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| YRAG TRADERS LLC,<br>Complainant, | ) | |
| v. | ) | CFTC Docket No. 12-R033<br>Served electronically and<br>via Express Mail |
| JAMES SCOTT CORDIER,<br>MICHAEL FREDERICK GROSS, and<br>LIBERTY TRADING GROUP,<br>Respondents. | ) | |

# ORDER GRANTING SUMMARY DISPOSITION

**[Corrected version]**

*Before*: Philip V. McGuire,
Washington, DC,
Commodity Futures Trading Commission

*Appearances*: Gary Kimmelman,
Philadelphia, Pennsylvania,
Representative for complainant, *pro se*

Henry Becker, Esq.,
Oak Park, Illinois,
Counsel for respondents

## Introduction

As explained below, after carefully reviewing complainant's and respondents' submissions, I have granted summary disposition: one, awarding to Yrag Traders $49,723 in damages proximately caused by respondents' unauthorized trading in violation of Commission rule 166.2, and Section 4d of the Commodity Exchange Act;

and two, denying damages based on Yrag Traders' various allegations that second-guess the wisdom of respondents' trades.[1]

## Factual Findings[2]

*The parties:*

1. Respondent Liberty Trading Group ("LTG"), located in Tampa, Florida, is currently a registered commodity trading advisor. At the relevant time -- from the account open in early July 2010, to the account close in early October 2011 -- LTG was a registered introducing broker with approximately 350 customers and six employees, including respondents James Cordier and Michael Gross who were registered associated persons with LTG. Cordier and Gross worked as a team: Cordier managed customer accounts, including the Yrag Traders account which is the subject of this dispute; and Gross, who is no longer registered, allocated trades amongst LTG customer accounts, monitored accounts, and handled most communications with complainant Yrag Traders' proprietor, Professor Gary Kimmelman.

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[1] The $49,723 damage award is based on the sum of $48,421 (the closing account liquidation value on Friday April 15, 2011, before Yrag Traders' owner, Professor Gary Kimmelman, instructed respondents to freeze trading, on Saturday April 16, 2011), plus $1,302 (the total amount debited to Yrag Traders' account in connection with the liquidation of the account on September 15, 2011). *See* discussion of damages calculation below, starting at page 25.

[2] The factual findings are principally based on: (1) Yrag Traders' initial reparations complaint, addendum to complaint, answers to respondents' interrogatories, and Kimmelman's statements and trade summaries supplementing Yrag Traders' initial pleadings; (2) respondents' joint answer to the complaint, supplemental affirmative defenses, and answers to respondents' interrogatories; (3) multiple affidavits by Kimmelman and joint affidavits by respondents James Cordier and Michael Gross, requested by a series of *sua sponte* discovery orders, which principally concern the parties' course of dealing during the relevant time; (4) various documents – including, *e.g.*, account-opening documents, monthly account statements, equity runs, weekly and monthly "Option Seller" newsletters, occasional "Dear Liberty Trading Client" letters from Cordier, and e-mail exchanges between Kimmelman and his lawyer, and Peregrine Financial Group (PFG), respondents Liberty Trading Group, Gross and Cordier and their lawyer, Henry Becker, which were produced by both sides; and (5) NFA records concerning the registration history of respondents and PFG. In order to simplify matters, I have followed respondents' allegation numbering system in references to Yrag Traders' complaint, and I have used the more conventional term "attachment" when referring to the location of a document filed with the complaint. Amounts are rounded to the nearest dollar.

Respondents' attorney in this proceeding is Henry Becker, Esq., of Oak Park, Illinois. In addition, as described in more detail below, after LTG received a heated, sabre rattling e-mail from Professor Kimmelman in mid-July 2011, Becker would take over from Gross and Cordier all account-related communications with Kimmelman until the account was closed in early October 2011. Simultaneously, Becker would conduct settlement negotiations with Kimmelman which would stretch past the account close into November 2011, when Becker began dealing with Kimmelman's newly hired lawyer, until the end of January 2012, when the negotiations reached impasse.

Peregrine Financial Group d/b/a PFG Best ("PFG"), a now bankrupt futures commission merchant headquartered in Cedar Falls, Iowa, acted as the guarantor for LTG and cleared Yrag Trader's account introduced by LTG.[3]

2. Complainant Yrag Traders, appearing *pro se*, is represented by Gary Kimmelman, a resident of Philadelphia, Pennsylvania.[4] Professor Kimmelman, a member of the adjunct faculty for the mathematics department of the Community College of Philadelphia, is the sole principal of Yrag Traders, which he started around

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[3] A review of the e-mail exchanges between Professor Kimmelman and his lawyer, and respondents and their lawyer, reveals that one of the factors that may have hindered the difficult and ultimately unsuccessful settlement discussions was the fact than no one, including Kimmelman's lawyer during the last stage of the negotiations, appears to have adequately explained to Kimmelman why PFG's responsibilities and liability as LTG's guarantor mandated its inclusion in any release. In this connection, Commission rule 1.10(j) sets forth the requirements for a guarantee agreement that may be used to satisfy the minimum financial requirements of an introducing broker ("IB") in CFTC rule 1.17(a)(2)(ii), 17 C.F.R. §§ 1.10(j), and 1.17(a)(2)(ii). The standard guarantee agreement provides that in consideration for the introduction of customer accounts, and in satisfaction of the adjusted net capital requirements with which the IB otherwise would have to comply, the futures commission merchant ("FCM") guarantees the performance of the IB and otherwise agrees to be liable for all liabilities of the IB. When the Commission adopted rules permitting the use of a guarantee agreement as an alternative minimum capital mechanism for certain IBs to protect the customers of the IB, it stated that the "alternative adjusted net capital requirement embodied in the guarantee agreement is consistent with two of the factors upon which an adjusted net capital requirement for IBs should be based: (1) insuring that IBs are not judgment proof; and (2) providing coverage for potential liabilities of IBs arising from business operations and customer relations." 48 FR. 35248, 35264 (August 3, 1983). The Commission reaffirmed this policy in *Paragon Futures* by stating that where a FCM enters into a guarantee agreement with an IB, it shall be, at a minimum, jointly and severally liable for all violations by the IB of the Commodity Exchange Act or CFTC rules. *In re Paragon Futures Association*, Comm. Fut. L. Rep. ¶25,266, at 38,851 (CFTC 1992).

[4] "Yrag" is Gary spelled backwards.

the same time that he opened the Yrag Traders account.[5] On the PFG account application filled out by Kimmelman in early July 2010, Kimmelman indicated that he had previously traded stocks and stock options, but had no previous experience with commodity futures or options. Kimmelman handled all communications for Yrag Traders during the life of the Yrag Traders account.

*Trading the account:*

3. The relevant time period here runs from the opening of Yrag Traders' account in early July 20<u>10</u> -- through Kimmelman's instruction to freeze new trades, in mid-April 2011; PFG's and LTG's loss-limiting liquidations of a portion of the open positions, in early August 2011; and LTG's liquidations of all remaining open positions, in mid-September 2011, after Kimmelman had accepted LTG's settlement offer -- to the closing of the account, in early October 20<u>11</u>, after Kimmelman had repudiated a settlement agreement reached in mid-September 2011.

