

UNITED STATES OF AMERICA
Before The
COMMODITY FUTURES TRADING COMMISSION

WILLIAM J. RALPH

v.

LIND-WALDOCK & COMPANY and
JEFFREY KUNST

CFTC Docket No. 00-R010

OPINION AND ORDER

Complainant William J. Ralph (“Ralph”) appeals from a Judgment Officer’s decision dismissing his complaint against Jeffrey Andrew Kunst (“Kunst”) and Lind-Waldock & Co. (“Lind-Waldock”) for a failure of proof. Ralph argues that the Judgment Officer erred by making factual findings based on an unreliable affidavit submitted by respondents. Respondents urge the Commission to affirm the Judgment Officer’s decision in all respects.

As explained below, we conclude that the current record does not permit a reliable determination of Ralph’s claim against Lind-Waldock but supports dismissal of Ralph’s claim against Kunst for a failure of proof. Consequently, we affirm the dismissal of the proceeding against Kunst but otherwise vacate the Judgment Officer’s decision and remand for further proceedings consistent with this opinion and order.

BACKGROUND

I.

In October 1999, Ralph submitted a reparations complaint essentially alleging that Lind-Waldock filled a sell order after it had expired. Although Ralph earned a profit as a result of the alleged unauthorized liquidation, he sought damages of \$13,240 from Lind-Waldock. Some of the damages Ralph claimed were the result of a loss he suffered when respondent Kunst allegedly forced him to re-establish his long gold futures position in the aftermath of the alleged unauthorized liquidation. The bulk of the damages Ralph claimed, however, were based on his allegation that, but for the alleged unauthorized

liquidation, he would have remained in the gold futures market until he had earned a substantial profit.

In support of his claim, Ralph alleged that on September 22, 1999, he entered a day order to liquidate his two-contract long February gold futures position.¹ Ralph used Lind-Waldock's electronic order entry system to communicate his order. According to the complaint, after that day's trading session was complete, Ralph checked the account-related information that Lind-Waldock maintained on its web site. Because Ralph did not see any indication that there were any "working orders" in his account, he believed his liquidation order had expired unfilled. 10/4/99 Description of Complaint at ¶ 2.

According to the complaint, on September 23, 1999, Ralph decided not to re-enter his liquidation order because the gold market looked strong. On Monday, September 27, 1999,² Ralph felt that the gold market was "extremely hot" and decided to enter a protective stop order at a price of 325. *Id.* at ¶ 4. When he checked the account-related information that Lind-Waldock maintained on its web site, however, he saw a report that

¹ Ralph attached a copy of his September 22, 1999 account statement to his complaint. The statement indicates that Ralph established his long gold position on August 20, 1999 at a price of 261.50.

The Glossary of Futures Terms published by the National Futures Association ("*NFA Glossary*") indicates that a day order is an order "that if not executed expires automatically at the end of the trading session on the day it was entered." *NFA Glossary* at 8.

² Ralph's complaint mistakenly refers to Monday as September 23, 1999. This appears to be a typographical error.

his long gold position had been liquidated on September 23, 1999.³

According to the complaint, Ralph then sent an e-mail message to Lind-Waldock's on-line support services.⁴ The message sought an adjustment that reinstated Ralph's two-contract February gold futures position. It explained that Lind-Waldock had liquidated the position on "Friday" based on a day order that had been entered "Thursday."⁵ E-mail dated 9/27/99, 10:04:26 (attached to Ralph's Complaint). The message also noted the importance of immediate action because Ralph wished "to enter protective stops at current levels." *Id.*

Later that day, Ralph received an e-mail message from Lind-Waldock.⁶ The message advised Ralph to contact his order desk as soon as possible "to determine what orders should be working or not, and what positions you should have or not." E-mail dated 9/27/99, 11:30:50 (attached to Ralph's Complaint). Ralph did not follow this advice because he "had switched to a discount account and transacted all [his] business through the internet." 10/4/99 Description of Complaint at ¶ 5. In the afternoon, he sent an e-mail message to Lind-Waldock's sales department.⁷ This message included the text of the earlier message Ralph had sent to online support services and the reply provided to

³Ralph attached a copy of his September 23, 1999 account statement to his complaint. The statement indicates that Lind Waldock sold 2 February gold futures contracts for Ralph's account at a price of 265.80. It lists the trade date as 9/23/99 and indicates that Ralph earned a profit of approximately \$770.

