

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:)

FIRST INVESTORS GROUP OF THE)
PALM BEACHES, INC.,)
WILLIAM SCOTT CORDO, and)
MITCHELL STEPHEN DAVIS,)

Respondents.)

CFTC Docket No. 01-10

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ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS

I.

On June 19, 2001, the Commodity Futures Trading Commission ("Commission") issued a Complaint and Notice of Hearing against First Investors Group of the Palm Beaches Inc. ("FIG"), William S. Cordo ("Cordo") and Mitchell S. Davis ("Davis") (collectively "Respondents"). The Complaint charges that Respondents FIG, Cordo and Davis violated Section 4c(b) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6c(b) (1992), and Sections 33.10 and 166.3 of the Commission's Regulations ("Regulations"), 17 C.F.R. §§ 33.10 and 166.3 (1997).

II.

Respondents FIG, Cordo and Davis have submitted Offers of Settlement ("Offers"), which the Commission has determined to accept. Respondents FIG, Cordo and Davis acknowledge service of this Order Making Findings and Imposing Remedial Sanctions ("Order"), and without admitting or denying the findings of fact or conclusions of law herein, consent to the use of the findings contained 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 Respondents FIG, Cordo and Davis do not consent to the use of the Offers or this Order, or the findings consented to in the Offers as entered in this Order, as the sole basis for any other proceeding brought by the Commission other than a proceeding brought to enforce the terms of this Order. Nor do Respondents FIG, Cordo and Davis consent to the use of the Offers or this Order, or the findings consented to in the Offers as entered in this Order, by any other party in any other proceeding. The findings made in this Order are not binding on any other person or entity named as a defendant or respondent in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

At various times from June 1998 through February 2000, FIG, a registered introducing broker ("IB") fraudulently solicited customers to open accounts with FIG to trade options on commodity futures contracts ("commodity options"). In numerous telephone sales solicitations by associated persons ("APs") and in a thirty-minute television infomercial, FIG solicited the customers by knowingly misrepresenting and failing to disclose material facts concerning the likelihood of profit and risk of loss based on existing and known supply and demand factors in the cash market for a commodity, including predictable seasonal trends.

Cordo and Davis were the sole principals and officers of FIG from its inception in 1993. Cordo and Davis are liable for FIG's fraudulent activity because they were controlling persons with regard to FIG's promotional materials and AP telephone solicitations. At various times, FIG, Cordo and Davis failed to diligently supervise FIG's APs in their solicitations and FIG's agents in the broadcast of the television infomercial.

B. RESPONDENTS

First Investors Group of the Palm Beaches, Inc., is a Florida corporation that, until September 2002, conducted business from 110 E. Atlantic Avenue, Suite 310, Delray Beach, Florida 33444. FIG has been registered as an independent introducing broker since 1993.

William Scott Cordo resides in Delray Beach, Florida. Cordo was President, an 80% shareholder, and a principal of FIG from its incorporation in 1993. Cordo was registered as an AP of FIG from June 30, 1993 through September 18, 2002.

Mitchell Stephen Davis resides in Boynton Beach, Florida. Davis was Vice President, a 20% shareholder, and a principal of FIG from its incorporation in 1993. Davis was registered as an AP of FIG from July 7, 1993 through September 18, 2002.

C. FACTS

From June 1998 to February 2000, FIG solicited members of the public to open accounts to trade commodity options on exchange mainly in the energy markets. Throughout this period, FIG employed APs to make telephone solicitation calls to individuals named in "leads" handed out by Cordo. From at least October 1998 to June 1999, FIG obtained some of its leads through a thirty-minute television infomercial aired under the name of Global Currency Consultants, Inc. ("GCC"), a now-dissolved Florida corporation wholly owned by Cordo and Davis.

1. The Infomercial

In late 1998, GCC employed a media company to broadcast a thirty-minute television infomercial and to forward the names of responding viewers. The infomercial was broadcast multiple times on television stations across the United States. A toll-free number displayed in the infomercial and the telephone answering service that took calls from viewers were arranged and paid for by FIG's management company, which was also owned and operated by Cordo and Davis. Some of the viewers who responded via the toll-free telephone number were subsequently solicited by FIG APs.

The infomercial represented that the cash price of unleaded gasoline rose each summer because of increased demands and lower supplies occasioned by summer driving vacations and that customers who purchased commodity options in unleaded gasoline would profit from these cash price increases, suggesting that there is a one-to-one correlation between an increase in the cash price of the commodity and the resulting profit to the holder of a commodity option. The infomercial repeatedly identified an average cash price movement, as well as the return that such a price movement purportedly would yield to the holder of a commodity option. It also referred to extraordinary returns that had been and could be achieved by the holder of a commodity option on unleaded gasoline.