During the relevant time, Kimmelman, and Cordier and Gross, and other LTG employees and agents, typically would communicate more frequently by e-mail than by phone. From August 2010 to January 2011, the tone of the communications was typically congenial, even when Kimmelman complained about PFG's paperwork, requested commission adjustments, and asked about losses.

However, as discussed in more detail below, by late March 2011, after large losses in February 2011, Kimmelman's e-mails would become increasingly accusatory and demanding -- at times vitriolic, over-reaching and convoluted – and the relationship

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[5] In an e-mail exchange with Becker during their negotiations, Professor Kimmelman alluded to an unidentified "investor" in Yrag Traders, who, he suggested, would be representing Kimmelman gratis. However, the evidentiary record has not been not further developed on this particular factual issue.

between Kimmelman and LTG would steadily degenerate. By mid-July 2011 the relationship had become sufficiently dysfunctional and toxic that LTG would appoint its lawyer, Becker, to handle all communications with Kimmelman. After the Yrag Traders account was closed in early October 2011, Kimmelman would hire his own lawyer, in mid-November 2011, to take over the mutually vexing settlement discussions, which would reach ultimate impasse on the last day of January 2012.

4. On July 9, 2010, Kimmelman executed the account-opening documents for Yrag Traders' account with PFG, including a standard PFG customer agreement.[6] Although both sides had intended that the account be a managed account, and in fact would treat it as such up to April 16, 2011, the required signature of Kimmelman on a written power of attorney granting discretionary trading authority to LTG had somehow "fallen through the cracks" at PFG and/or LTG. This oversight would not be revealed during the relevant time. However, nothing in the record supports the conclusion that respondents were aware of the oversight during the relevant time.[7]

5. On July 15, 2010, LTG confirmed that PFG had approved the account for trading, and gave Kimmelman instructions on how to access daily account reports online.[8]

6. On July 22, 2010, Kimmelman deposited $200,000 in the account.

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[6] ¶10 of the PFG customer agreement signed by Kimmelman provided, in pertinent part, that: in the event that PFG determined, regardless of current market quotations, that any collateral deposited to protect a customer account was inadequate to secure the account, or in any other circumstances or developments that PFG deemed appropriate for its protection, PFG, in its sole discretion, could liquidate the customer's positions by offsetting any or all futures options held or carried for the customer, and that either of these actions could be taken without demand for margin or additional margin, and without prior notice of sale or purchase or other notice to Customer. ¶11 of the customer agreement provided in pertinent part that: the customer recognized that PFG was financially liable to the clearing members through which PFG cleared transactions for deficit balances occurring in Customer's Accounts; and that the customer therefore agreed that Customer should at all limes be liable for the payment of any deficit balance occurring in Customer's Account including any deficiency balance remaining in the account in the event of the liquidation thereof in whole or in part by PFG.
[7] Respondents state that, at this point, they do not know whether LTG and PFG failed to obtain a signed power of attorney, or the power of attorney was signed but subsequently lost.
[8] *See* Gross e-mail to Kimmelman: July 15, 2010, 3:42 pm.

7. Yrag Traders' out-of-pocket losses would total $74,571, based on the difference between the single $200,000 deposit on July 22, 2010, and the total $125,429 refunded: $100,000 on August 1, and $25,429 on October 3, 2011.

Yrag Traders' account would be charged a total of $18,749 in commissions and $1,785 in fees. Per standard industry practice, commissions were charged when an option position was opened, not when it was closed.

8. LTG would place the first trades for Yrag Traders' account on August 2, 2010. The last date that LTG would place a new trade in Yrag Traders' account would be March 16, 2011. All transactions after March 16, 2011 would be liquidations or expirations.

9. Throughout the life of the account, Kimmelman could monitor the status of the account by logging in at a website provided by PFG. Typically, after about 10:00 pm each business day, PFG would e-mail Kimmelman a notice that it had updated his account and that his daily e-statement was ready for review. The daily PFG statement confirmed trades and expirations, and reported, among other things, the status of open positions (including the expiration date, and the liquidation value at the close), the net market value of all open options, the account margin status, the cash balance, and the account value at market.

10. LTG routinely e-mailed to its customers Cordier's weekly and monthly newsletters. Also, occasionally after losses -- *e.g.*, on October 14, and November 10, 2010, and February 28, and March 2, 2011 -- Cordier sent out "Dear Liberty Trading Client" letters explaining the losses and his anticipated follow-up strategy.

11. Starting around August 13, 2010, Kimmelman and Gross, from time-to-time, exchanged e-mails to discuss matters like commission adjustments and the results and the rationale for certain trades. These e-mails confirm that Kimmelman was checking

the daily PFG reports during the relevant time. As previously noted, from August 2010 through January 2011, the tone of these exchanges was collegial. For example, on October 19, 2010, Kimmelman e-mailed Gross: "I expected those losses and am not concerned."

12. All but one of the trades placed by LTG throughout the life of the account would involve short options with expirations more than four months out. Respondents' descriptions of LTG's trading strategy are set out in the following documents:

> one, ¶1 of Cordier and Gross joint affidavit (filed September 20, 2013);
>
> two, Cordier's *Dear Liberty Trading Client* updates, dated October 14, and November 10, 2010, and February 28, and March 2, 2011;
>
> three, LTG's monthly and weekly *Option Seller* newsletters;
>
> four, pages 1-2 of the CTA Disclosure Document for LTG's "Diversified Option Seller Trading Program," dated December 15, 2010;
>
> five, an undated brochure titled *The Seven Best Kept Secrets of Building a Winning Option Selling Portfolio: Confessions of a Professional Option Seller*; and
>
> six, an interview with Cordier in the November 16, 2009 edition of the Tampa Bay Times, headlined *Liberty Trading Group boss Cordier is a commodities crackerjack*.

Professor Kimmelman has based his characterization of LTG's "prescribed trading plan" -- and his assertions about the purported reckless deviations from that plan – exclusively on the *Seven Best Kept Secrets* brochure and the *commodities crackerjack* newspaper article.[9] In sharp contrast, in rebutting Kimmelman's second-guessing, respondents have focused on the *Dear Liberty Trading Client* updates and the *Option*

[9] *See, e.g.*: one, allegations 3, 4, 9, 11, 12, 13, 27, 28, 30, 31, 32, and 33 in the statement of facts in Yrag Traders' complaint; two, paragraphs 1-3 of Yrag Traders' first Supplement to Allegations (filed July 25, 2013); and three, paragraph 1 of Yrag Traders' second Supplement to Allegations (filed September 20, 2013).

*Seller* newsletters which, unlike the brochure and newspaper article relied on by Kimmelman, directly addressed LTG's trading strategy during the relevant time. In their joint September 20, 2013 affidavit, Cordier and Gross also referenced their book *The Complete Guide to Options Trading* (1st ed. McGraw Hill).

