## U.S. COMMODITY FUTURES TRADING COMMISSION



Three Lafayette Centre 1155 21st Street, NW, Washington, DC 20581

OFFICE OF PROCEEDINGS			21	
BRIAN M. MURPHY, Complainant v.  ROBERT BENITEZ, ANDREW DAVID FISHER, and FSG INTERNATIONAL, INC Respondents	 CFTC Docket No. 00-066	SICE OF PROCESSINGS	2001 AUS 27 A II: 08	RECEIVED C.F.T.C.

## DEFAULT ORDER AND REPARATION AWARD

Respondent Benitez, who participated in the settlement conference that resulted in the cancellation of the oral hearing begun in this matter on May 17, 2001, when complainant entered into settlements with each of the three respondents, has never executed the settlement agreement despite being warned by the undersigned to do so. His promises to file an executed agreement have yet to be carried out, and furthermore, Benitez has (according to complainant) yet to make any payments under the terms of the agreement tentatively reached on May 17. By now all three payments were due under that agreement, although both Benitez and complainant had notified the undersigned that they had reached a subsequent agreement allowing Benitez to delay payments by one month.

Benitez's failure to execute the settlement agreement would be relatively inconsequential had he made any effort to undertake performance of his obligations assumed in the settlement conference, or the promises he made to the complainant to make payments on a delayed basis. However, the lack of any substantial – or even minimal -- steps toward carrying out the promises he made strongly indicate that Benitez entered into the settlement without any intent to perform his obligations and thus that the promise was made fraudulently. *Cf. Wills v. First Financial Corp.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) Para. 22,605 (CFTC May 31, 1985).

Benitez's actions of making a settlement agreement without any intent have substantially prejudiced the ability of the Court to properly adjudicate the merits of this matter. The oral hearing, at which the complainant and two other respondents appeared and were prepared to testify, had begun and initial testimony had been taken. To have cancelled that hearing and then be required to begin again will result in the waste of hours and hours of preparation by all participants. Moreover, all parties were aware that the undersigned had explicitly stated during

the settlement discussions that the hearing would continue unless settlement was reached as to all parties. Thus, completion of the hearing could have been accomplished in a timely manner had Benitez revealed that he had no intent to sign the settlement or pay under its terms.

Under the circumstances, Benitez's apparently fraudulent entry into a settlement – by which he forestalled completion of the oral hearing and thus prevented consideration of all the evidence by which his alleged liability to complainant could be assessed – will result in the sanction of default and the initiation of a default proceeding as to Benitez.

In a default proceeding, Benitez is deemed to have waived the right to contest the allegations against him, and those allegations are considered true. In this matter – FOR PURPOSES SOLELY OF THIS DEFAULT ORDER – it is deemed admitted by Benitez that the complainant's options-on-futures account was churned (i.e., traded excessively to generate commissions) in violation of CFTC Rule 33.10, resulting in illegal commissions and fees amounting to \$50,507 (see account statements). It is further deemed admitted by Benitez that he was responsible for supervising the account and failed to do so properly in violation of CFTC Rule 166.3. As the jurisdictional limit of a Summary Proceeding is only \$30,000, judgment will be entered for complainant in that amount, plus prejudgment interest beginning on the date of the last trade on which commissions were assessed, as well as the filing fee.

Accordingly, violations having been found, respondent Robert Benitez is ORDERED to pay reparations to complainant in the amount of \$30,000, plus prejudgment interest on that amount compounded annually at the rate of 3.44 % from August 6, 1999 to the date of payment, plus \$125.00 as the filing fee.

Any motion to vacate this Default Order must be directed to the undersigned and must be accompanied by a Notice of Satisfaction from complainant as to respondent Benitez, or otherwise demonstrate that Benitez is entitled to relief from the findings and liabilities imposed in this Order. See Rule 12.23.

Dated: August 27, 2001

Joel R. Maillie Joel R. Maillie Judgment Officer

The settlement agreement provided for imposition of a default judgment in the event the agreement was defaulted on by any respondent, and limited the amount of that judgment to whatever sums remained unpaid. However, as noted, Benitez has never executed the agreement and thus does not benefit under its terms.