

Commodity Exchange Act, as amended (“Act”), 7 U.S.C. § 6m(1) (2002). Novak is vicariously liable for these violations pursuant to Section 13(b) of the Act. *See* 7 U.S.C. § 13c(b) (2002).

2. During the relevant period, Nexgen failed to provide required disclosure documents to its clients. Specifically, Nexgen failed to provide its prospective and actual CTA clients with a Disclosure Document containing the information set forth in Commission Regulations 4.34 and 4.35, 17 C.F.R. §§ 4.34 and 4.35 (2003). As a result, Nexgen violated Commission Regulation 4.31, 17 C.F.R. § 4.31 (2003). Novak is vicariously liable for these violations pursuant to Section 13(b) of the Act. *See* 7 U.S.C. § 13c(b) (2002).

3. During the relevant period, Nexgen – through Novak - used fraudulent and misleading representations to solicit members of the general public to direct the trading in their commodity interest accounts. Novak knew or recklessly disregarded the falsity of his representations. Novak thereby violated Sections 4b(a)(2)(i) and (iii) and Commission Regulations 4.41(a)(1) and (2), 17 C.F.R. § 4.41(a)(1) and (2) (2003). Nexgen is vicariously liable for Novak’s fraudulent conduct pursuant to Section 2(a)(1)(B) of the Act because Novak was an officer of Nexgen, *see* 7 U.S.C. § 2a(1)(B) (2002), and thereby violated Section 4o(1) of the Act.

4. The Commission brings this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), to enjoin the unlawful acts and practices of defendants and to compel their compliance with the Act. Unless enjoined by this Court, defendants are likely to continue to engage in the acts and practices alleged in this Complaint and similar acts and practices, as more fully set forth below. The Commission also seeks civil monetary penalties, restitution to clients, and such other relief as this Court may deem necessary or appropriate.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), which authorizes the Commission to seek injunctive relief against any person whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation or order thereunder.

6. Venue properly lies with the Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1(e) (2002), in that the defendants are found in, inhabit, or transact business in this district, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this district.

III. THE PARTIES

7. Plaintiff **Commission** is an independent federal regulatory agency charged with the responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.* (2000), and the Regulations promulgated under it, 17 C.F.R. §§ 1 *et seq.* (2003).

8. Defendant **John P. Novak** resides at 27 Sunspree Place, The Woodlands, Texas 77382. Novak incorporated Nexgen Software Systems, Inc. in February 2000 and is the owner and sole shareholder of the company. Novak has never been registered with the Commission in any capacity.

9. Defendant **Nexgen Software Systems, Inc.**, is a Texas corporation located at 27 Sunspree Place, The Woodlands, TX 77382. Novak incorporated Nexgen Software Systems, Inc. in February 2000. Nexgen has never been registered with the Commission in any capacity.

IV. FACTS

10. Novak, while d/b/a Nexgen Software Systems, began developing and selling computer software for trading commodity futures in late 1998. Novak subsequently incorporated Nexgen in February 2000 and is the sole owner of the company. Novak and Nexgen have never registered with the Commission.

11. Since founding Nexgen, Novak, through Nexgen, has offered a variety of different trading programs to the public. In recent years Novak, through Nexgen, has also offered to direct the trading in clients' commodity interest accounts. Nexgen advertises its trading programs as well as its offer to direct the trading in commodity interest accounts primarily on Nexgen's Internet website, located at www.nss-t3.com. Nexgen obtains client leads mainly through responses to the website and through referrals from registered futures commissions merchants ("FCMs"). Prospective clients are telephonically contacted by Novak or by one of a handful of individuals Nexgen uses as salespersons.

The "Nexgen Live" Trading Service

12. In early 2000, Nexgen offered a service described as "on-line S&P and Nasdaq trading signals." The service was referred to by various names, but was commonly called "Nexgen Live." From early 2002 to February 2003, the "Nexgen Live" trading service operated in a manner whereby each Nexgen Live client signed a "Letter of Direction" directing their account executive, at the FCM where they maintained an account, to execute trading instructions provided by Nexgen. During this time period, approximately ten "Nexgen Live" clients maintained accounts at the FCM, Man Financial, Inc. ("Man"). For a brief period beginning in late 2002, Novak also sent trading instructions to a registered-IB, eLocal, LLC, for eight Nexgen Live clients.

13. During the time period between early 2002 to February 2003, Novak determined and caused the specific trades to be executed in the "Nexgen Live" clients' accounts. Novak issued his trading decisions to account executives at the FCMs, who in turn executed the trades in each Nexgen Live client's account. Novak conveyed these trading decisions through instrumentalities of interstate commerce. At all times during this period, Novak used his own discretion when making trading decisions.. The account executives at the FCMs never possessed or exercised any discretion in executing these trades. Novak was the only person from Nexgen who submitted trading decisions to the FCMs' account executives during this time period.