The infomercial downplayed the risk of loss involved in trading commodity options. It mentioned "risk" just twice, and then only to state that risk is "predetermined" and "limited." The possibility of loss was never mentioned. Instead, the infomercial described the likelihood that the price of unleaded gasoline would increase due to seasonal factors, which in turn would yield profits to the options investor. It suggested that an options investor could lose money only if the touted price increase somehow failed to materialize, but presented extensive historical data designed to demonstrate that such an occurrence was exceedingly unlikely.

2. The Telephone Sales Solicitations By FIG APs

In their telephone sales solicitations, some of FIG's APs often discussed seasonal pricing trends and current news events as reasons that large profits could be made on the purchase of commodity options in the energy markets. At various times FIG APs advised customers that there was a "tremendous" and "profitable" opportunity in a particular energy market, cited well-known supply and demand factors as reasons for the "opportunity" and followed them with leverage examples depicting large profits the customer could make trading options with FIG. However, the APs did not advise customers that publicly available information, including seasonal price trends, is already factored into the price of options and the underlying futures contracts, nor that FIG customers following the firm's past seasonality-based trade recommendations had not achieved the types of profits described.

At the same time, FIG's APs downplayed the risk involved in trading commodity options. APs told customers that they could lose some or all of the investment, but often did so in a manner that implied such losses were unlikely. APs told some customers that they could manage risk in options trading by taking advantage of seasonal tendencies. Finally, APs

routinely accompanied statements about risk with numerous statements about large anticipated price movements, which tended to undermine any risk disclosure made.

3. Trading Losses

FIG customers did not make the profits that the FIG APs led them to believe were likely. Nearly 96% of FIG customers who closed their accounts between January 1998 and February 2000 lost money. Total losses in unprofitable accounts at the time they were closed were \$7,487,540, while total profits in profitable accounts at the time they were closed were only \$79,171.

Each business day, FIG received a computer-generated daily equity run from its futures commission merchant ("FCM"). The equity run showed the daily equity positions of each FIG customer, including all open positions and the unrealized gain or loss on those positions. FIG's APs reviewed the equity run everyday and were aware of the actual trading results of their customers. Therefore, FIG knew that FIG customers did not benefit from FIG's trade recommendations based on seasonal or other existing and known supply and demand forces in the cash market.

4. Control of FIG

Cordo and Davis were the only two corporate officers of FIG. Together, they possessed final authority in all hiring and firing decisions; had the authority to investigate, reprimand, and discipline FIG APs; controlled FIG's finances, were co-signatories of FIG's corporate checking account, and signed paychecks to employees, and established the commission rates paid by FIG customers and the compensation for FIG APs and themselves. Cordo and Davis reviewed the equity run everyday and were aware of the actual trading results of FIG's customers. Cordo and Davis exercised complete control over all of FIG's activities. Cordo owned 80% of FIG and Davis owned 20%.

5. Supervision

Cordo and Davis trained FIG's APs in how to solicit customers. All trade recommendations made to FIG customers were developed and approved by Cordo and Davis, who instructed the APs on the basis for each recommendation. At twice daily meetings on the sales floor, Cordo and Davis explained to the APs how to present FIG's trade recommendations and information in news articles to customers.

Cordo and Davis walked among the APs in FIG's small office while the APs spoke on the telephone. They also had the ability to monitor the conversations via telephone. However, FIG's monitoring logs show that monitoring occurred infrequently. Additionally, as a result of settling a National Futures Association ("NFA") BCC action, FIG employed an independent monitoring consultant to record and review fifteen hours of telephone solicitations each month. Several times in 1999, reports by the independent consultant warned Cordo and Davis that some APs were emphasizing seasonality in their recommendations.

Cordo and Davis were aware of the representations being made by FIG's APs. However, Cordo and Davis issued few disciplinary or corrective memos to FIG's APs. Most of the memos that were issued contained general language such as "Based on last months conversations that were monitored [by an independent monitor], the following corrective actions are recommended: performance." Cordo and Davis did not normally discuss monitoring more specifically with the AP. Moreover, FIG's compliance interviews do not appear to be designed to cure any deceptive sales pitch by FIG APs.