⁴Ralph attached a copy of the September 27, 1999 e-mail message to his complaint. The time shown on the e-mail is 10:04 a.m.

⁵Once again, Ralph is confused about the time sequence. The record indicates that Ralph entered his day order on 9/22/99, which was a Wednesday. The account statement he received indicates that the liquidation order was filled on 9/23/99, which was a Thursday.

⁶Ralph attached a copy of Lind-Waldock's September 27, 1999 e-mail message to his complaint. The time shown on the e-mail is 11:30.

⁷Ralph attached a copy of his second September 27, 1999 e-mail message to his complaint. The time shown on the e-mail is 2:55 p.m.

Ralph. Ralph indicated that the sales department should advise him when the “problem [was] corrected.” E-mail dated 9/27/99, 14:55:40 (attached to Ralph’s Complaint). Once again, Ralph stated that immediate action was important because he wished to enter protective stops.⁸

The complaint claimed that on Tuesday, September 28, 1999, Ralph telephoned Lind-Waldock’s technical support staff and spoke to a person who identified himself as “Andrew.” 10/4/99 Description of Complaint at ¶ 6. Andrew verified that his September 22, 1999 order was a day order. Ralph then telephoned Lind-Waldock’s trade desk and spoke to Jeff Kunst.

According to the complaint, Kunst was “arrogant” and initially indicated that nothing could be done due to Ralph’s delay in contacting him. 10/4/99 Description of Complaint at ¶ 6. Later in the conversation, Kunst offered to establish a two-contract long gold futures position at the current market price. Ralph declined this offer. The complaint alleged that after additional discussion, Kunst agreed to make an adjustment if it were true that Lind-Waldock was responsible for an error, but only if Ralph agreed to re-enter the market at the current market price. Ralph agreed to this arrangement because he was “confident that Lind-Waldock was responsible for the sale” of his position. *Id.*

On September 28, 1999, Lind-Waldock bought two February gold futures contracts for Ralph’s account at a price of 310. The complaint alleged that Kunst failed to contact Ralph to resolve the problem and that Ralph eventually liquidated the September 28, 1999 long gold futures position at a loss of \$1,600.

⁸ Ralph’s message also claimed that he had changed to a discount account but was still being charged the higher rate of commission applicable to a “Lind Plus” account. *Id.*

In summarizing his complaint, Ralph claimed that Lind-Waldock, or an agent of Lind-Waldock, had “stolen” his profitable position. In this regard, Ralph claimed that absent Lind-Waldock’s fraud, he would have maintained his August 20, 1999 long gold futures position until the price rose to 320 and would not have established the September 28, 1999 long gold futures position. On this basis, he requested damages of \$13,240. 10/4/99 Description of Complaint at ¶ 7.

In late October, the Office of Proceedings (“Proceedings”) notified Ralph that his complaint had several deficiencies. Proceedings directed Ralph to clarify his description of the date he decided to enter a protective stop order and the method he used to calculate his damages, and asked him to indicate whether he intended to name Kunst as a respondent. Proceedings also advised that Ralph should submit his account statements and other documents supporting his claim for lost profits.

Ralph submitted an amended complaint in late November. The amended complaint indicated that Ralph decided to enter a protective stop order on Monday, September 27, 1999. It also explained that Ralph’s damage calculation presumed that absent Lind-Waldock’s wrongdoing, Ralph would have liquidated his August 20, 1999 long gold futures position at a price of 323.⁹ Ralph also submitted his September 29, 1999 account statement, which showed that the liquidation of his September 28, 1999 long gold futures position resulted in a loss of \$1,690.32.

On December 2, 1999, Proceedings sent Ralph a letter seeking further clarification. The letter directed Ralph to indicate whether he wished to name Kunst as a

⁹ In support of this calculation, Ralph submitted price charts for the February gold futures contracts for 9/22, 9/23, 9/27, and 9/28/99. These charts show that the high price for these days was 267.5, 268.9, 288, and 330.

respondent and to submit daily and monthly account statements for the period at issue, as well as his account-opening documents.