14. From early 2002 through February 2003, the Nexgen trading service was offered for as much as \$1000 per month, but the amount each client paid varied. Some clients paid Nexgen \$500 per for "Nexgen Live," while others were offered free trials as incentive to purchase Nexgen software programs. Some clients were told that they would only be charged the fee if profits were derived from the trading activity.

15. In the process of soliciting clients to purchase the trading service and the trading programs, Novak held Nexgen out generally to the public as a CTA. For example, in response to the initial public solicitations via the Internet, prospective clients contacted Nexgen, which in turn led to Novak offering to direct the trading in their accounts. Novak told prospective clients that he personally developed the trade decisions made for those clients who purchased the trading service.. Novak told these prospective clients that by using his expertise to interpret the indicators produced by a software program, they could avoid the difficult process of learning to interpret the indicators for themselves. The trading service was not incidental to Nexgen's business. Rather, it was part of its regular business.

16. From November 2001 through February 2003, neither Novak nor any Nexgen salesperson ever delivered a Disclosure Document containing the information set forth in Commission Regulations 4.34 and 4.35 to either prospective, or actual, Nexgen Live clients.

Misrepresentations and Omissions By Novak

17. To persuade individuals to accept Novak's offer to direct the trading in their accounts, Novak made material misrepresentations and omissions of fact regarding both the profitability and reliability of his trading skill and success. Novak falsely represented that he used a software program profitably in his own account and in the accounts of other Nexgen clients. For example, Novak represented to one client that he was doing so well in his personal trading with the software system that he was "looking to retire in a few years." Novak told another client that he had been using the software program in the equities market and was making so much money that he was considering no longer offering it to the public. Novak told a third client that he had "S&P trading licked" and was winning on six or seven of 10 trading days.

18. To persuade prospective clients to accept the offer to direct the trading in their accounts, Novak made material misrepresentations of fact regarding the profitability of the Nexgen trading service. For example, Novak made the following representations to clients or prospective clients:

- a) The client could expect to quickly earn back the cost of the Nexgen trading service; and
- b) During a two-week free trial period, a trading service client would easily make enough money to pay the fee for the trading service.

19. In soliciting prospective clients to accept the offer to direct the trading in their accounts, Novak omitted material facts regarding the profitability of the Nexgen trading service.

For example, while touting the likelihood of profits if one used the Nexgen trading service, Novak failed to disclose that his personal trading using the trading service had never been profitable and neither was that of any client who had agreed to authorize Nexgen/Novak to direct the trading in their accounts. Novak knew his trading was never profitable and knew that the Nexgen clients never profited from using the trading service.

Novak is Nexgen's Controlling Person

20. Novak is the sole owner of Nexgen. Novak also is in charge of all aspects of Nexgen's operations, including its development and marketing of trading programs and the Nexgen Live directed trading service. Novak makes all hiring decisions for the firm, directs its sales program and controls and operates its website. Novak is the controlling person of Nexgen.

V. VIOLATIONS OF THE COMMODITY EXCHANGE ACT

COUNT I

**VIOLATION OF SECTION 4m(1) OF THE ACT, 7 U.S.C. § 6m(1)
FAILURE TO REGISTER AS A COMMODITY TRADING ADVISOR**

21. Paragraphs 1 through 19 are re-alleged and incorporated herein.
22. Section 1a(6) of the Act, 7 U.S.C. § 1a(6), defines a CTA as any person who, *inter alia*, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market. Section 4m(1) Act makes it unlawful to make use of the mails or instrumentalities of interstate commerce to provide commodity trading advice to 15 or more persons during the preceding 12-month period, or to hold oneself out generally to the public as a CTA, unless registered as a CTA under the Act. Commission Regulation 4.14(a)(9) further provides that CTAs that direct the trading in another's commodity interest account are not

exempt from being registered as a CTA. 17 C.F.R. § 4.14(a)(9) (2003). Commission Regulation 4.10(f) defines “direct”, as used in the context of trading commodity interest accounts, as an “agreement whereby a person is authorized to cause transactions to be effected for a client’s commodity interest account without the client’s specific authorization.” 17 C.F.R. § 4.10(f) (2003).

23. By virtue of the conduct described in paragraphs 1, 10, 11, 12, 13, and 14 above, Nexgen should have registered as a CTA and is not exempt from registration as such. Therefore, Nexgen violated Section 4m(1) of the Act by acting as a CTA without being registered with the Commission as a CTA.

24. Because Novak is Nexgen’s controlling person, Novak is liable for Nexgen’s violation pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2002).

COUNT II

**VIOLATIONS OF SECTIONS 4b(a)(2), 4o(1)(A) and (B) OF THE ACT,
7 U.S.C. §§ 6b(a)(2), 4o(1)(A) and (B), and COMMISSION REGULATIONS
4.41(A)(1) AND (2), 17 C.F.R. §§ 4.41(A)(1) AND (2):
FRAUD BY A PRINCIPAL OF A COMMODITY TRADING ADVISOR**

25. Paragraphs 1 through 20 are re-alleged and incorporated herein.

26. Sections 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii), prohibit any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made or to be made, for or on behalf any other person if such contract for future delivery is or may be used for hedging or determining the price basis of any transaction in interstate commerce, or delivering any such commodity in interstate commerce, from cheating or defrauding or attempting to cheat or defraud such other person, and from

willfully deceiving or attempting to deceive such other person by any means whatsoever in regard to the order or contract.