D. LEGAL DISCUSSION

1. FIG Violated Section 4c(b) of the Act and Commission Regulation 33.10

FIG violated Section 4c(b) of the Act and Commission Regulation 33.10 by fraudulently soliciting customers to trade commodity options. Section 4c(b) of the Act and Commission Regulation 33.10 make it unlawful to cheat or defraud or deceive, or attempt to cheat or defraud or deceive, any person in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, exchange-traded commodity option transactions. Under these provisions, liability for solicitation fraud involving options is established when a person or entity is found to have made misleading statements of, or omitted to disclose, material facts with *scienter*. See *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,810 (CFTC Dec. 18, 1997) (*scienter* is a necessary element of options as well as futures fraud); see also *Hammond v. Smith Barney, Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,657-36,659 (CFTC Mar. 1, 1990) (*scienter* is a necessary element to establish futures fraud). Statements made in solicitations to open commodity option accounts meet the "in or in connection with" requirement of Section 33.10 of the Regulations as do representations made in the solicitation of specific orders. *In re R&W Technical Services*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,193 at 45,724-25 (CFTC Dec. 1, 1997).

a. FIG APs Made False Misrepresentations to Customers

It is the "overall message" and the "common understanding" of the information conveyed that is examined to determine if a misrepresentation has been made. *Hammond*, ¶ 24,617 at 36,657 n.12; *In re Staryk*, ¶ 27,206 at 45,809-11. The infomercial and FIG's AP's emphasized the supposed advantage that knowledge of seasonal or other existing supply and demand forces offers the options investor and juxtaposed those statements with "leverage examples" depicting large profits. Together these statements conveyed the false message that large profits and reduced risk were to be expected when trading options according to FIG's recommendations. See *In re Staryk*, ¶ 27,206 at 45,809 (quoting from and endorsing ALJ holding in *In re Staryk*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,701 at 43,928-29 (ALJ June 5, 1996)) ("Although Staryk does not explicitly state that the predictable nature of the seasonal price trends in gasoline and heating oil decreases the risk or increases the likelihood of profits in options tied to those commodities, no reasonable consumer could fail to take this message away from his sales presentation.").

i. Misrepresentations Regarding the Profitability and the Knowledge of Seasonal and Other Existing and Known Supply and Demand Forces

The infomercial and FIG's APs represented that knowledge of seasonal or other existing supply and demand forces offers the options investor an advantage in trading options on energy futures. In fact, known supply and demand forces in the cash market, including predictable seasonal trends, do not affect the likelihood of profit or the risk of trading commodity options because the markets anticipate and account for those factors in the price paid for the option and in the price of the option's underlying futures contract. *Bishop v. First Investors Group of the Palm Beaches, Inc. and Michael F. Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,004 at 44,418 (CFTC March 26, 1997) ("[A] seasonal increase in the demand for heating oil would not necessarily result in the increased value of a heating oil option, because the market had already factored seasonal demand into the price of an option. [These] statements were misleading half-truths and thus violate Section 4c(b) of the Act and Regulation § 33.10."); *In re Staryk*, ¶ 27,206 at 45,809 (leading customers to believe that they could take advantage of historical, seasonal, price changes in heating oil to trade options profitably was misleading). These representations were false and misleading.

ii. Misrepresentations Regarding Correlation Between an Increase in the Price of a Commodity and Profits from Trading Commodity Options

The infomercial indicated that there is a direct correlation between an increase in the price of a commodity and the resulting profit to the holder of a call option for that commodity. In fact, price movements in the cash and futures markets generally do not move in direct correlation and the non-correlation is even more pronounced between price movements in the cash and options markets. *In re JCC, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,576 (CFTC May 12, 1994), *aff'd sub nom., JCC, Inc. v. CFTC*, 63 F.3d 1557 (11th Cir. 1995) (statement "every time sugar moves ten cents you make \$67,000" violated antifraud provisions of the Act and Regulations); *Bishop*, ¶ 27,004 at 44,418 ("the statements misrepresented the profit potential of such a seasonal strategy by representing that a penny move in the underlying market would translate into a \$420 profit per option"); *CFTC v. Commonwealth Financial Group*, 874 F. Supp. 1345, 1352 (S.D. Fla. 1994) (such statements "are deceptive because the movement of the cash price or the underlying futures contract seldom produces a directly proportional increase in the value of an option on that futures contract"). These representations were false and misleading.

iii. FIG APs Made Fraudulent Profit Claims and Minimized the Risk of Trading

In the infomercial and numerous telephone solicitations by FIG AP's, the Respondents exaggerated both the likelihood and the magnitude of profit that purchasers of commodity options are likely to achieve and minimized the risk of trading commodity options. FIG's APs told some customers that risk was "limited," within conversations that conveyed the clear message that profits are more likely than losses. Statements regarding expected price increases were often followed by "leverage examples" suggesting customers could double their

investments or more. They added stories of considerable profits that could have been made in the past on options in the commodity being pushed. Such solicitations conveyed that customers could anticipate large profits, not losses, if they followed the FIG's advice. It is well established that promises of large and essentially certain profits are fraudulent. *Munnell v. Paine Webber Jackson & Curtis*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,313 at 32,863 (CFTC Oct. 8, 1986). See also *CFTC v. Commonwealth Financial Group*, 874 F. Supp. at 1353 (combining claims that risks are subject to certain limitations with "predictions of profit [that] exceeded 'mere optimism'" violated Section 4c(b) of the Act and Section 33.10 of the Regulations); *Levine v. Refco*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,488 at 36,115 (CFTC July 11, 1989) ("bold predictions of significant profit coupled with claims that risks are subject to specific limitations amounts to the type of guarantee of profits" that are prohibited). These representations were false and misleading.