Proceedings received Ralph's response on December 17, 1999. Ralph indicated that he wished to name Kunst as a respondent because whoever had traded his account in an unauthorized manner was "reportedly" under Kunst's authority. 12/17/99 Amendment at 1. Ralph also stated that during their discussion of his complaint, Kunst insisted that Ralph immediately decide whether to re-establish a long gold futures position.

On December 20, 1999, the Office of Proceedings forwarded Ralph's complaint to Lind-Waldock and Kunst for response. Respondents filed a joint answer on January 20, 2000, denying any wrongdoing. The answer denied that Lind-Waldock personnel made any errors in communicating Ralph's orders to the exchange floor and claimed that they properly handled all orders in the ordinary course of business. Respondents acknowledged that some of the confusion surrounding the execution of Ralph's September 22, 1999 liquidation order might have been caused by an error in Lind-Waldock's initial report of the price of the fill. They emphasized, however, that under the particular circumstances at issue, Ralph was on notice that his liquidation order had probably been filled.

In support, respondents' answer indicated that Ralph had actually entered three liquidation orders on September 22, 1999: (1) at 9:33 a.m., Ralph entered a limit liquidation order at a price of 266.70 or better; (2) at 9:42 a.m., Ralph sought to cancel his limit liquidation order and replace it with an order to liquidate at the current market price; and (3) at 11:02 a.m., Ralph sought to cancel his market liquidation order and replace it with a limit liquidation order at a price of 266.70 or better. Noting that Ralph

was an experienced trader and that 80 minutes had passed between the entry of his second and third orders, respondents emphasized that “[c]ommon sense would dictate that [the] market order had already been filled.” They also asserted that “[i]n fact,” Ralph’s market liquidation order (the second order) had already been filled at a price of 266.20 when his cancellation order (the third order) was received. 1/21/2000 Answer at 2-3.

The answer admitted that Lind-Waldock initially reported that Ralph’s long gold position was liquidated at a price of 265.80. It claimed that this error had been corrected, however, by crediting Ralph’s account \$80 on September 27, 1999. As to Ralph’s September 28, 1999 long gold futures position, respondents’ answer claimed that Ralph established the position by entering an unsolicited order with Burt Schlicter.¹⁰ The answer stated that Kunst did not have the authority to make an adjustment in Ralph’s account and denied that he had forced Ralph to re-establish his long gold position.

Finally, respondents’ answer denied that Lind-Waldock stole Ralph’s long gold futures position, and claimed that Lind-Waldock neither engaged in proprietary trading nor competed against its customers in futures markets.

Respondents attached several documents to their answer. These included: (1) Ralph’s September 22, 1999 account statement,¹¹ (2) Ralph’s customer agreement with Lind-Waldock; and (3) order tickets for some of the transactions at issue. One of the order tickets corresponds to Ralph’s September 22, 1999 market liquidation order. The

¹⁰ The answer identified Schlicter as Ralph’s “LindPlus broker.” In this regard, it indicated that Lind-Waldock’s records did not indicate that Ralph had changed his account from a LindPlus account to a discount account.

¹¹ This statement does not reflect the liquidation of Ralph’s August 20, 1999 long gold futures position. Indeed, it lists the position as “open” and with a value of \$1,000.

order ticket, dated September 22, 1999, includes a handwritten price of 266.20 and the designation “JEFF.” It does not, however, show the time that the order was filled.¹²

In late January, Proceedings wrote respondents a letter seeking additional information regarding Kunst.¹³ Respondents filed an amended answer on February 7, 2000. The amended answer indicated that Kunst did not recall the specifics of his conversation with Ralph, but explained that, in the ordinary course of business, he would have advised a customer complaining about an alleged error “to establish a position in the market that he wanted as soon as possible and work out the complaint or the alleged error issue separately.” Amended Answer at 4.

Respondents’ amended answer also raised additional allegations unrelated to the discrepancies Proceedings had noted in its letter. For example, it alleged that on September 23, 1999, Schlicter was informed that Ralph’s September 22, 1999 market liquidation order had been filled at 266.20 and that it had been too late to cancel. In addition, the amended answer claimed that a “keypunch error” was responsible for the incorrect price reported on Ralph’s September 23, 1999 account statement. Amended Answer at 3.