13. August 22, 2011 – more than a year after the first trade and four months after the freeze-trading instruction -- is the date of the first e-mail from Kimmelman to Gross where he would clearly and explicitly complain to LTG that numerous trades had recklessly deviated from a purported plan to trade exclusively short-term options: *i.e.*, options with expiration dates out 90 days or less. Before that date, Kimmelman had been monitoring the daily account statements, and had not hesitated to assertively question or complain to LTG, but about different matters, such as: PFG's fees, in late summer 2010; and LTG's losing trades, in mid-winter 2010. However, before August 22, 2011, Professor Kimmelman had not explicitly questioned LTG's regular selection of options with expiration dates more than three months out.

14. Set out below is the end-of-month account liquidation value for the Yrag Traders account for August 2010 through March 2011:

| | |
|---|---|
| August | $195,693 |
| September | 184,001 |
| October | 182,314 |
| November | 182,971 |
| December | 184,804 |
| January | 190,830 |
| February | 151,339 |
| March | 153,525 |

The end of January 2011 would represent the high-water mark for Yrag Traders' account, with a reported account balance of $254,863.[10] However, since the account's reported option market value was a negative $64,033, the account value at market (*i.e.*, market liquidation value) was $190,830.

15. Kimmelman would not begin to express any serious concerns about losses until January 31, 2011, when he e-mailed Cordier:

> Its [sic] been six months, when can I start/expect, to see substantial profits to draw on? I see many trades with thousands ($) in fees and expenses, and the account moving in a negative directions, with increases in liability (DR), and decrease in Market value.

Later that day, Gross replied:

> Thank you for your email.
>
> I am not sure how to answer your question. Your account started off at a time right before we had a severe drawdown. We have spent the better part of the past 90 days recovering that loss. While the recent movement in oil is giving your current positions a bit of pressure, we feel this is temporary in nature and have no plans to close any at this time.
>
> We have worked to get your total equity pushed up over $250,000 which means nothing now - but means everything to how your portfolio is positioned to gain in the next 90 days.
>
> I can make you no guarantees as to when or how much profit you will see. However, we feel that with the market value back close to even and the equity on the books now built to healthy levels, the account is in position to start reaping some benefits this quarter.
>
> I hope this is helpful to you.

Unfortunately, the three weeks later, the energy markets reversed against Yrag Traders' short heating oil and light crude calls, and on February 23 and 24, LTG bought back several heating oil and light crude calls for significant losses.

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[10] Early in the protracted settlement discussions, Kimmelman would demand that LTG restore the Yrag Traders account to $256,000. This particular demand to settle for a profit would be echoed in Kimmelman's duplicative claim for recovery of $34,176 for "expired premiums" on top of his out-of-pocket losses, and in Kimmelman's claim for a default judgment for over $108,000 in connection with a discovery dispute.

16. In connection with these losses, on March 2, Gross responded to a query from Kimmelman:

> Thank you for your email.[11]
>
> In regard to your question, it is likely we can be repositioned within 1 to 3 weeks. However, it will be longer than that before we can expect to realize profits to make up the pullback.
>
> There are no guarantees and there is obviously risk in the new positions as well. However, if all goes well, it is not unreasonable to target a recovery within 60-90 days.
>
> We will be sending you an additional update later today for all clients.

Later that day in a "Dear Liberty Trading Client" letter, Cordier offered the following explanation:

> This letter is to update you on my earlier correspondence dated February 28th.
>
> At that time, we were closing out short call positions in the energy markets in response to the surge higher in crude prices. Our action plan was to reduce exposure and then attempt to hold a portion of our remaining call position in crude oil.
>
> Since that time, the situation in the Middle East has continued to deteriorate. While it still appears that the market is pricing supply disruptions where there are none (yet), I no longer feel the risk of holding these positions justifies the potential gain. While I still feel that holding some of these calls would eventually prove profitable, there is a slight but growing chance that oil markets could experience a parabolic move to the upside in the coming weeks.
>
> For this reason, we closed our remaining energy call positions today. While this will result in an additional drawdown to the account, the margin it frees will allow us to reposition into other sectors than can benefit from current market conditions.
>
> In addition, your portfolio will no longer be directly exposed to continued turbulence in the Middle East. We will go about recapturing premiums in the portfolio over the next 7-10 days. Thank you again for your patience.

[11] Neither side has produced a copy of Kimmelman's March 2nd e-mail referenced here by Gross.

Kimmelman did not reply until Friday, March 18, 2011, with what would be the first of his harsh e-mails.

*Kimmelman's instructions to freeze trading and demands for compensation:*

17. In his lengthy March 18th e-mail, Kimmelman complained about the "unacceptable" February losses and asked for compensation. Kimmelman stated in pertinent part:

> I thought you the experts, and put my trust in your judgments that have been more narcisstic/commission-based, and less fiduciary/client based.
>
> The question is What Happen Next? How does Liberty compensate its clients for such massive losses?
>
> I calculate that I paid you for my losses over $20,000 and lost over $65,000 . . . .

[Capitalization, spelling and syntax in original.][12] In this e-mail, Kimmelman also referenced consultations with a lawyer.

On Tuesday March 22, Gross attempted to address the multiple concerns raised by Kimmelman, and offered to rebate a portion of the commissions charged and to discount future commissions:

> I do, however, feel we need to discuss some aspects of the management of your account in moving forward, i.e., risk management, markets traded, etc., in order to clarify your expectations.

On April 8, Gross offered a $5,000 commission rebate and 50% commission discount.

On April 14, Kimmelman told Gross that he would be willing to continue trading, but only if he could communicate directly with Cordier. On April 15, Gross replied:

> I am sorry if you misunderstood. That was not my intention. I assist James Cordier with trading research and decisions, I allocate trades to accounts, and I talk to most of our clients. We work together on most things. However, I am not a partner.

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[12] In reality, at this point, Yrag Traders' account was down less than $50,000, and had been charged less than $19,000 in commissions.

> Our firm has over 350 clients. If James spoke to everyone that had a question, he would never have time to trade or focus on his research.

This apparently would not satisfy Professor Kimmelman.

At the close on Friday April 15, 2011, the liquidation value of the account was $151,579.

18. On Saturday April 16, 2011, Kimmelman sent an e-mail instructing respondents: "<u>do not liquidate any options that will expire the next three months</u>." [Underlining added for emphasis.] On Monday April 18, 2011, respondents confirmed receipt of the instructions. Although they did not say so in their reply, given the tone and substance of Kimmelman's recent e-mails, Cordier and Gross treated this instruction as an instruction to freeze all trading activity, at least until some sort of resolution of Kimmelman's discontent. The parties' subsequent e-mail exchanges would confirm that Cordier's and Gross' interpretation of Kimmelman's April 16th instruction had been correct.

19. Not surprisingly, Kimmelman was much displeased on May 2, 2011, when PFG placed several new trades in Yrag Traders' account. Nonetheless, the next day, May 3, 2011, PFG cancelled and removed these trades and reversed all related charges from the account, and Gross promptly explained to Kimmelman that a PFG key punch error had erroneously placed the trades in Yrag Traders' account.

