

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

U.S. COMMODITY FUTURES TRADING )  
COMMISSION, )

Plaintiff, )

v. )

FIRST CAPITOL FUTURES GROUP )  
a/k/a and d/b/a FIRST CAPITOL GROUP )  
and DAVID MICHAEL KOGAN, )

Defendants. )

No. 09-0488-CV-W-DW

**ORDER**

Before the Court is Plaintiff Commodity Futures Trading Commission's (CFTC) *Ex Parte* Emergency Motion for a Statutory Restraining Order, Expedited Discovery, Order to Show Cause Regarding Preliminary Injunction and Other Equitable Relief (Doc. 4). The Court, having considered the Motion, the suggestions in support thereof, and all other evidence presented by the CFTC, finds that:

1. This Court has jurisdiction over the parties and over the subject matter of this action pursuant to Section 6c of the Commodity Exchange Act (Act), 7 U.S.C. § 13a-1 (2006), and Section 2(c)(2) of the Act, as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act (CRA), §§ 13101-13204, 122 Stat. 1651 (effective June 18, 2008), to be codified at 7 U.S.C. § 2(c)(2).

2. Venue lies properly within this District pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e).
3. There is good cause to believe that First Capitol Futures Group a/k/a and d/b/a First Capital Group ("First Capital") and its principal, David Michael Kogan ("Kogan") (collectively, "Defendants") have engaged, are engaging, and are about to engage in acts and practices constituting violations of the Act, as amended, to be codified at 7 U.S.C. §§ 1, *et seq.*
4. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for investors in the form of monetary redress will occur from the sale, transfer, assignment, or other disposition by Defendants of assets or records unless Defendants are immediately restrained and enjoined by Order of the Court.
5. Good cause exists for the freezing of assets owned, controlled, managed, or held by, on behalf of, or for the benefit of Defendants and for entry of an order prohibiting Defendants, their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with Defendants, including any successor thereof, from destroying records and/or denying CFTC representatives access to inspect and copy records to ensure that CFTC representatives have immediate and complete access to those books records.
6. Weighing the equities and considering the CFTC's likelihood of success in its claims for relief, the issuance of a statutory restraining order is in the public interest.

## I. DEFINITIONS

For purposes of this Order, the following definitions apply:

7. The term "document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure (FRCP) 34(a), and includes, but is not limited to, writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.
8. "Assets" mean any legal or equitable interest in, right to, or claim to, any real or personal property, whether individually or jointly, direct or indirect control, and wherever located, including, but not limited to: chattels, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts (including, but not limited to, bank accounts and accounts at financial institutions), credits, receivables, lines of credit, contracts including spot and futures or options contracts, insurance policies, and all cash, wherever located.
9. "Defendants" shall mean and refer to not only First Capitol Futures Group a/k/a and d/b/a First Capital Group ("First Capital") and its principal, David Michael Kogan ("Kogan") (collectively, "Defendants"), but also to any d/b/a, successor, affiliate, subsidiary or other entity owned, controlled, managed or held by, on behalf of, or for the benefit of First Capital and/or Kogan.

## II. RELIEF GRANTED

### A. Order Against Transfer, Dissipation, and Disposal of Assets

IT IS HEREBY ORDERED that:

10. Defendants and their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with them, including any successor thereof, and persons in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, are immediately restrained and enjoined from directly or indirectly transferring, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, dissipating, converting, withdrawing, or otherwise disposing of any of Defendants' Assets, wherever located, including Defendants' Assets held outside the United States, except as provided in Section III of this Order, or as otherwise ordered by the Court. The Assets affected by this paragraph shall include both existing Assets and Assets acquired after the effective date of this Order.
11. Defendants are restrained and enjoined from directly or indirectly opening or causing to be opened any safe deposit boxes titled in the name of, or subject to, access by Defendants.

