determine whether the Commission  
26 has well-pleaded facts sufficient to justify recovery, or whether the complaint merely  
27 recites legal conclusions.

28     ///

1                   **a. Counts One --Three: Violations of § 4b(a)(1)(A)–(C)**

2           The Commission alleges Defendants violated Section 4b(a)(1)(A)–(C) of the  
3 Act, 7 U.S.C. § 6b(a)(1)(A)–(C), as amended, by “misrepresentations and omissions  
4 of material fact, issuance of false statements, and misappropriation of pool participant  
5 funds.” (Mot. at 18:18–22.)

6           The Act exists to regulate commodity pools and their operators, in part for the  
7 purpose of “protecting . . . market participants from fraudulent or other abusive sales  
8 practices and misuses of customer assets.” 7 U.S.C. § 5(b). The Commission brings  
9 this suit under the portion of the Act making it unlawful:

10           for any person, in or in connection with any order to make, or the  
11 making of, any contract of sale of any commodity for future delivery,  
12 or swap, that is made, or to be made, for or on behalf of, or with, any  
13 other person . . .

14           (A) to cheat or defraud or attempt to cheat or defraud the other person;

15           (B) willfully to make or cause to be made to the other person any false  
16 report or statement or willfully to enter or cause to be entered for the  
17 other person any false record; [or]

18           (C) willfully to deceive or attempt to deceive the other person by any  
19 means whatsoever in regard to any order or contract or the disposition  
20 or execution of any order or contract, or in regard to any act of agency  
21 performed, with respect to any order or contract for or, in the case of  
22 paragraph (2), with the other person[.]

23 7 U.S.C. §6b(a)(2)(A)–(C).<sup>2</sup>

24           To establish liability, the Commission “must establish that Defendants made a  
25 material misrepresentation or omission with scienter.” *Commodity Futures Trading*  
26 *Comm’n v. Driver*, 877 F. Supp. 2d 968, 977 (C.D. Cal. 2012), *aff’d* 585 F. App’x  
27 366 (9th Cir. 2014) (citing *Commodity Futures Trading Comm’n v. R.J. Fitzgerald*  
28 *& Co.*, 310 F.3d 1321, 1328–29 (11th Cir. 2002)). A statement or omission is

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29           <sup>2</sup> As the Commission notes, two amendments to the statute took place  
30 during the period between 2008 and 2011; while the subsections were renumbered,  
31 this language remained materially the same. *See* Dodd–Frank Act of 2010, Pub. L.  
32 No. 111-203, § 741, 124 Stat. 1376, 1730–3; Food, Conservation, & Energy Act of  
33 2008, Pub. L. No. 110-234, § 13,102, 122 Stat. 923, 1432–33.



1 material if “it is substantially likely that a reasonable investor would consider the  
2 matter important in making an investment decision.” *Id.* (citing *TSC Indus. v.*  
3 *Northway, Inc.*, 426 U.S. 438, 449 (1976)). Notably, misrepresentations of profit and  
4 risk are material. *See R.J. Fitzgerald & Co.*, 310 F.3d at 1332–33. Further, to prove  
5 scienter, there must be “evidence that a [d]efendant committed the alleged wrongful  
6 acts intentionally, or ‘that the representations were made with a reckless disregard for  
7 their truth or falsity.’” *Driver*, 877 F. Supp. 2d at 977, *aff’d* 585 F. App’x 366  
8 (internal citation omitted).

9 **i. Count One: Fraudulent Solicitation at Seminars**

10 The Court finds the Commission has pleaded facts sufficient to find  
11 Defendants’ solicitations during their “educational seminars” violated Section  
12 4(b)(a)(1) of the Act. In particular, Defendants illegally, with at least a reckless  
13 disregard for the truth, presented participants with the following material  
14 information, in PowerPoint presentations:

- 15 • profitable performance figures for various funds in years when  
16 Defendants knew the Pool did not exist;
- 17 • hypothetical trading performance without labeling it as such; and
- 18 • at least two years of profitable performance results for one of the Pool’s  
19 funds when, in fact, that fund had experienced losses.