iv. Fraudulent Omission of the Fact that Past FIG Customers Had Failed to Achieve the Profits Described

FIG's failure to advise prospective customers that past FIG customers had not actually achieved the large profits described in their solicitations was misleading. *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002). While there is no express obligation for IBs to disclose track record information under the Act or the Commission's regulations, such an obligation may be triggered by the statement of a "half-truth" when a failure to disclose the information could make the half-truth misleading. *Lehoczky v. Gerald, Inc.*, [1994-1996 Transfer Binder] Com. Fut. L. Rep. (CCH) ¶ 26,441 at 42,923-34 n.24 (CFTC June 12, 1995). Although the mathematical calculations undertaken by the APs in their "leverage examples" may be technically correct, FIG's APs used them to convey a clear message that FIG customers should expect to reap similar profits when following FIG's trade recommendations. This message was misleading in light of the fact that past FIG customers following the firm's seasonality-based recommendations had failed to achieve the types of profits described in the leverage examples. The infomercial and FIG's APs strongly emphasized to numerous mostly novice investors a "tremendous" and "profitable opportunity" in the options markets, where one could turn \$10,000 into \$50,000 in a relatively short period of time. Once they conveyed this deceptive message, FIG's APs had an obligation to disclose to the customers that in reality the basis for their recommendations had failed to produce results in the past and that the majority of FIG's clients came away with large losses, rather than profits. Failing to do so was misleading.

b. The Misrepresentations and Omissions Were Material

A statement or omitted fact is material if it is substantially likely that a reasonable investor would consider the matter important in making an investment decision. *In re Citadel Trading Co.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082, 32,187 (CFTC May 23, 1986). See *R&W Tech. Serv., Ltd. v. Commodity Futures Trading Commission*, 205 F.3d 165, 170 (5th Cir. 2000) ("Because extravagant claims understate the inherent risks in commodities trading, a reasonable investor would find [such] fraudulent misrepresentations to be material"); *CFTC v. British Am. Commodity Options Corp.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,662, at 22,701 (S.D.N.Y. 1978) (Unsupported and unreasonable predictions [of price shifts] unmistakably implied the near-certainty of sizeable and immediate

returns, and were thus materially misleading to potential investors"); *Commonwealth Financial Group*, 874 F. Supp. at 353-54. Facts that would enable customers to assess independently the risk inherent in their investment and the likelihood of profit are material. *See In re Commodities International Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943 at 44,563-44,564 (CFTC Jan. 14, 1997) (misrepresentations and omissions to customers were material and fraudulent because customers could not properly evaluate their circumstances with regard to risk of loss and opportunity for profit); *see also Sudol v. Shearson Loeb and Rhoades, Inc.* [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 (CFTC Sept. 30, 1985). The misstatements and omissions made by FIG APs regarding profit potential, risk of loss and performance record were all material because a reasonable investor would have relied on these statements in determining whether to invest in the commodities markets with FIG.

c. FIG APs Made the False and Misleading Representations and Omissions with *Scienter*

Scienter requires proof that a respondent committed the alleged wrongful acts "intentionally or with reckless disregard for his duties under the Act." *Hammond*, ¶ 24,617 at 36,657-36,659 (*scienter* is a necessary element to establish futures fraud); *Do v. Lind-Waldock & Co.* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,516 at 43,321 (CFTC Sept. 27, 1995) (the conduct of a futures industry employee acting for a customer is reckless when the action departs so far from the standards of ordinary care that it is very difficult to believe the actor was not aware of what he was doing). *Scienter* is met when the respondent's conduct involves "highly unreasonable omissions or misrepresentations . . . that present a danger of misleading [customers] which is either known to the [respondent] or so obvious that [the respondent] must have been aware of it." *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002) (quoting *Ziamba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001)). Here, FIG acted knowingly or with reckless disregard to the misrepresentations made in the infomercial and in the telephone solicitations of FIG's APs. Despite the warnings about the impropriety of the use of publicly known information, including seasonal price trends, as well as the clear failure to actually produce profits for its customers, FIG continued to utilize the same pitches.