II.

On February 18, 2000, the Commission’s Proceedings Clerk issued an order assigning the case to a Judgment Officer and informing the parties of the general deadlines for discovery and submitting verified statements in a summary proceeding.

¹² The other order tickets Lind-Waldock submitted relate to: (1) the two limit liquidation orders Ralph entered on September 22, 1999, and (2) the market order Ralph entered on September 28, 1999 to establish his two-contract long February gold futures position.

¹³ Proceedings also directed respondents to correct some mislabeled exhibits.

None of the parties undertook discovery during the relevant period.

On May 16, 2000, the Judgment Officer issued an order indicating that he did not believe an oral hearing was required to resolve the dispute. The order also established July 7, 2000 as the deadline for submitting final verified statements and additional documentary evidence.

Ralph submitted an unverified statement in late May. He noted that Lind-Waldock recorded conversations with its order desk and suggested that the tape recording of his conversation with Kunst would be the best evidence of what was said. As for respondents' claim that his market liquidation order had been filled on September 22, 1999, Ralph emphasized that Lind-Waldock's own documents were to the contrary. In this regard, he pointed out that his September 22, 1999 account statement indicated that his long February gold position remained open and that his September 23, 1999 account statement showed that his liquidation order was filled on September 23, 1999. Finally, Ralph challenged Lind-Waldock's claim that it was implausible that his market liquidation order remained unfilled for 80 minutes, noting that "[a]nyone with even a cursory knowledge of the futures markets is aware that situations often arise in active markets that legitimately delay or prohibit a timely execution of a market order." Ralph's Unverified Statement at 2.

On July 7, 2000, Lind-Waldock submitted a two-page affidavit signed by Schlicter. According to the affidavit, during "normal trading reconciliation procedures" on the morning of September 23, 1999, "it was determined that [Ralph] had executed a trade the previous day." Schlicter Affidavit at 1. The affidavit also claimed that the trading days at issue in this case represent "what might be determined as the most hectic

in gold trading on the Comex,” and that “[d]ue to the unprecedented trading volume and price moves in gold contracts, execution reports were delayed for days, not hours.”

Schlicter Affidavit at 2. Finally, the affidavit indicated that “[s]ubsequent reports rated [Lind-Waldock] positively in providing customer service during this turbulent time.” *Id.*

On August 1, 2000, the Judgment Officer directed Lind-Waldock to produce a copy of the Comex price change register for the February 2000 gold futures contract for September 22 and 23, 1999. The order also “encouraged” Lind-Waldock to produce: (1) a copy of any report that discussed market conditions and order handling problems on September 22 and 23, 1999, in the Comex gold futures pit; and (2) the reports mentioned in Schlicter’s affidavit which rated Lind-Waldock positively in providing customer service on September 22 and 23, 1999.¹⁴

Lind-Waldock’s response was limited to the Comex price change register for September 22 and 23, 1999. The report for September 22, 1999 indicated that between 9:15 a.m. and 10:20 a.m.¹⁵, the February gold futures contract traded at prices of 265.70, 265.80, 265.30, 265.50, 265.70, 265.80, 265.70, 265.80, 265.90, and 267.50. During a four- minute “fast market” period that began about 10:21 a.m., the contract traded at prices of 267.20, 267.30, 266.10 and 266.20. Between approximately 10:25 a.m. and 12:25 p.m., the contract only traded at a price of 266.20 for the brief period between 10:42:18 a.m. and 10:42:45 a.m. The report for September 23, 1999 indicated that the February 2000 contract opened at a price of 265.80.¹⁶

¹⁴ The Judgment Officer issued the order pursuant to Commission Rule 12.34, which authorizes presiding officers to undertake *sua sponte* discovery.

¹⁵ As noted above, order tickets respondents submitted indicate that Ralph’s first limit liquidation order was entered about 9:33 a.m., his market liquidation order was entered about 9:42 a.m., and his second limit liquidation order was entered around 11:02 a.m.

III.