20. As discussed in more detail below, after LTG confirmed Kimmelman's do-not-liquidate instruction on April 18, 2011: one, on July 14, 2011 Kimmelman would extend the do-not-liquidate order to all options with later expiration dates; two, LTG would allow to expire all open option puts and calls with expiration dates up to and including September 15, 2011; three, Kimmelman would withdraw $100,000 on August 1, 2011; four, no buys or sells would be made for the account, until August 9, 10 and 11,

2011, when PFG liquidated certain short gold and crude positions to limit losses; and five, on September 15, 2011, all remaining open positions would be liquidated, after Kimmelman had accepted LTG's settlement offer and signaled that he was amenable to closing out the account as part of the settlement agreement which was designed to return Yrag Traders to the *status quo ante*. As also described below: on May 11, Gross would suggest that Kimmelman liquidate certain positions; on July 12 and 14, and August 1, 2011, Becker would try to nudge Kimmelman to authorize liquidation of the account to facilitate a settlement; and Kimmelman would reject or disregard these suggestions, which in turn would prove quite costly.

Here is the end-of-month account liquidating value for the Yrag Traders account for April through August 2011:

| | |
|---|---|
| April | $143,965 |
| May | 158,577 |
| June | 166,761 |
| July | 166,627 |
| August | 24,722 |

21. On May 11, 2011, Gross suggested that Kimmelman liquidate the October and November crude puts:

> As you have instructed me not to take profits on any options, please let me know if you would like yours to exit with the rest of our clients.

Kimmelman ignored this advice.

Had Kimmelman not rejected Gross' recommendation on May 11, he could have avoided a net loss of $2,110. Kimmelman ultimately cost himself about $3,300 by rejecting Gross' recommendation to liquidate the <u>November</u> crude puts: on August 11, 2011, Yrag Traders' account would be debited $2,400 for the premium paid when LTG liquidated three November puts at .80; and on September 15, 2011, Yrag Traders' account would be debited $900 for the premium paid when LTG liquidated the remaining six November puts at .15. Conversely, Kimmelman ultimately saved himself a smaller amount, about $1,190, by rejecting Gross' recommendation to liquidate the <u>October</u> crude puts, because on May 11: the three October crude 6100 puts would settle at .21, for a liquidation value of a negative $630; and the two October crude 6300 puts would settle at .28, for a liquidation value of a negative $560. The October crude puts would eventually expire on September 15.

22. Meanwhile, since early April, Gross and Kimmelman had been discussing a commission adjustment or refund in light of Kimmelman's displeasure with the February losses. In this connection, on June 20, 2013, Gross followed up on a phone conversation earlier that day between Kimmelman and Cordier and Gross, and expressed a preference to continue the relationship, and offered a 50% rebate of total commissions paid and a 50% fee reduction in future commissions if and until the account "gets back to even." Kimmelman's reply effectively squashed the notion of maintaining a functional relationship based on reasonable expectations:

> Getting Even – does this mean, from where the equity was, or just the initial investment.
>
> I was hoping that the $256,000 was the amount of getting even.

As previously noted, $256,000 represented the high-water mark for the account at the end of January 2011. Nonetheless, the discussions continued. However, the two sides' e-mails indicated that after this date they had effectively abandoned the notion of maintaining their relationship.

By late June Kimmelman and Gross reached a verbal understanding where Kimmelman agreed to release LTG, Cordier and Gross in exchange for full reimbursement of all commissions: $18,749. On Wednesday, July 6, Gross forwarded to Kimmelman a settlement agreement that included a release of LTG's guarantor PFG. Later that day, Kimmelman replied in an e-mail in which he refused to release PFG, repudiated the offer, intimated future legal action, and demanded to be paid "inexcessive [sic] of $109,000."

On Thursday July 7, Cordier replied that it would not further increase its "generous offer [made] in a sincere attempt to settle this issue in a realistic manner." Cordier stated that the offer would remain open through the close of business the next day, and that any correspondence after that date would be referred to their attorneys. Later that day, Kimmelman replied with an acrimonious, all caps, diatribe, in which he complained about the losing trades in February and the erroneous trades in May, and in which he threatened to drag LTG through lengthy, expensive litigation.

In the face of Kimmelman's threats, LTG designated its lawyer, Henry Becker, to handle <u>all</u> communications with Kimmelman. Settlement discussions between Kimmelman and Becker would extend to the closing of the account on October 3, 2011, and thus would overlap and mix -- problematically -- with the communications that related to the disposition of open positions in the account.

23. The next week, on July 12, 2011, Becker asked Kimmelman for further instructions concerning his open positions. Kimmelman replied that he would be forwarding a calculation of commissions or damages, apparently in connection with furthering the settlement discussions, but offered no instructions. Later that day, Becker responded: "I await your analysis. In the meantime, <u>please let me know how you</u>

would like to handle the current positions in your account." [Underlining added for emphasis.] However, Kimmelman again did not promptly provide any instructions.

On July 14, Becker followed up: "Please let me know by Noon Central time today what you would like to do with the open positions in your account." [Underlining added for emphasis.] Kimmelman replied by complaining that Cordier and Gross had violated a fiduciary duty in connection with one of the February trades, and finally provided instructions: "All expiring contract[s] will be left alone." [Underlining added for emphasis.] Becker confirmed that Kimmelman had effectively extended his initial do-not-liquidate instruction to the open August, September, October, November and December options in the account:

> In light of your comments we will keep the positions open for the time being subject to the final agreement between the parties.
>
> I look forward to your accounting [of commissions] as you indicate in your other e-mail.

[Underlining added for emphasis.] At the close on July 14, 2011, the Yrag Traders account had a liquidation value of $165,436. Thus, at this point, the account was down $34,564 from its open a year earlier. Six days later, on July 20, 2011, Kimmelman told Becker: "Still working on the trade evaluations. Hope to have the calculations done shortly." However, Professor Kimmelman would never provide these promised calculations before the close of the account in early October 2011.

24. Kimmelman's next communication would be nine days later, late in the evening after the close on Friday July 29, 2011. Kimmelman e-mailed PFG: "Please forward immediately all funds available to be withdrawn."

Early Monday morning, August 1, 2011, PFG directed Kimmelman to contact LTG, which he did not do. Later that day, in the afternoon, Becker e-mailed Kimmelman:

> I understand that you requested a withdrawal from your account held at PFG. That's fine, but I just want to alert you to the fact that a certain amount of cash has to remain in the account in order to cover any potential margin increases while your option positions are still open. Failure to maintain a cash reserve would result in margin calls or forced liquidation and a possible debit balance if the options move the wrong way.
>
> Pursuant to the above, a check for $100,000 will be sent to you via UPS overnight mail out of an approximate $124,000 cash position.
>
> Of course if you wish to liquidate the positions in your account, the entire account value after liquidation would be available to you in cash. Please let me know if this is what you desire.
>
> Additionally, I believe you were going to get some figures to me, I don't know whether you sent these over, but I haven't received anything.