The Respondents received ample notice of the misleading nature of these types of representations from the National Futures Association's ("NFA") Notice I-96-11, issued in 1996, and the decisions in *In re Staryk*,² *Kelly v. Michael F. Staryk and First Investors Group of the Palm Beaches, Inc.*,³ and *Bishop v. First Investors Group of the Palm Beaches, Inc. and Michael*

² [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,701 at 43,924 (June 5, 1996), *aff'd in part, vacated and rem'd in part*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 (CFTC Dec. 18, 1997), on remand [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,515 (Dec. 4, 1998).

³ [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,754 at 44,115 (Init. Dec. July 25, 1996), *summ. aff'd*. (CFTC August 1, 1997).

F. Staryk,⁴ issued 1996 and 1997. The Respondents also knew that most of their customers lost money and did not earn the types of profits suggested in the infomercial and by FIG's APs. FIG's APs reviewed equity runs daily and kept track of their customers' positions on customer account cards. Therefore, they knew that the trading results of FIG's customers were disastrous and refuted the Respondents' claims of tremendous profit potential with only a modest risk of loss. Given that 97% of FIG's customers lost money, the FIG APs were either aware that these representations were false or acted with reckless disregard for the truth. Accordingly, the Respondents acted with *scienter*.

d. FIG Is Liable For the Acts of Its Officers and Employees

FIG, through the infomercial and the telephone sales solicitations of its APs, defrauded numerous customers by knowingly or recklessly making material misrepresentations concerning, among other things, the likelihood and extent of profits to be made on commodity options, the risks inherent in such options, and the actual performance record in trading commodity options by FIG customers. See 7 U.S.C. § 2(a)(1)(B).

Section 2(a)(1)(B)(iii) of the Act provides in pertinent part:

the act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

7 U.S.C. § 4. FIG is strictly liable for the acts, omissions and failures of Respondents Cordo and Davis and other FIG employees, which therefore may be charged against FIG. *Stotler v. Commodity Futures Trading Commission*, 855 F.2d 1288, 1292 (7th Cir. 1988) (Section 2(a)(1)(A)(iii) imposes vicarious liability on the principal for acts of the agent regardless of the principal's knowledge of its agent's acts); *Clayton Brokerage v. Commodity Futures Trading Commission*, 794 F.2d 573, 581 (11th Cir. 1986) (Section 2(a)(1)(A)(iii) provides respondeat superior and general principal-agent standards for imposing liability). Accordingly, FIG is liable for the violations of Section 4c(b) of the Act and Regulation 33.10 by Cordo, Davis and FIG's APs.

2. As Controlling Persons, Respondents Cordo and Davis are Liable for FIG's Violations Under Section 13(b) of the Act

Respondents Cordo and Davis are responsible for FIG's violations as controlling persons of FIG. To be liable as a controlling person under Section 13(b) of the Act, a person must possess the requisite degree of control. Besides general control over the operations of the entity principally liable, Section 13(b) requires that a person be "possessed [of] the power or ability to control the specific transaction or activity upon which the primary violation was predicated, even

⁴ [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,004 at 44,841 (CFTC Mar. 26, 1997).

if such power was not exercised." *Monieson v. CFTC*, 996 F.2d. 852, 860 (7th Cir. 1993). In addition, the Commission must prove that the controlling person "did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation." *CFTC v. Sidoti*, 178 F.3d 1132, 1136 (11th Cir. 1999). Respondents Cordo and Davis's conduct meet this test.

Respondents Cordo and Davis exercised day-to-day authority over all of FIG's operations and performed all important managerial, administrative, and supervisory functions, including those related to compliance. Cordo and Davis set the commissions and salaries at FIG, and possessed the final authority in all hiring, disciplinary and firing decisions over APs. See *Commonwealth Financial Group*, 874 F. Supp. at 1357 (controlling person in charge of hiring and firing, negotiating contracts, company finances, and regulatory issues was liable as a controlling person for the statements of brokers). Therefore, Respondents Cordo and Davis had the requisite power and control at FIG.

Respondents Cordo and Davis had the power to control the content of the FIG telephone solicitations and did so by training and supervising the APs, including specific responsibility for monitoring sales solicitations. Knowing inducement requires a showing that "the controlling person had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue." *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24, 103 at 34, 767 (CFTC Jan. 12, 1988). Respondents Cordo and Davis knew that FIG's trading record for customers was poor and did not support the representations of profit and track record being made in the infomercial and by the APs, yet failed to take reasonable steps to correct the problem.