The Judgment Officer issued his Initial Decision dismissing the complaint in September 2000. *Ralph v. Lind Waldock & Co.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,252 (Sept. 21, 2000) (“I.D.”). The Judgment Officer characterized the complaint as arising from Ralph’s “unsuccessful attempt to cancel and replace a market order” on September 22, 1999. I.D. at 50,533. He noted that by September 2000, Ralph had traded with Lind-Waldock for five years and emphasized that Ralph had attempted to cancel his market liquidation order approximately 80 minutes after he entered it. I.D. at 50,534.

The Judgment Officer found that Ralph’s market liquidation order was filled at 266.20 on September 22, 1999, but was not reported back to Lind-Waldock until September 23, 1999. He attributed the delay in the report to “hectic” trading that disrupted the handling and reporting of trades. In this regard, he noted that Ralph did not produce any evidence “that would shift the burden to Lind-Waldock to produce reliable evidence showing extraordinary conditions in the gold futures market” on the day in question. *Id.* He also emphasized that Ralph “produced no evidence showing market conditions in the gold ring that would have precluded or delayed the execution of market orders.” I.D. at 50,535.

The Judgment Officer characterized Ralph’s asserted belief that the absence of a fill report on September 22, 1999 indicated that his market order had expired unfilled as “tenuous and unreasonable.” *Id.* He noted that after trading ended on September 22, 1999, Ralph had checked Lind-Waldock’s web site for information about working orders,

¹⁶ As noted above, Ralph’s September 23, 1999 account statement indicated that his liquidation order had been filled on September 23 at a price of 265.80.

but emphasized that Ralph did not explain why he had not checked for information about “fills” or “dead orders” on September 22, 23, or 24. *Id.*¹⁷ The Judgment Officer reasoned that, because Lind-Waldock reported the fill of the market liquidation order on an account statement dated September 23, 1999, it was not “unreasonable to assume that Lind-Waldock also reported the fill over the on-line system” on the same day. I.D. at 50,535 n.3.

The Judgment Officer found that during their conversation on September 27, 1999, Kunst had advised Ralph to re-enter the market while they worked out the alleged error. I.D. at 50,535. He concluded that in the circumstances of this case, where Ralph did not raise his objection for five days, Kunst’s advice was not improper. *Id.*

In light of these conclusions, the Judgment Officer dismissed Ralph’s complaint for a failure of proof.

IV.

Ralph submitted a timely notice of appeal and appeal brief. In his brief, Ralph criticizes what he calls the Judgment Officer’s decision to “accept[] without question the statement made by Bert Schlieter.” Appeal Brief at 4. In addition, he argues that it is unreasonable to infer that the market was sufficiently hectic to justify delay in reporting executions, but insufficiently hectic to affect Lind-Waldock’s ability to obtain timely execution of orders. He also emphasizes that Lind-Waldock’s own account statements indicate that his liquidation order was filled on September 23, 1999 at a price that the market traded when it opened that day.

¹⁷ The Judgment Officer indicated that exhibits attached to Ralph’s Unverified Statement showed that on-line system customers could access separate reports for “working orders,” “fills,” and “dead orders.” I.D. at 50,534.

Ralph also raises two new factual allegations. First, he claims that after trading ended on September 22, 1999, he did check Lind-Waldock's web site for information about both "fills" and "dead orders." Second, he claims that he checked Lind-Waldock's web site for information on both September 23 and 24, 1999. Finally, Ralph claims that the Judgment Officer should have required Lind-Waldock to produce its tape recording of his conversation with Kunst.

Respondents' answering brief argues that the new factual allegations that Ralph raises on appeal are inconsistent with his prior submissions. It also reiterates many of the points that respondents raised before the Judgment Officer.

DISCUSSION

I.

Ralph's allegations of wrongdoing by Kunst are, at best, unclear. According to Ralph's amended complaint, during their conversation on September 28, 1999, Kunst insisted that Ralph immediately decide whether to re-establish a long gold futures position. Given the information available to Kunst at that time and Ralph's claim that he wanted to take advantage of an anticipated rise in the gold futures market, the Judgment Officer properly ruled that Kunst did not breach any duty under the Act or Commission regulations by offering such advice. In any case, Ralph's complaint admitted that Kunst expressed skepticism about the alleged error in processing his orders, but that Ralph re-entered the market because he was "confident that Lind-Waldock was responsible for the

sale” of his gold futures position. Given this admission, we cannot infer that Kunst’s comments played a substantial role in Ralph’s decision to re-establish his position.¹⁸

II.