20 DIP is liable for the actions of Glytenko, who approved of and provided  
21 information for the promotional materials used, and directly participated, in the  
22 seminars. Section 2(a)(1)(B) of the Act provides that an entity is liable for the “act,  
23 omission, or failure of any official, agent, or other person acting for [it] . . . within  
24 the scope of his employment or office.” 7 U.S.C. § 2(a)(1)(B). “Whether one person  
25 is an agent acting for another turns . . . on an overall assessment of the totality of the  
26 circumstances in each case.” *Stotler & Co. v. Commodity Futures Trading Comm’n*,  
27 855 F.2d 1288, (7th Cir. 1988) (internal citations omitted). As CEO and director,  
28 Glytenko acted on behalf of DIP when he participated in the educational seminars,

1 aimed toward soliciting investors to participate in the Pool. (See ECF No. 86-5 at  
2 Ex. 4, 58:9–12.)

3 **ii. Count Two: Fraud by Misappropriation**

4 The Court finds the Commission has pleaded facts sufficient to find  
5 Defendants liable for Glytenko’s personal loan to himself from the participants’  
6 funds. Misappropriation of funds entrusted to one for trading purposes is a “willful  
7 and blatant” fraud, in violation of Section 4(b)(a)(1)(A) and (C) of the Act. *Driver*,  
8 877 F. Supp. 2d at 978, *aff’d* 585 F. App’x 366 (quoting *Commodity Futures Trading*  
9 *Comm’n v. Weinberg*, 287 F. Supp. 2d 1100, 1106 (C.D. Cal. 2003)).

10 Glytenko’s active participation in the misappropriation of participant funds  
11 makes him liable for violating the Act. Further, as discussed above, DIP is liable for  
12 Glytenko’s misappropriation, as he was acting in the scope of his employment. See  
13 *Commodity Futures Trading Comm’n v. Raleigh Capital Mgmt.*, No. CIV.A. 09-  
14 6780, 2011 WL 2268956, at \*3 (N.D. Ill. May 12, 2011) (holding a principal’s  
15 misappropriation of fund money for personal loans created liability under the Act,  
16 since principal was acting “within the scope of his employment.”).

17 **iii. Count Three: Fraudulent Representations Online**

18 The Court finds the Commission has pleaded facts sufficient to find  
19 Defendants’ representations on the password-protected portion of www.di-  
20 holding.com violated Section 4(b)(a)(1) of the Act. In particular, Defendants  
21 illegally, and knowingly or with reckless disregard for the truth, used the website to  
22 communicate the following misrepresentations and omissions of material facts:

- 23 • the performance history of the DI-Portfolio trading strategy, and  
24 • false and inaccurate net asset value calculations for the Pool.

25 Glytenko was acting within the scope of his employment when he used his  
26 control over DIP’s operations to create and approve of false statements on the website  
27 in order to retain participants in the Pool. As discussed earlier, DIP is thus vicariously  
28 liable for these violations.

1                                   **b. Count 4: Violation of Section 4o(1)(A)–(B)**

2           The Commission alleges Defendants violated Section 4o(1)(A)–(B) of the Act,  
3 7 U.S.C. §6o. Section 4o(1) prohibits a commodity pool operator or its associated  
4 person from the following:

5                   [U]s[ing] . . . the mails or any means or instrumentality of  
interstate commerce, directly or indirectly—

6                   (A) to employ any device, scheme, or artifice to defraud any  
7 client or participant or prospective client or participant; or

8                   (B) to engage in any transaction, practice, or course of business  
9 which operates as a fraud or deceit upon any client or participant or  
prospective client or participant.

10 7 U.S.C. §6o.