In addition, Respondents Cordo and Davis failed to act in good faith. A controlling person fails to act in good faith if he does not maintain a reasonably adequate system of internal supervision and control over the controlled persons or does not enforce with any reasonable diligence such a system. See *In re Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,251 at 38,794. FIG did not have an adequate system of internal controls, and Respondents Cordo and Davis made no effort to create or maintain an adequate system. Accordingly, pursuant to Section 13(b) of the Act, Respondents Cordo and Davis are responsible for FIG's violations of Section 4c(b) of the Act and Regulation 33.10.

3. Respondents Cordo and Davis Violated Section 166.3 of the Commission's Regulations

a. Legal Standard

Commission Regulation 166.3 imposes on each Commission registrant, except associated persons with no supervisory duties, a duty to "diligently supervise the handling by its partners, officers, employees and agents . . . of all commodity interest accounts carried, operated, advised or introduced the registrant, and all other activities . . . relating to its business as a Commission registrant." The "focus of any proceeding to determine whether Rule 166.3 has been violated will be on whether such review occurred and, if it did, whether it was 'diligent.'" *In re Paragon Futures Ass'n.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,850

(CFTC April 1, 1992). The duty to diligently supervise "include[s] the broader goals of detection and deterrence of possible wrongdoing" by the registrant's employees and agents. *Lobb v. J.T. McKerr & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 36,444 (CFTC Dec. 14, 1989). Evidence of violations which "should be detected by a diligent system of supervision, either because of the nature or because the violations have occurred repeatedly" is probative of a firm's failure to supervise. *In re Paragon Futures Ass'n.*, *supra*. The Eleventh Circuit has found a violation of Section 166.3 where a firm and its principal "failed to establish or maintain meaningful procedures for detecting fraud by their employees" and the principal "knew of specific incidents of misconduct, yet failed to take reasonable steps to correct the problems." *See CFTC v. Sidoti*, 178 F.3d at 1137.

b. Respondents Failed to Diligently Supervise FIG and Its APs

FIG, Cordo and Davis failed to diligently supervise FIG and its employees and agents. Their failure to diligently supervise is evidenced by the repeated nature of the misrepresentations in the APs' telephone sales solicitations. *See In re Paragon Futures Ass'n.*, *supra* ("evidence of the occurrence of violations . . . is probative of a firm's failure to supervise, if the violations which occurred are of a type which should be detected by a diligent system of supervision, either because of the nature of the violations or because the violations occurred repeatedly"). FIG's APs on numerous occasions made a sales pitch touting seasonal pricing trends and current news events as reasons that profits could be made on the purchase of commodity options in the energy markets. Given the evidence of Cordo and Davis's day-to-day involvement in and proximity to FIG's APs and operations, and given the scope of the fraud, Cordo and Davis disregarded their supervisory responsibilities and violated Regulation 166.3.

IV.

OFFERS OF SETTLEMENT

Respondents have submitted Offers of Settlement in which, without admitting or denying the findings herein, they acknowledge service of the Complaint and receipt of this Order and admit the jurisdiction of the Commission with respect to the matters set forth in the Complaint and this Order; and waive: a hearing, all post-hearing procedures, judicial review by any court, any objection to the staff's participation in the Commission's consideration of the Offer, any claim of double jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief, and all claims which they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), as amended by Pub. L. No. 104-121, § § 231-32, 110 Stat. 862-63, and Part 148 of the Commission Regulations, 17 C.F.R. § § 148.1, et seq. (2003), relating to, or arising from this action.

Respondents stipulate that the record basis on which this Order is entered consists solely of the findings in this Order, the entry of which they have consented to in the Offers. Respondents consent to the Commission's issuance of this Order, which makes findings, as set forth herein, and orders that: (1) Respondents cease and desist from violating the provisions of the Act and Regulations that they have been found to have violated; (2) Respondents Cordo and

Davis' registrations as associated persons of FIG and Respondent FIG's registration as an introducing broker be revoked; (3) Respondents be permanently prohibited from trading on or subject to the rules of any registered entity; (4) Respondent Cordo pay a civil monetary penalty of \$480,000, pursuant to a payment plan as provided below; (5) Respondent Davis pay a civil monetary penalty of \$120,000, pursuant to a payment plan as provided below; and (6) Respondents comply with their undertakings as set forth in the Offers and incorporated in this Order including, but not limited to: (a) never to apply for registration or seek exemption from registration with the Commission in any capacity, except as provided for in Regulation 4.14(a)(9), and never to engage in any activity requiring registration or exemption from registration, unless such exemption is pursuant to Regulation 4.14(a)(9); and (b) not to take any action or make any public statement denying, directly or indirectly, any allegation in the Complaint or finding or conclusion in this Order or creating, or tending to create, the impression that the Complaint or this Order is without a factual basis.

V.