[Underlining added for emphasis.] Later that day, PFG refunded $100,000.

On August 3, Kimmelman followed up with a "show me the money" demand for a refund of the entire cash balance, but conspicuously did not provide any new corresponding instructions for the open positions.

25. A few days later, the market moved against the gold and crude oil positions in the account. As a result, on August 9, 10 and 11, 2011, PFG and LTG unilaterally decided to limit losses and to avoid a debit balance in the account by liquidating, in whole or in part, these gold and crude positions, which resulted in an aggregate debit charge of $50,280. During these three days, PFG and LTG did not issue any margin notices before the liquidations, and Kimmelman did not express any interest in returning to the account recently refunded funds to bolster margin.

On August 9, PFG and LTG: bought back ten December gold 2000 calls, at 28, debiting the account $28,000 for the premium paid; bought back three December crude 60 puts, at 1.30, debiting the account $3,900 for the premium paid; and bought back one December crude 63 put, at 1.72, debiting the account $1,720 for the premium paid. Had PFG and LTG not liquidated these positions, the resulting losses would have more than wiped out all the equity in the Yrag Traders account: the December gold 2000 call hit a high price of 70.4 on August 22 (a potential loss of over $70,000); the December crude 60 put hit a high of 2.39 on August 9, and traded well above the 1.30 buy-back price on August 10 (1.79) and August 19 (1.62); and the December crude 63 put hit a high of 2.49 on August 9, and traded above the 1.72 buy-back price on August 10 (2.27) and August 19 (2.03). At the close on August 9, the account had a $34,704 margin deficit.

The morning of August 10, Kimmelman e-mailed Becker to complain about the losses: "Just reviewed the [August 9] Gold buy-backs. I'm in disbelief." Later that morning, Cordier sent out a "Dear Liberty Trading Clients" letter:

> As you may know, on August 5th, Standard and Poors rating agency downgraded the US credit rating from AAA to AA+.
>
> This, in conjunction with fears of a global recession and continuing credit turmoil in Europe, caused a shock to global stock markets which spilled over into certain commodities.
>
> While our positions in the affected markets were proportional, we have aggressively moved to cut risk on these positions over the past two trading days.
>
> It is our opinion that the majority of the risk has now been eliminated. However, we will continue to monitor existing positions should market movement warrant any further covering.
>
> In the meantime, this may have resulted in a drawdown to your account. We will be working diligently over the next few weeks in replacing premium to your account.
>
> If you have general concerns, please rest assured that we are monitoring market movements and your account up to the minute and are fully abreast of the latest news.
>
> We look forward to updating you on premium replacement as the month progresses.

Also on August 10, LTG: bought back two October gold 2100 calls, at 11, debiting the account $2,200 for the premium paid; and bought back five December gold 2200 calls, at 20, debiting the account $10,000 for the premium paid. Had LTG not liquidated these positions, additional devastating losses would have resulted: the October gold 2100 call hit a high price of 15.3 on August 22 (a potential loss of over $30,000); and the December gold 2200 call hit a high price of 32.5 on August 22 (a potential loss of over $16,000). At the close on August 10, the account had a $6,945 margin deficit.

On August 11, Kimmelman e-mailed Becker to complain about the losses on the August 10th gold liquidations. Later that day, Becker replied that he found Kimmelman's complaints about the timing of the liquidations hard to understand, since he appeared to be complaining that LTG's liquidations had been simultaneously too soon and too late. Kimmelman replied with a convoluted diatribe. Also on August 11, LTG bought back one November crude 60 put, at .80, debiting the account $2,400 for the premium paid. Had LTG not liquidated this position, greater losses would have resulted, because the November crude 60 put rise to a high of 1.09 on August 19 (a potential loss of over $3,000). At the close on August 11, 2011, the account had a liquidation value of $22,257, and the account had a $7,629 margin excess.

On August 12, Becker e-mailed Kimmelman and recapped their July 12th to August 1st e-mail exchanges, and asserted that since Kimmelman had extended the do-not-liquidate instruction on July 14, and had disregarded Becker's suggestion on August 1st that he liquidate all positions and close out the account: "Surely you must accept some responsibility for your decisions and actions?"

26. On August 16, Kimmelman complained about various matters including the fact that PFG had not returned the entire $125,000 cash balance. Later that day, as part of his response to the various issues raised by Kimmelman, Becker reminded Kimmelman that he had "explained the cash withdrawal issues" in the August 1st e-mail. Also, Becker made an offer to settle the dispute for $42,939, which represented the sum

of the total commissions over the life of the account, plus approximately half of the post-August 1st losses. Kimmelman did not respond to this offer.

27. On Tuesday September 13, 2011, Becker offered to return Kimmelman to the *status quo ante*:

> [I]n order to resolve this matter, I am authorized to offer you a return of the total loss in your account. <u>If you accept this offer, Liberty will liquidate the current positions in your account to bring it up to $100,000.</u> This, plus your previous withdrawal of $100,000 will equal your deposit total. This is as good as it will get.
>
> This offer will be open until the close of business on Friday, September 16.

[Underlining added for emphasis.] About an hour later, Kimmelman responded in an affirmative fashion that signaled that he had accepted Becker's latest offer and that he thus was ready to close out the account:

> The situation is now closed. Thank you for your time and effort to resolve this unfortunate matter.
>
> Time to move on.

Later that same day, Becker made it clear to Kimmelman that he interpreted Kimmelman's "situation is now closed -- time to move on" reply as an acceptance of the latest offer: "I'll get the settlement documents to you shortly." As can be seen, Becker did not reaffirm that, based on Kimmelman' acceptance of the latest offer, Liberty would promptly liquidate the current positions in Yragtraders' account to bring it up to $100,000.

As a practical matter, the offer to return Yrag Traders to the *status quo ante* would have required fixing the amount of Yrag Traders' compensable losses by promptly liquidating all remaining open positions. In addition, given the acrimonious, dysfunctional nature of the relationship between Kimmelman and respondents, a complete and total termination of the relationship, including closing out the account, reasonably appeared to be the only feasible means "to close the situation" and "to move on," as those terms are commonly understood. Furthermore, the liquidation of all open positions also served to eliminate the risk of additional losses caused by the sort of market reversal experienced by Yrag Traders' account in early August 2011.

However, notwithstanding Kimmelman's apparent acceptance of respondents' settlement offer, LTG did not contact Kimmelman, directly or through Becker, either to confirm that he clearly understood that all open positions had to be closed out to effectuate the agreement or otherwise to obtain his specific authorization to liquidate the open positions. Rather, LTG – no doubt more than ready to move on – simply relied on Becker's message that Kimmelman had accepted their latest offer and thus had impliedly green-lighted liquidation of the account. As a result, LTG placed orders to liquidate all the remaining open options in Yrag Traders' account, which resulted in a debit charge totaling $1,302.

28. The next day, September 16, Kimmelman asked Becker why LTG had liquidated certain October options which had been due to expire on September 15:

> Just received a confirmation from PFG that trades were closed yesterday.
>
> Many of the options were to expire yesterday (9/15), why did they buy back instead of waiting???