11           Under the Act, a commodity pool operator is any person who is registered with  
12 the Commission as such or who is “engaged in a business that is of the nature of a  
13 commodity pool . . . or similar form of enterprise, and who, in connection therewith,  
14 solicits, accepts, or receives from others, funds . . . for the purpose of trading in  
15 commodity interests[.]” 7 U.S.C. § 1a(11)(A). An associated person is a natural  
16 person who is associated with a commodity pool operator “as a partner, officer,  
17 employee, consultant, or agent . . . in any capacity which involves . . . the solicitation  
18 of funds, securities, or property for a participation in a commodity pool or . . . the  
19 supervision of any person or persons so engaged[.]” 17 C.F.R. § 1.3(aa)(3).

20           The pleaded facts establish DIP was registered as a commodity pool operator  
21 with the Commission beginning in 2007, and that, before then, it fell within the  
22 statutory definition by soliciting and accepting funds to participate in futures trading.  
23 Similarly, Glytenko was registered as an associated person of DIP since early 2007  
24 and, before that, acted as an associated person by assisting DIP and supervising others  
25 at DIP in soliciting funds for participation in the Pool.

26           The Court finds that Defendants violated Section 4o(1) of the Act by the use  
27 of [www.di-holding.com](http://www.di-holding.com) to issue false statements and make material omissions  
28 regarding the performance of the Pool. Glytenko provided information for and

1 verified the content of the internet site and, therefore, is liable for its  
2 misrepresentations. As discussed above, since he was acting as an agent for DIP at  
3 the time, this liability is extended to DIP.

4 **c. Count 5: Violations of Commission Regulation 4.41(b)**

5 The Commission alleges Defendants violated Commission Regulation 4.41(b),  
6 governing advertising by commodity pool operators and their principals. See 17  
7 C.F.R. § 4.41(b). That regulation provides that “[n]o person may present the  
8 performance of any simulated or hypothetical commodity interest account,  
9 transaction in a commodity interest or series of transactions in a commodity interest  
10 of a commodity pool operator, commodity trading advisor, or any principal thereof,”  
11 unless the presentation is accompanied by an “immediately proximate” statement that  
12 the results are hypothetical, not actual. *Id.*

13 The Court finds the pleaded facts establish that Defendants presented  
14 hypothetical performance results to potential participants in their “educational  
15 seminars” as inducement to invest, as well as to actual customers in the protected  
16 portion of www.di-holding.com. These activities violated Regulation 4.41(b), as  
17 Defendants failed to provide a disclaimer that the results were not actual, but  
18 theoretical.

19 Like Section 2(a)(1)(B) of the Act, 17 C.F.R. § 1.2 creates liability for an entity  
20 on the basis of the “act, omission, or failure of any official, agent, or other person  
21 acting . . . within the scope of his employment or office.” 17 C.F.R. § 1.2. DIP is  
22 thus liable for its own actions, as well as those of Glytenko, which violated § 4.41(b).

23 **3. Sum of Money at Stake**

24 “Under the third *Eitel* factor, the court must consider the amount of money at  
25 stake in relation to the seriousness of [the] [d]efendant’s conduct.” *PepsiCo, Inc. v.*  
26 *Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002). The sum of money at  
27 stake here is not insignificant: the Commission seeks restitution of \$2,459,633 in  
28 addition to a civil monetary penalty of \$1,392,000. (Mot. at 41:18; 43:13.) While

1 substantial, the sum requested is not unreasonable. Rather, the Commission seeks  
2 approximately the same amount Defendants solicited from the investors. As the sum  
3 of money at stake is reasonable considering the seriousness of Defendants' conduct,  
4 the Court finds this factor favors granting default judgment. *See Commodity Futures*  
5 *Trading Comm'n v. Gustaveson*, No. C12-04519 HRL, 2013 WL 6578992, at \*4  
6 (N.D. Cal. Aug. 19, 2013) (granting default judgment, including imposing  
7 \$1,230,000 in penalties against defendant, based on tripling the amount defendant  
8 retained from his clients).