### B. Accounting and Transfer of Funds and Documents

IT IS FURTHER ORDERED that within five (5) business days following the service of this Order, Defendants shall:

12. Provide the CFTC with a full accounting of all Defendants' Assets, both within and outside of the United States, from January 1, 2007 to the date of this Order; and

C. Directives to Financial Institutions and Others

IT IS FURTHER ORDERED, pending further Order of this Court, that any financial or brokerage institution, business entity, or person that holds or has held, controls or has controlled, or maintains or has maintained custody of any of Defendants' Assets at any time since January 1, 2007, shall:

13. Prohibit Defendants and all other persons from withdrawing, removing, assigning, transferring, pledging, encumbering, disbursing, dissipating, converting, selling, or otherwise disposing of Defendants' Assets, except as directed by further Order of the Court;
14. Deny Defendants and all other persons access to any safe deposit box that is: (a) owned, controlled, managed, or held by, on behalf of, or for the benefit of Defendants, either individually or jointly; or (b) otherwise subject to access by Defendants;
15. Provide counsel for the CFTC, within five (5) business days of receiving a copy of this Order, a statement setting forth: (a) the identification number of each and every account or other asset owned, controlled, managed, or held by, on behalf of, or for the benefit of Defendants, either individually or jointly; (b) the balance of each such account, or a description of the nature and value of such asset as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other asset was remitted; and (c) the identification of any safe deposit box that is owned

controlled, managed, or held by, on behalf of, or for the benefit of Defendants, either individually or jointly, or is otherwise subject to access by Defendants; and

16. Upon request by the CFTC, promptly provide the CFTC with copies of all records or other documentation pertaining to such account or asset, including, but not limited to, originals or copies of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, Internal Revenue Service Form 1099s, and safe deposit box logs.

D. Maintenance of Business Records

IT IS FURTHER ORDERED that:

17. Defendants and their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with Defendants, including any successor thereof, and all other persons or entities who receive notice of this Order by personal service or otherwise, are immediately restrained and enjoined from directly or indirectly destroying, mutilating, erasing, altering, concealing or disposing of, in any manner, directly or indirectly, any documents that relate to the business practices or business or personal finances of Defendants and their subsidiaries or affiliates.

E. Inspection and Copying of Books and Records

IT IS FURTHER ORDERED that:

18. Representatives of the CFTC shall immediately be allowed to inspect the books, records, and other documents of Defendants and their agents, including, but not limited

to, electronically stored information, tape recordings, and computer discs, wherever they may be situated and whether they are in the person of Defendants or others, and to copy said documents, information and records, either on or off Defendants' premises; and

19. Defendants and their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with Defendants, including any successor thereof, who receive actual notice of this Order by personal service or otherwise, including facsimile or other electronic transmission, shall cooperate fully with the CFTC to locate and provide to representatives of the CFTC all books and records of Defendants, wherever such books and records may be situated, and to locate and provide to representatives of the CFTC information regarding the whereabouts of Defendants.

### **III. BOND NOT REQUIRED**

IT IS FURTHER ORDERED that:

20. The CFTC is an agency of the United States of America and, accordingly, need not post a bond.

### **IV. SERVICE**

IT IS FURTHER ORDERED that:

21. Copies of this Order may be served by any means, including facsimile transmission, upon any entity or person that may have possession, custody, or control of any documents or Defendants' Assets that may be subject to any provision of this Order, and, additionally, that Jeff Le Riche, Jennifer J. Chapin, Jo Mettenburg, and Rick

Glaser (among other representatives of the CFTC, including but not limited to private process servers), are specially appointed by the Court to effect service. Further, service of the Summons, Complaint, or other process may be effected by any CFTC representative, any private process server, any U.S. Marshal or deputy U.S. Marshal, or in accordance with FRCP 4.

**V. FORCE AND EFFECT**

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until further order of this Court and that this Court retains jurisdiction of this matter for all purposes.

**VI. HEARING ON PRELIMINARY INJUNCTION**

IT IS FURTHER ORDERED that:

22. A hearing on whether a preliminary injunction should issue in this matter is scheduled for Tuesday, July 14, 2009 at 9:00AM in Courtroom 8B of the United States District Courthouse, 400 East 9th Street, Kansas City, Missouri.

Date: June 30, 2009

/s/ Dean Whipple  
Dean Whipple  
United States District Judge