FINDINGS OF VIOLATIONS

Solely on the basis of Respondents' consent, as evidenced by the Offers, and prior to any adjudication on the merits, the Commission finds that Respondents violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Sections 33.10 and 166.3 of the Commission's Regulations, 17 C.F.R. §§ 33.10 and 166.3.

VI.

ORDER

Accordingly, it is hereby ordered that:

1. Respondents FIG, Cordo and Davis shall cease and desist from violating Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Sections 33.10 and 166.3 of the Commission's Regulations, 17 C.F.R. §§ 33.10 and 166.3;

2. The registrations of Respondents Cordo and Davis as APs of FIG and the registration of FIG as an introducing broker are revoked;

3. Respondents Cordo and Davis are prohibited from trading on or subject to the rules of any registered entity, and all registered entities shall refuse them all privileges, beginning on the first Monday after the date of the Order;

4. Respondent Cordo shall pay a total civil monetary penalty ("CMP") of four hundred eighty thousand dollars (\$480,000) pursuant to a payment plan, as provided below.

a. Cordo shall pay the CMP in the following manner:

i. The first twenty thousand dollars (\$20,000) of the CMP within ten (10) business days of the entry of this Order;

- ii. The next twenty-five thousand dollars (\$25,000) of the CMP on or before April 30, 2004;
 - iii. The next one hundred ninety-five thousand dollars (\$195,000) of the CMP on or before August 31, 2008; and
 - iv. The final two hundred forty thousand dollars (\$240,000) of the CMP, on or before August 31, 2013.
- b. Cordo agrees that the National Futures Association shall be designated as the Monitor for a period commencing on the date of this Order and continuing through December 31, 2013. On or before July 31 of the years 2008 and 2013, the Monitor shall send written notice to Cordo with instructions to pay no later than August 31 of that year the amount of CMP to be paid in accordance with the terms provided in this section. Cordo agrees that in the event Cordo moves his residence at any time through December 31, 2013, he shall provide written notice of his new address to the Monitor within ten (10) calendar days thereof. Notice to the Monitor shall be made to Daniel A. Driscoll, Esq., Executive Vice President, and Compliance Officer, or his successor, at the following address: National Futures Association, 200 West Madison Street, Chicago, IL 60606.
- c. Cordo shall make each payment of CMP by electronic funds transfer to the account of the Commission at the United States Treasury or by certified check or bank cashier's check made payable to Commodity Futures Trading Commission and addressed to Dennese Posey, or her successor, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover letter that identifies Cordo and the name and docket number of this proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581, and the Monitor.
- d. In the event that Cordo fails to pay the CMP, or any part thereof, in accordance with the terms directed above by the date(s) specified herein, the entire remaining amount of the CMP shall be due on the tenth business day following the due date of the payment that was missed. In the event that Cordo fails to pay the entire remaining amount of the CMP by the tenth business day following the due date of the payment that was missed, the Commission may bring a proceeding or action to enforce compliance with the Order or take any other action to obtain immediate payment of the entire amount of the CMP. The only issue Cordo may raise in defense of such proceeding or action is whether he has paid the CMP in accordance with the terms directed above. Cordo may not, by way of defense to any such proceeding or action, contest the validity of, or the findings in, the Order, assert that payment of a CMP should not be ordered, or contest the amount of the CMP. Any proceeding or action

brought by the Commission compelling payment of the CMP, or any acceptance by the Commission of partial payment of the CMP by Cordo, shall not be deemed a waiver of Cordo's obligation to make further payments according to the terms directed above, or a waiver of the Commission's right to obtain immediate payment of the remaining balance of the CMP assessed against Cordo.

5. Davis shall pay a total civil monetary penalty ("CMP") of one hundred twenty thousand dollars (\$120,000) pursuant to a payment plan, as provided below.

- a. Davis shall pay the CMP in the following manner:
 - i. The first five thousand dollars (\$5,000) of the CMP within ten (10) business days of the entry of this Order;
 - ii. The next fifty-five thousand dollars (\$55,000) of the CMP on or before August 31, 2008; and
 - iii. The final sixty thousand dollars (\$60,000) of the CMP on or before August 31, 2013.
- b. Davis agrees that the National Futures Association shall be designated as the Monitor for a period commencing on the date of this Order and continuing through December 31, 2013. On or before July 31 of the years 2008 and 2013, the Monitor shall send written notice to Davis with instructions to pay no later than August 31 of that year the amount of CMP to be paid in accordance with the terms provided in this section. Davis agrees that in the event Davis moves his residence at any time through December 31, 2013, he shall provide written notice of his new address to the Monitor within ten (10) calendar days thereof. Notice to the Monitor shall be made to Daniel A. Driscoll, Esq., Executive Vice President, and Compliance Officer, or his successor, at the following address: National Futures Association, 200 West Madison Street, Chicago, IL 60606.
- c. Davis shall make each payment of CMP by electronic funds transfer to the account of the Commission at the United States Treasury or by certified check or bank cashier's check made payable to Commodity Futures Trading Commission and addressed to Dennese Posey, or her successor, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover letter that identifies Davis and the name and docket number of this proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581, and the Monitor.
- d. In the event that Davis fails to pay the CMP, or any part thereof, in accordance with the terms directed above by the date(s) specified herein, the entire remaining amount of the CMP shall be due on the tenth business