9 **4. Possibility of Disputed Facts or Excusable Neglect**

10 Defendants have failed to make an appearance in this action. Thus, the well-  
11 pleaded facts in the Commission's complaint are taken as true. No dispute has been  
12 raised by Defendants; neither have they made any claim of excusable neglect in the  
13 period of time since the entry of default judgment four months ago. Both these factors  
14 weigh in favor of granting default judgment.

15 **5. Policy Favoring Decisions on the Merits**

16 Although there is a policy favoring decisions on the merits when possible, this  
17 factor is not alone dispositive. *Cal. Sec. Cans*, 238 F. Supp. 2d at 1177. Since the  
18 other *Eitel* factors support default judgment, the Court finds default judgment is  
19 appropriate in this case.

20 **C. Remedies**

21 **1. Permanent Injunctive Relief**

22 The Commission seeks permanent injunctive relief against Defendants under  
23 Section 6c of the Act, 7 U.S.C. § 13a-1, prohibiting future violations. To obtain  
24 permanent injunctive relief, the Commission must establish a violation as well as  
25 "some reasonable likelihood of future violations." *Commodity Futures Trading*  
26 *Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (internal citations omitted).  
27 "While past misconduct does not lead necessarily to the conclusion that there is a  
28 likelihood of future misconduct, it is 'highly suggestive of the likelihood of future

1 violations.” *Id.* (quoting *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir.  
2 1975).

3 Defendants perpetrated a transcontinental scheme, swindling over 700 citizens  
4 of former republics of the Soviet Union out of nearly \$4 million dollars. To advance  
5 the scheme, Defendants made numerous misrepresentations, including representing  
6 hypothetical trading performance as actual results, portraying the Pool as profitable  
7 during years when it did not even exist, and failing to incorporate significant losses  
8 in the calculation of the Pool’s net asset value. Defendants, further, misappropriated  
9 \$464,000 of the participants’ funds as a personal loan to Glytenko. As such, the Court  
10 finds Defendants’ past fraudulent misconduct makes it highly likely that Defendants  
11 will continue to commit violations of the Act and Commission Regulations unless a  
12 permanent injunction is granted.

13 Accordingly, the Court **GRANTS** a permanent injunction, trading ban, and  
14 registration ban against Defendants DIP and Glytenko, consistent with the language  
15 contained in the Commission’s Proposed Order filed concurrently with its Motion.

## 16 2. Restitution

17 The Commission requests restitution, also pursuant to Section 6c of the Act, to  
18 be measured by “the difference between what defendants obtained and the amount  
19 customers received back, but [not including] payments to customers that exceeded  
20 their principal.” 7 U.S.C. § 13a-1; *Driver*, 877 F. Supp. 2d at 981, *aff’d* 585 F. App’x  
21 366 (internal citation omitted).

22 The Commission has submitted evidence in support of its request for  
23 \$2,459,633 in restitution. (*See* ECF No. 86-2 at Ex. 1 (Decl. of Michelle Bougas), ¶¶  
24 43–44 (stating participants deposited \$3,999,300, of which Defendants returned  
25 \$1,539,667).) The Court finds this amount reasonable to return the participants to  
26 status quo and therefore **GRANTS** the Commission’s request for restitution.

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1                   **3. Civil Monetary Penalties**

2           The Commission requests the Court order Defendants to pay civil penalties in  
3 the amount of \$1,392,000, triple the \$464,000 misappropriated by Defendants.

4           Under Section 6c(d) of the Act:

5           the court shall have jurisdiction to impose, on a proper showing, on any  
6           person found in the action to have committed any violation . . . a civil  
7           penalty in the amount of not more than the greater of \$100,000<sup>3</sup> or triple  
8           the monetary gain to the person for each violation.

8           7 U.S.C. § 13a-1(d)(1).