However, a close examination of the September monthly account statement shows that Kimmelman had misread the September 15th confirmation statement: one, the only open options in the Yrag Traders account with September 15th expiration dates had been October sugar puts and October crude puts, which in fact <u>had been allowed to expire</u> on September 15; and two, the only other open options with September expiration dates were October gold puts, with a September 27th expiration date, which were liquidated on the 15th for a minimal loss.

An hour later, Becker, missing or ignoring Professor Kimmelman's error, addressed Kimmelman's concern more broadly by explaining simply that respondents would be compensating Yrag Traders for all losses pursuant to the agreement reached on September 13:

> I don't know. I told them to close out the positions. No matter what the balance is, the funds will be added [to the amount to be paid by [respondents] to get you back to even.
>
> As soon as I get that number I'll prepare the settlement documents. Figure early next week for me to get that to you.

In the days after September 15, Kimmelman did not complain about the other September 15th liquidations. However, Kimmelman began making new demands, such as an additional contribution by Gross, and deletion of the release of PFG and deletion of an enforceable confidentiality clause. By the September 30th deadline set by Becker, Kimmelman had not signed the settlement documents.

On October 3, 2011, PFG refunded the $25,429 account balance.

## Discussion and Conclusions

*Standard for Summary Disposition*

Summary disposition is appropriate when three conditions are met: one, there is no genuine issue as to any material fact; two, there is no need for further factual development; and three, the moving party is entitled to a decision as a matter of law. *See Levi-Zeligman v. Merrill Lynch Futures, Inc.*, Comm. Fut. L. Rep. ¶ 26,236, at 42,031 (CFTC 1994). CFTC rule 12.310(d) provides that a presiding official who "believes that there is no genuine issue of material fact to be determined and that one of the parties is entitled to a decision as matter of law . . . may direct the parties to submit papers in support of and in opposition to summary disposition . . . substantially as provided in [CFTC rules 12.310(a), (b) and (c).]"[13]

As explained below, after carefully reviewing both sides' submissions, I have concluded that there is no genuine issue as to any fact material to the alleged unauthorized trading or to the alleged reckless trading deviations, and thus that, as a matter of law: one, that Yrag Traders is entitled to an award of $49,723, based on the out-of-pocket losses proximately caused by respondents' violations of CFTC rule 166.2 and Section 4d of the Commodity Exchange Act; and two, that respondents are entitled to dismissal of Yrag Traders' allegations that second-guess the wisdom of the trades that purportedly recklessly deviated from their "prescribed trading plan."

*Unauthorized Trading*

Both sides have essentially concurred that they treated Yrag Traders' PFG account as a managed account, at least up to April 16, 2011, and as a result, although they may have periodically consulted Professor Kimmelman, respondents placed all, or almost all, of the trades without first obtaining Kimmelman's specific authorization. In this connection, during the course of *sua sponte* discovery, respondents forthrightly acknowledged that, although both sides had treated the account as a managed account,

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[13] By Notice dated September 25, 2013, pursuant to CFTC rules 12.304(j) and 12.310(d), I notified the parties that I had determined that additional discovery and written testimony, or any oral testimony, would be unlikely to significantly clarify the relevant factual circumstances, and thus that the evidentiary record was sufficiently developed for reliable resolution of the two principal issues in question: one, whether respondents' acknowledged failure either to obtain a written discretionary trading authorization, or to obtain specific authority for the various trades executed for Yrag Traders' account constituted *per se* unauthorized trading in violation of rule 166.2; and two, whether respondents, in connection with the bulk of the trades in the account had recklessly deviated from a purported "prescribed [short option] trading plan" and thus exposed Yrag Traders to "exponentially greater risk." Accordingly, I directed complainant Yrag Traders to file arguments in favor of summary disposition awarding damages proximately caused by respondents' unauthorized trading, and arguments in opposition to summary disposition denying damages based on Yrag Traders' allegations that second-guess the wisdom of respondents' trades; and I directed respondents Cordier, Gross and LTG to file arguments in opposition to summary disposition awarding damages proximately caused by respondents' unauthorized trading, and arguments in favor of summary disposition denying damages based on Yrag Traders' allegations that second-guess the wisdom of respondents' trades.

a written power of attorney granting Liberty Trading Group discretionary trading authority had "fallen through the cracks" at LTG and/or PFG, and thus respondents could not show that they had obtained a signed power of attorney from Kimmelman, as required for managed accounts by CFTC rule 166.2.

CFTC rule 166.2 provides, in pertinent part:

> No . . . introducing broker, or [its associated person] may directly or indirectly effect a transaction in a commodity interest for the account of any customer unless before the transaction the customer, or person designated by the customer to control the account:
>
> (a) [S]pecifically authorized . . . the introducing broker or [its associated person] to effect the transaction (a transaction is "specifically authorized" if the customer, or person designated by the customer to control the account specifies – (1) The precise commodity interest to be purchased or sold; and (2) the exact amount of commodity interest to be bought or sold); or
>
> (b) Authorized in writing the . . . introducing broker [or its associated person] to effect transactions in commodity interests for the account without the customer's specific authorization.

17 C.F.R §166.2 (2013). In its most recent significant opinion concerning unauthorized trading, *Adams v. Black Diamond Futures,* Comm. Fut. L. Rep. ¶30,493 (CFTC 2007), the Commission explained that an acknowledged failure either to obtain a written discretionary trading authorization required by rule 166.2, or to obtain a customer's specific authority for the trades executed for the customer's account, constituted *per se* unauthorized trading, and offered the following summary of Commission case law on unauthorized trading:

> A liability analysis under Commission Rule 166.2 focuses on two issues: (1) whether there was a written power of attorney in effect at the time of the transaction at issue and, if not, (2) whether the transaction was specifically authorized by the customer in advance of its execution. *See Wolken v. Refco*, Inc., Comm. Fut. L. Rep. ¶24,509 at 36,188 (CFTC July 18, 1989). Under Rule 166.2, a customer's oral grant of general discretion to an account executive is irrelevant to the analysis of liability, because the rule renders such oral agreements void. *Id*. The customer's post-transaction conduct is equally irrelevant to an analysis of liability, because

> a transaction cannot be specifically authorized unless the customer selects the type of transaction (purchase or sale), the commodity interest, and the exact amount of the commodity interest, in advance of the transaction.... Similarly, in *In re Paragon Futures Association*, Comm. Fut. L. Rep. ¶25,266 at 38,850 (CFTC Apr. 1, 1992), the Commission noted that "oral authorization which is not specific does not satisfy the requirements of Commission Rule 166.2."

*Adams, id.*

The Commission further stated in *Adams* that the proper measure of damages for unauthorized trading, where the violations of CFTC rule 166.2 had stretched over the entire life of the account, was complainant's total out-of-pocket (*i.e.*, total net) losses:

> Under Section 14 of the Act, Adams is entitled to recovery of "actual damages proximately caused" by a violation of the Act or Commission Regulations [citation omitted]. Consequently, Hundley shall reimburse Adams for the entire amount of her out-of-pocket losses incurred in connection with her account . . . .