day following the due date of the payment that was missed. In the event that Davis fails to pay the entire remaining amount of the CMP by the tenth business day following the due date of the payment that was missed, the Commission may bring a proceeding or action to enforce compliance with the Order or take any other action to obtain immediate payment of the entire amount of the CMP. The only issue Davis may raise in defense of such proceeding or action is whether he has paid the CMP in accordance with the terms directed above. Davis may not, by way of defense to any such proceeding or action, contest the validity of, or the findings in, the Order, assert that payment of a CMP should not be ordered, or contest the amount of the CMP. Any proceeding or action brought by the Commission compelling payment of the CMP, or any acceptance by the Commission of partial payment of the CMP by Davis, shall not be deemed a waiver of Davis's obligation to make further payments according to the terms directed above, or a waiver of the Commission's right to obtain immediate payment of the remaining balance of the CMP assessed against Davis; and

6. The Commission notes that an order requiring immediate payment of the civil monetary penalty against Respondents would be appropriate in this case, but does not impose it based upon Respondents' financial condition. Respondents acknowledge that the Commission's acceptance of their Offers is conditioned upon the accuracy and completeness of the sworn Financial Statements Respondents have provided regarding their financial condition. Respondents consent that if at any time following entry of this Order the Division of Enforcement ("Division") of the Commission obtains information indicating that their representations concerning their financial condition were fraudulent, misleading, inaccurate or incomplete in any material respect at the time they were made, the Division may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondents 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 in paragraphs 4 and 5 above; and (3) seek any additional remedies that the Commission would be authorized to impose in this proceeding if Respondents' Offer had not been accepted. No other issues shall be considered in connection with this petition other than whether the financial information provided by Respondents Cordo and Davis was fraudulent, misleading, inaccurate or incomplete in any material respect, and whether any additional remedies should be imposed. Respondents may not, by way of defense to any such petition concerning the financial information provided by them, contest the validity of, or the findings in, this Order, assert that payment of a civil monetary penalty should not be ordered, or contest the amount of the restitution or civil monetary penalty to be paid. If in such proceeding, the Division petitions for, and the Commission orders, immediate payment of less than the full amount of the civil monetary penalty, such petition shall not be deemed a waiver of Respondents' obligation to pay the remaining balance of the civil monetary penalty assessed against them, pursuant to the payment plan; and

7. Respondents shall comply with the following undertakings as set forth in their Offers:

A. Registration With The Commission

Respondents FIG, Cordo and Davis shall never apply for registration or claim exemption from registration with the Commission in any capacity, and shall never engage in any activity requiring registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Commission Regulations, 17 C.F.R. § 4.14(a)(9); or act as a principal, employee, agent or officer of any person registered, exempted from registration or required to be registered with the Commission, unless such exemption is pursuant to Section 4.14(a)(9) of the Commission Regulations, 17 C.F.R. § 4.14(a)(9); and Respondents Cordo and Davis shall not, beginning on the date of the Order:

1. directly or indirectly act as a principal, partner, officer, or branch office manager of any entity registered or required to be registered with the Commission; or
2. directly or indirectly act in any supervisory capacity over anyone registered or required to be registered with the Commission.

B. Cooperation With The Commission

Respondents Cordo and Davis shall cooperate fully with the Commission and its staff in this proceeding by, among other things responding promptly, completely and truthfully to any inquires or requests for information, authenticating documents, providing interviews and testifying completely and truthfully at any hearing in this matter.

C. Public Statements

Respondents FIG, Cordo and Davis agree that neither they nor any of their agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the Complaint or finding or conclusion in the Order or creating, or tending to create, the impression that the Complaint or the Order is without a factual basis; provided, however, that nothing in this provision affects Respondents Cordo and Davis's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondents FIG, Cordo and Davis will undertake all steps necessary to assure that all of their agents and employees under their authority or control understand and comply with this agreement.

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

By the Commission

A handwritten signature in cursive script that reads "Jean A. Webb". The signature is written in black ink and is positioned above a horizontal line.

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

Dated: May 24, 2004