9           As noted above, Defendants' misappropriation of client funds occurred after  
10          Defendants put a freeze on the participants' funds. Further, the terms of the loan to  
11          Glytenko left him virtually unfettered to use the funds for any purpose, solely  
12          requiring him to repay the loan after five years.

13          In these circumstances, the Court finds a civil monetary penalty of \$1,392,000,  
14          or triple the amount misappropriated, to be appropriate. Therefore, the Commission's  
15          request is **GRANTED**.

16          **IV. CONCLUSION**

17          In light of the foregoing, the Court **GRANTS** the Commission's motion for  
18          default judgment (ECF No. 86) and **ORDERS** the Clerk of Court to enter judgment  
19          as follows:

20                  **A. Permanent Injunction**

21          Based on the foregoing, Defendants DIP and Glytenko are hereby permanently  
22          enjoined from directly or indirectly engaging in conduct in violation of Sections  
23          4b(a)(1)(A)–(C) and 4o(1)(A) & (B) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)–(C),  
24          6o(1)(A) & (B); and Commission Regulation 4.41(b), 17 C.F.R. § 4.41(b).  
25          Defendants are also permanently enjoined from the following:

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28                  <sup>3</sup> The Commission passed regulations fixing this amount at \$130,000 per  
violation for acts before October 23, 2008, and \$140,000 per violation for acts on or  
after October 23, 2008. *See* C.F.R. § 143.8(a)(1).

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- a. entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Commission Regulation 1.3(hh), 17 C.F.R. § 1.3(hh)), security futures products, swaps (as that term is defined in Section 1a(47) of the Act, 7 U.S.C. § 1a(47), and as further defined by Regulation 1.3(xxx), 17 C.F.R. § 1.3(xxx)), and/or foreign currency (as described in Section 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, 7 U.S.C. § 2(c)(2)(B) and 2(c)(2)(C)(i)) (“forex contracts”) for their own personal account(s) or for any account(s) in which they have a direct or indirect interest;
- b. having any commodity futures, options on commodity futures, commodity options, security futures products, swaps, and/or forex contracts traded on their behalf;
- c. 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, security futures products, swaps, and/or forex contracts;
- d. 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, security futures products, swaps, and/or forex contracts;
- e. 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 Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9); and/or



1 f. acting as a principal (as that term is defined in Commission  
2 Regulation 3.1(a), 17 C.F.R. § 3.1(a)), agent, or any other officer  
3 or employee of any person (as that term is defined in Section 1a  
4 of the Act, 7 U.S.C. § 1a) registered, exempted from registration,  
5 or required to be registered with the Commission except as  
6 provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. §  
7 4.14(a)(9).

8 **B. Restitution and Civil Monetary Penalty**

9 **1. Restitution**

10 Defendants shall be jointly and severally liable for, and shall pay, restitution  
11 in the amount of two million, four hundred fifty-nine thousand, six hundred thirty-  
12 three dollars (\$2,459,633) (“Restitution Obligation”), plus post-judgment interest.  
13 Post-judgment interest shall accrue on the Restitution Obligation beginning on the  
14 date of entry of this Order and shall be determined by using the Treasury Bill rate  
15 prevailing on the date of the entry of this Order pursuant to 28 U.S.C. § 1961.

16 To effect payment of the Restitution Obligation and the distribution of any  
17 restitution payments to Defendants’ pool participants, the Court appoints the National  
18 Futures Association (“NFA”) as Monitor. The Monitor shall collect restitution  
19 payments from Defendants and make distributions as set forth below. Because the  
20 Monitor is acting as an officer of this Court in performing these services, the NFA  
21 shall not be liable for any action or inaction arising from NFA’s appointment as  
22 Monitor, other than actions involving fraud.