*Id.* Before the Commission issued its *Adams* opinion, the Commission's general rule had been to <u>not</u> net-out winning and losing trades when measuring damages for unauthorized trading. That is, generally the customer had been allowed to recover the total amount lost on the losing unauthorized trades, while retaining the total profits gained on unauthorized winning trades, based on the equitable notion that the respondent should not be able to enjoy any profits on unauthorized winning trades, but should be held liable for any unauthorized losing trades. See *Shashaani v. Merrill Lynch, Pierce, Fenner & Smith,* Comm. Fut. L. Rep. ¶ 22,629 (CFTC 1985) *Shashaani I* ; and *Shashaani v. Merrill Lynch, Pierce, Fenner & Smith*, Comm. Fut. L. Rep. ¶ 23,271 (CFTC 1986) *Shashaani II*. In *Shashaani II* , the Commission noted:

> Absent evidence to the contrary, each futures contract established and liquidated in an account without authority represents an unauthorized transaction for purposes of calculating damages. . . .
>
> When a futures commission merchant places unauthorized trades in a customer's account, it exposes the customer's account to market risk that the customer may be unwilling to undertake. In doing so, the futures

> commission merchant fails to treat and deal with the customer's money "as belonging to such customer" and violates Section 4d of the Act. Even when the unauthorized position results in a profit, the customer's funds have been at risk. In this situation, the customer's right to the profit is clearly superior to the right of the futures commission merchant not simply because the futures commission merchant has breached its professional duty and should not be unjustly enriched, but because the customer's funds have margined the position and been at risk.

However, in *Adams*, the Commission, without acknowledgement or explanation, departed from the *Shashaani* no-netting rule, when it awarded damages for unauthorized trading based on the customer's aggregate net losses.

In a subsequent decision, *Los Angeles Trading v. Peregrine Financial Group,* Comm. Fut. L. Rep. ¶ 30,805 (CFTC 2008), the Commission offered further explanation for its *Adams* decision. In *LA Trading,* the Commission noted that Section 14(a)(1)(A) of the Commodity Exchange Act ("Act") authorizes the Commission to award "actual damages proximately caused by [a violation of the Act or CFTC rule]," and thus, the Commission explained, in *Adams* it had: "held that this [statutory] language refers primarily to out-of-pocket losses and does not extend to compensation for lost profits except in limited circumstances where lost profits are directly caused by a respondent's law violation and the magnitude of the losses is determinable with reasonable particularity." The Commission further noted: "In practice, the Commission generally has limited recovery for lost profits in reparations cases to cases involving the unauthorized liquidation of a complainant's market position." *LA Trading, id.*

Despite the fact that the *Shashaani* general "no-netting" measure of damages for extensive unauthorized trading is not the same as a "lost (post-liquidation, potential) profits" measure of damages for an unauthorized liquidation, despite the fact that the Commission has yet to acknowledge its departure from the *Shashaani* "no-netting" rule, and despite the fact that *Adams* did not involve a claim for lost profits, *Adams* does represent the Commission's latest word on determining damages proximately caused by unauthorized trading over an extensive portion of the life of an account.[14] Moreover, in the case at hand, applying the Commission's preferred *Adams* "netting" rule promotes judicial efficiency, and does not result in a manifest injustice because straight netting restores Yrag Traders to the status quo before the two sets of unauthorized trades: one, the unauthorized trades before the trading freeze on April 16, 2011; and two, the unauthorized liquidations on September 15, 2011. Accordingly, I have followed the *Adams* "netting" rule for determining the damages proximately caused by respondents' unauthorized trading in violation of CFTC rule 166.2 and Section 4d of the Commodity Exchange Act.[15]

Here, the violations of CFTC rule 166.2, and Section 4d of the Act, stretched from the opening of the account to at least Saturday April 16, 2011, when Professor Kimmelman instructed respondents to freeze all trading activity. Up to that date, respondents had failed to obtain Kimmelman's specific authorization in advance of the execution of any trade, as mandated by CFTC rule 166.2 in the absence of a signed written power of attorney. After that date, respondents were similarly obligated to follow Kimmelman's do-not-liquidate instructions. *See, e.g., Do v. Lind Waldock & Company*, Comm. Fut. L. Rep. ¶25,910 (CFTC 1993) (*Do I*); and *Do v. Lind Waldock & Company*, Comm. Fut. L. Rep. ¶26,516 (CFTC 1995) (*Do II*).

As for the period after April 16, 2011, Kimmelman's "do-not-liquidate" instructions on that and later dates broke the causal nexus between the previous rule

[14] In *Adams*, as in Professor Kimmelman's case, the *pro se* complainant had not discovered the rule 166.2 violation until well after the account had been closed, and had limited her damage claim for violations of rule 166.2 to the aggregate net losses.

[15] Generally, unauthorized trading violates Section 4d of the Act, 7 U.S.C §6d. Section 4d (a)(2) provides in pertinent part: "It shall be unlawful for any person to be a futures commission merchant unless — (2) such person shall . . . treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer."

166.2 violations and the subsequent losses.[16] On July 14, 2011 Kimmelman extended the do-not-liquidate order to all options with later expiration dates than those specified in the original April 16th instruction. Then on other dates before August 9, 2011, Kimmelman rejected suggestions that he liquidate the account. As a result, on August 9, 10 and 11, 2011, PFG -- consistent with its authority under the customer agreement signed by Kimmelman -- exercised sound business judgment and prevented catastrophic losses that would have resulted in a large debit balance by liquidating certain gold and crude positions.[17] Since these August 2011 losses flowed directly from Kimmelman's do-not-liquidate instructions, Kimmelman must bear full responsibility for these losses. Thus, the proper measure of damages for respondents' rule 166.2 and Section 4d violations before Saturday April 16, 2011 should be based on the difference between the $200,000 deposit, and the $151,579 liquidation value of the account at the market close on Friday April 15, 2011: $48,421.

Respondents also must bear responsibility for the losses connected to the liquidations on September 15, 2011. On one hand, it was not unreasonable for respondents to interpret Kimmelman's September 15th "situation is now closed -- time to move on" reply to their September 13th order as affirmatively signaling that Kimmelman had accepted the September 13th offer, in which Becker had specifically stated that the liquidation of all open positions was a necessary component of the agreement to return Kimmelman to the *status quo ante*. On the other hand, Kimmelman's "situation is now

[16] PFG's keypunch error in May 2011 may have been an aggravating hiccup, but it was quickly corrected with all charges reversed the next day, and thus ended up creating no losses.