27. Section 4o(1) of the Act, 7 U.S.C. § 6o(1), makes it unlawful for a CTA, whether registered or not, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly – (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

28. Commission Regulations 4.41(a)(1) and (2) make it unlawful for a principal of a CTA or a CTA to advertise in a manner that: (1) employs any device, scheme, or artifice to defraud any client or prospective client; or (2) involves any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client.

29. As a result of the conduct described above in paragraphs 1, 3, 16, 17, and 18 Novak violated Section 4b(a)(2)(i) and (iii) of the Act and Commission Regulations 4.41(a)(1) and (2).

30. Because Novak was acting as Nexgen's agent, officer, and principal while he engaged in the conduct described above in paragraphs 1, 3, 16, 17, and 18, Nexgen, which was acting as a CTA, is liable for violating Sections 4b(a)(2)(i) and (iii), and 4o(1)(A) and (B) of the Act and Commission Regulations 4.41(a)(1) and (2), pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2002).

31. Each fraudulent misrepresentation and omission by Novak and Nexgen, including those specifically alleged herein, are alleged as separate and distinct violations of Sections 4b(a)(2)(i) and (iii) and 4o(1)(A) and (B), and Commission Regulations 4.41(a)(1) and (2).

COUNT III

VIOLATION OF COMMISSION REGULATION 4.31(a) and (b), 17 C.F.R. § 4.31 (a) and (b) (2003)

FAILURE TO PROVIDE DISCLOSURE DOCUMENTS

32. Paragraphs 1 through 20 are re-alleged and incorporated herein.
33. Commission Regulation 4.31(a), 17 C.F.R. § 4.31(a) (2003) provides that any CTA registered or required to be registered under the Act is prohibited from soliciting prospective clients, or entering into agreements with prospective clients, to direct the client's commodity futures trading account unless the CTA "at or before the time it engages in the solicitation or enters into the agreement (whichever is earlier), delivers or causes to be delivered to the prospective client a Disclosure Document for the trading program pursuant to which the trading advisor seeks to direct the client's account...."
34. Commission Regulation 4.31(b) prohibits a CTA from entering into an agreement to direct a client's account unless the CTA has received a signed acknowledgement from the client that states that the client has "received a Disclosure Document for the trading program pursuant to which the trading advisor will direct his account...." The information required in the disclosure documents is described in §§ 4.34 and 4.35 of the Commission's Regulations.
35. By virtue of the conduct described in paragraphs 1, 2, 11, 12, 13, 14, and 15 above, Nexgen, while acting as a CTA required to be registered under the Act, failed to provide clients with disclosure documents containing the information set forth in §§ 4.34 and 4.35 of the Commission's Regulations, and entered into agreements to direct client accounts with out receiving acknowledgement that such clients received the required disclosures. Therefore, Nexgen violated Commission Regulations 4.31(a) and (b), 17 C.F.R. § 4.31(a) and (b) (2003).

36. Because Novak is Nexgen's controlling person, Novak is liable for Nexgen's violations of Commission Regulation 4.31(a) and (b), pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2002).

37. Each failure to provide disclosure documents by Nexgen is alleged as a separate and distinct violation of Commission Regulations 4.31(a) and (b), 17 C.F.R. § 4.31(a) and (b).

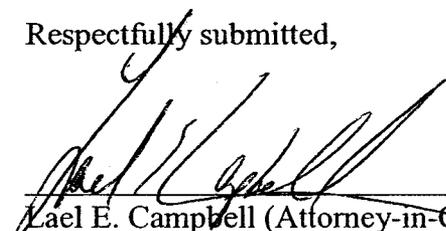
VI. RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1, and pursuant to its own equitable powers, enter:

- a) a permanent injunction prohibiting Novak and Nexgen from engaging in conduct in violation of Sections 4b(a)(2)(i) and (iii), 4c(1)(A)(1) and (2), and 4m(1) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii), 6c(1)(A) and (B), and 6m(1) (2002), and Commission Regulations 4.31(a) & (b) and 4.41(b), 17 C.F.R. §§ 4.31(a) & (b) and 4.41(a)(1) and (2) (2003);
- b) an order directing Novak and Nexgen to make full restitution to every client whose funds were lost as a result of acts and practices which constituted violations of the Act and Regulations, described herein, and interest thereon from the date of such violations;
- c) an order directing Novak and Nexgen to pay a civil monetary penalty in the amount of not more than the higher of \$120,000 or triple the monetary gain to each Defendant for each violation of the Act or Regulations; and
- d) such other and further remedial ancillary relief as the Court may deem appropriate.

Date: July 20, 2004

Respectfully submitted,


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