23 Defendants shall make Restitution Obligation payments under this Order to the  
24 Monitor in the name “Direct Investment Products Restitution Fund” and shall send  
25 such Restitution Obligation payments by electronic funds transfer, or by U.S. postal  
26 money order, certified check, bank cashier’s, or bank money order, to the Office of  
27 Administration, National Futures Association, 300 South Riverside Plaza, Suite  
28 1800, Chicago, Illinois 60606 under a cover letter that identifies the Defendant

1 making payment and the name and docket number of this proceeding. Defendants  
2 shall simultaneously transmit copies of the cover letter and the form of payment to  
3 the Chief Financial Officer, Commodity Futures Trading Commission, Three  
4 Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

5 Any financial institution holding funds of Defendants is directed to liquidate  
6 and release all such funds, whether the funds are held in a single or joint account, or  
7 in any other capacity, and to convey them (minus any amounts to cover the financial  
8 institution's administrative or wire transfer fees) by wire transfer to an account  
9 designated by the Monitor within thirty (30) days of receiving a copy of this Order.  
10 At no time during the liquidation, release, and /or wire transfer of these funds  
11 pursuant to this Order shall Defendants be afforded any access to, or be provided  
12 with, any of these funds. Defendants, and all financial institutions subject to this  
13 Order, shall cooperate fully with the Commission and the Monitor in the liquidation,  
14 release, and wire transfer of these funds.

15 The Monitor shall oversee the Restitution Obligation and shall have the  
16 discretion to determine the manner of distribution of such funds in an equitable  
17 fashion to Defendants' pool participants identified by the Monitor and/or the  
18 Commission or may defer distribution until such time as the Monitor deems  
19 appropriate. In the event that the amount of Restitution Obligation payments to the  
20 Monitor are of a *de minimis* nature such that the Monitor determines that the  
21 administrative cost of making a distribution to eligible pool participants is  
22 impractical, the Monitor may, in its discretion, treat such restitution payments as civil  
23 monetary penalty payments, which the Monitor shall forward to the Commission  
24 following the instructions for civil monetary penalty payments set forth below.

25 Defendants shall cooperate with the Monitor as appropriate to provide such  
26 information as the Monitor deems necessary and appropriate to identify Defendants'  
27 pool participants to whom the Monitor, in its sole discretion, may determine to  
28 include in any plan for distribution of any Restitution Obligation payments.

1 Defendants shall execute any documents necessary to release funds that they have in  
2 any repository, bank, investment, or other financial institution, wherever located, in  
3 order to make partial or total payment toward the Restitution Obligation.

4 Any amounts paid to any pool participant shall not limit the ability of that pool  
5 participant from proving that a greater amount is owed from Defendants or any other  
6 person or entity, and nothing herein shall be construed in any way to limit or abridge  
7 the rights of any pool participant that exist under state or common law. Pursuant to  
8 Rule 71 of the Federal Rules of Civil Procedure, each pool participant of Defendants  
9 who suffered a loss is explicitly made an intended third-party beneficiary of this  
10 Order and may seek to enforce obedience of this Order to obtain satisfaction of any  
11 portion of the restitution that has not been paid by Defendants to ensure continued  
12 compliance with any provision of this Order and to hold Defendants in contempt for  
13 any violations of any provision of this Order.

14 To the extent that any funds accrue to the U.S. Treasury for satisfaction of  
15 Defendants' Restitution Obligation, such funds shall be transferred to the Monitor for  
16 disbursement in accordance with the procedures set forth above.

## 17 **2. Civil Monetary Penalty**

18 Defendants shall be jointly and severally liable for, and shall pay, a civil  
19 monetary penalty of one million, three hundred ninety-two thousand dollars  
20 (\$1,392,000) within ten (10) days of the date of entry of this Order ("CMP  
21 Obligation"), plus post-judgment interest. Post-judgment interest shall accrue on the  
22 CMP Obligation beginning on the date of entry of this Order and shall be determined  
23 by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant  
24 to 28 U.S.C. § 1961.