[17] Here, given the particular factual circumstances -- one, the absence of any evidence that PFG had computed the margin deficit in bad faith, or that respondents had mislead Kimmelman about PFG's margin policy; two, the rapidly increasing margin deficit; three, Kimmelman's repeated, insistent demands for the return of the entire cash balance, in total disregard of recent advice that some cash had to be retained to provide adequate margins; and four, Kimmelman's pattern of recalcitrant refusals to respond in a timely fashion to respondents' requests to discuss the disposition of open positions -- it would have been imprudent and unreasonable for respondents to have first issued margin calls and then waited for a reply from Kimmelman while losses rapidly mounted.

closed -- time to move on" reply was sufficiently vague to require clarification regarding the disposition of the open positions. Respondents did not do this, and thus failed to obtain Kimmelman's specific authorization to liquidate the open option positions, and thus respondents violated Commission rule 166.2. The proper measure of damages for the rule 166.2 and Section 4d violation on September 15, 2011 is the total amount debited to Yrag Traders' account in connection with the liquidation of the account on that date: $1,302.

Accordingly, the amount of damages proximately caused by respondents' violations of Commission rule 166.2 and Section 4d of the Act is the sum of $48,421 (damages for the unauthorized trading before April 16, 2011) and $1,302 (damages for unauthorized liquidation of the account on September 15, 2011): $49,723.

*Disputed Trading Strategy*

The core of Professor Kimmelman's claim that respondents deviated from a "prescribed trading plan," and thus exposed Yrag Traders to "exponentially greater risk," is that all but one of the trades initiated from August 2, 2010, to March 16, 2011, involved options with expiration dates more than three months out:

> The main factor that initiated the substantial losses was their non-adherence to the shorter expirations that substantially increases the daily erosion factor and a substantially quicker capture of premium.
>
> When a buy back does occur from a losing trade of longer duration, the lack of premium decaying leads to a substantial higher buy back cost, encompassing not only the premium collected on that trade, but several other trades as well.
>
> . . . .
>
> What I was referring to by using the term "exponentially higher risk" was the "Exponential rate of Change" of the erosion of time decay.
>
> The longer the time to expiration, the lower rate of erosion of premium (daily) decay, hence a substantial higher buy back cost, and substantially high losses.

[Syntax in original; first and fourth pages of Kimmelman's statement (filed September 20, 2013).]

In response, respondents have asserted that none of these disputed trades significantly deviated from their diversified option selling strategy:

> Respondents can state that the Yrag Traders account was traded consistent with the other managed accounts during this time period. . . .
>
> Mr. Kimmelman's account used a few basic option strategies. A basic naked sell (puts or calls), and a strategy called credit spreads. . . . [Credit spreads] are still a net short strategy - in other words, they still look to take advantage of time decay. Even in a credit spread, the object is to have all of the options expire worthless - in which case the account holder keeps the net premium derived from the spread.
>
> . . . .
>
> There were two basic types of credit spreads used in the Yrag account. A strategy called a bull-put or bear-call spread and a strategy called a ratio spread. A bull put or bear call spread uses one long option to protect one short option. A ratio spread uses one option to protect 2 or more options. . . .
>
> It appears that Mr. Kimmelman also believes that any trade not allowed to expire worthless was against the "trading plan". When an option decayed down to where it was worth less than $50 or $100, there was little to gain by holding on for the extra $50 or $100 but everything to lose. At this point, the risk reward ratio became skewed and often we would close the positions to eliminate that risk. . . .
>
> . . . .
>
> Additionally, Mr. Kimmelman appears to be under the perception that the trading was to be restricted to only options expiring within a certain time frame. Nothing could be further from the truth. At no time was this presented to Mr. Kimmelman as part of the "trading plan". We considered the totality of the market including risk/reward parameters when deciding how far out to purchase options. There was no hard and fast rule that trading would be limited to options expiring within a certain time period.
>
> . . . .
>
> For the life of the account a diversified mix of commodities was in place. During some of this period, commodities in our opinion had a

> slightly bullish landscape in which all accounts were positioned with a price positive model by emphasizing short puts. Also, during the duration of this account there were bearish implications to price discovery and thus trading for all accounts was emphasizing short calls. Also, there were durations of time when price discovery had a neutral landscape and accounts were positioned to benefit from stable prices by selling both puts and calls simultaneously. . . .

[Cordier and Gross joint affidavit (filed September 20, 2013).] [18] A review of respondents' most pertinent documents -- particularly the periodic newsletters and the occasional "Dear Client" updates – confirms that their option selling strategy was never intended to be strictly limited to options with close-in expiration dates. Moreover, Kimmelman's claim that such a strict limitation lay at the heart of Cordier's option selling strategy was belied: one, by the fact that after Kimmelman had become upset about the losses in February 2011 he specifically instructed respondents not to liquidate any open options in the account, most of which happened to violate this purported strict limitation; and two, by the fact that Kimmelman would not explicitly question the routine selection of options with further out expiration months until four months after he had given his initial instruction to freeze trading.

Generally, since any attempt to second-guess a trade involves a determination that does not readily lend itself to a clear-cut answer, the fact that a trade proves to be unsuccessful, standing alone, cannot reasonably constitute a basis for an award in reparations. Otherwise, any customer losing money on a managed account or recommended trade would be entitled to automatically recover his losses with proof of nothing beyond the loss itself. The exception to this general rule exists where the trade is made without any reasonable basis. In this connection, the Commission has noted: one, that a complainant must provide convincing evidence beyond a poor outcome that

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[18] *See also* respondents' responses to Yrag Traders' allegations 3, 4, 9, 11, 12, 13, 27, 28, 30, 31, 32, and 33, in joint answer; and respondents' responses to Yrag Traders' interrogatories 2, 4, 7, 14, 17, 19, 20, 21, 22, and 23.

a disputed trade was unreasonable or without foundation, and two, that respondents' rationale for a disputed trade need not be the ultimate or most preferable of available alternatives. *See Syndicate Systems, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Comm. Fut. L. Rep. ¶23,289 (CFTC 1986).

Here, Kimmelman has produced no compelling evidence that any of the disputed trades materially deviated from, or exposed complainant to "exponentially" greater risk than, the risk normally associated with, Liberty Trading Group's "Diversified Option Seller Trading Program," and otherwise has produced no compelling evidence that the disputed trades lacked a reasonable basis or were without foundation. Accordingly, no genuine issue of material fact exists with regard to the relative wisdom of respondents' trades, and thus respondents are entitled to summary disposition dismissing those allegations that second-guess the wisdom of the option trades initiated from August 2, 2010 to March 16, 2011.

## ORDER

Yrag Traders has established by a preponderance of the evidence that Liberty Trading Group LLC, James Cordier and Michael Gross violated Commission rule 166.2, and Section 4d 0f the Commodity Exchange Act, and that these violations proximately caused $49,723 in damages. Accordingly, Liberty Trading Group LLC, James Cordier and Michael Gross are ordered to pay to Yrag Traders reparations of $49,723, plus interest on that amount at 0.13%, compounded annually from July 22, 2010, to the date of payment, plus $250 in costs for the filing fee. Liability shall be joint and several.

Yrag Traders has failed to establish, by a preponderance of the evidence, any other violations by respondents proximately causing damages. Accordingly, all other claims are hereby dismissed.

Dated December 12, 2013.

Philip V. McGuire

Philip V. McGuire,
Judgment Officer