25 Defendants shall pay their CMP Obligation by electronic funds transfer, U.S.  
26 postal money order, certified check, bank cashier's check, or bank money order. If  
27 payment is to be made other than by electronic funds transfer, then the payment shall  
28 be made payable to the Commodity Futures Trading Commission and sent to the

1 address below:

2 Commodity Futures Trading Commission  
3 Division of Enforcement  
4 ATTN: Accounts Receivables - AMZ 340  
5 E-mail Box: 9-AMC-AMZ-AR-CFTC  
6 DOT/FANMMAC  
7 6500 S. MacArthur Blvd.  
8 Oklahoma City, OK 73169  
9 Telephone: (405) 954-5644

10 If payment by electronic funds transfer is chosen, Defendants shall contact  
11 Nikki Gibson or her successor at the address above to receive payment instructions  
12 and shall fully comply with those instructions. Defendants shall accompany payment  
13 of the CMP Obligation with a cover letter that identifies the paying Defendant and  
14 the name and docket number of this proceeding. Defendants shall simultaneously  
15 transmit copies of the cover letter and the form of payment to the Chief Financial  
16 Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155  
17 21st Street, NW, Washington, D.C. 20581.

18 Any acceptance by the Commission or the Monitor of partial payment of  
19 Defendants' Restitution Obligation or CMP Obligation shall not be deemed a waiver  
20 of Defendants' obligation to make further payments pursuant to this Consent Order,  
21 or a waiver of the Commission's right to seek to compel payment of any remaining  
22 balance.

23 Defendants shall not transfer, or cause others to transfer, funds or other  
24 property belonging to Defendants to the custody, possession, or control of any  
25 members of their family or any other person or entity for the purpose of concealing  
26 such funds from this Court, the Commission, or the Monitor or any officer appointed  
27 by this Court.

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1           **C. Miscellaneous Provisions**

2           All notices required by this Order shall be sent by certified mail, return receipt  
3 requested. Notices to the Commission shall be sent to the Director, Division of  
4 Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre,  
5 1155 21st Street, NW, Washington, D.C. 20581. Defendants shall provide the  
6 Commission and the Receiver with written notice of their contact telephone numbers  
7 and/or mailing addresses within thirty (30) calendar days of this Order. Until such  
8 time as Defendants satisfy their Restitution Obligation and CMP Obligation as set  
9 forth in this Order, Defendants shall provide written notice by certified mail to the  
10 Commission and the Receiver and/or Monitor of any change to their telephone  
11 number and/or mailing address within ten (10) calendar days of the change(s).

12           Nothing shall serve to amend or modify this Order in any respect whatsoever,  
13 unless: (a) reduced to writing; and (b) approved by order of this Court.

14           If any provision of this Order or if the application of any provision or  
15 circumstance is held invalid, the remainder of the Order and the application of its  
16 provisions to any other person or circumstance shall not be affected by the holding.

17           The injunctive and equitable relief provisions of this Order shall be binding  
18 upon Defendants, upon any person under their authority or control, and upon any  
19 person who receives actual notice of this Order by personal service, e-mail, facsimile,  
20 or otherwise, insofar as he or she is acting in active concert or participation with  
21 Defendants.

22           This Court shall retain jurisdiction of this cause to assure compliance with this  
23 Order, the Restitution Obligation, the CMP Obligation, and for all other purposes  
24 related to this action. This Order shall be interpreted and enforced according to the  
25 Federal Rules of Civil Procedure, the Local Rules of the United States District Court  
26 for the Southern District of California, and all provisions of the Act and Commission  
27 Regulations relating or referring to the obligations hereunder.

28           Copies of this Order may be served by any means, including U.S. Mail,

1 facsimile transmission, e-mail, United Parcel Service, and Federal Express, upon  
2 Defendants and any other entity or person that may be subject to any provision of this  
3 Order.

4 **IT IS SO ORDERED.**

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7 **DATED: September 21, 2015**

  
8 **Hon. Cynthia Bashant**  
9 **United States District Judge**

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