The Judgment Officer expressed skepticism about Ralph’s unauthorized trading claim against Lind-Waldock because Ralph failed to offer a plausible explanation for his purported belief that his September 22, 1999 market liquidation order was not filled. In this regard, the Judgment Officer found it implausible that a trader with Ralph’s experience would expect that he could cancel a market liquidation order 80 minutes after he entered it. The Judgment Officer also found it implausible that, in the circumstances presented, Ralph would rely on the absence of an online report of working orders as a definitive indication that his market liquidation order had not been filled.

We agree that these circumstances raise substantial questions about the credibility of Ralph’s version of the events at issue. Moreover, there is a decidedly “post-hoc” quality to Ralph’s allegations that lends support to the Judgment Officer’s skepticism.¹⁹

In some circumstances, however, the nature of the documentary evidence in the record may permit an otherwise incredible complainant to establish his claim by the weight of the evidence. *See, e.g., McGough v. Bradford*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 (CFTC Sept. 28, 2000). Here, Lind-Waldock’s

¹⁸ Ralph’s claim that the Judgment Officer erred by failing to order respondents to produce the tape of Ralph’s conversation with Kunst is unpersuasive. Ralph failed to seek the tape during the discovery period and has offered no excuse for his failure to raise the issue at that time.

¹⁹ For example, the fact that Ralph entered a market liquidation order on September 22, 1999 suggests that he was quite eager to exit the market. In such circumstances, we would ordinarily expect some type of immediate inquiry in the face of indications that his position remained open at the end of the day. Ralph, however, failed to make any inquiry until five days later, when the abrupt upward trend in the price of February gold futures was readily apparent. Of course, according to Ralph, he had recognized the beginning of the trend on the day following his attempted liquidation because the market “looked strong.”

own business records quite clearly suggest that Ralph's liquidation order was not filled until September 23, 1999. Ralph's September 22, 1999 account statement showed that his two-contract long gold futures position remained open at the close of trading. His September 23, 1999 account statement showed that the long gold position was liquidated on September 23, 1999 at the opening price of 265.80. None of Ralph's account statements indicate that his liquidation order was filled on September 22, 1999 at a price of 266.20.²⁰

Despite the information reflected on these documents, the Judgment Officer found that Ralph's market liquidation order was filled at 266.20 on September 22, 1999. The only documentary evidence that even generally supports this finding is the order ticket submitted by Lind-Waldock that includes the terms of Ralph's market liquidation order, a date of September 22, 1999, the price 266.20 and the name "Jeff." This document, however, does not show a time for the alleged execution. Consequently, it does not provide a reliable basis for finding that Ralph's market liquidation order was filled prior to Lind-Waldock's receipt of the 11:02 a.m. order canceling the market liquidation order.

Moreover, information reflected in the price change registers respondents submitted raises a substantial question about the plausibility of Lind-Waldock's claim that Ralph's market liquidation order was filled in the ordinary course of business. Lind-Waldock acknowledges that Ralph's market liquidation order was received around 9:42 a.m. The price change register for September 22, 1999, however, does not show a print at 266.20 until 10:23:46 (during a fast market period) and does not show a second print at that price until 10:42:18. Lind-Waldock does not explain how a delay of at least 30

²⁰The September 27, 1999 account statement that Lind-Waldock claims corrected the price reflected on the September 23, 1999 account statement does not provide a date for the transaction at issue.

minutes in the fill of a market order is consistent with trading in the ordinary course of business.

Because the documentary evidence does not support the Judgment Officer's finding that Ralph's market liquidation order was filled at 266.20 on September 22, 1999, the affidavit submitted by Schlicter is central to the proper resolution of the parties' dispute. The information in the affidavit, however, is sketchy and conclusory. Moreover, the affidavit obviously reflects information that Schlicter learned from another source, but does not either identify the source or discuss the process used to "determine[] that [Ralph] had executed a trade" on September 22, 1999. Nor does it specifically address whether the alleged trade was executed prior to 11:02 a.m. Finally, even though the Judgment Officer gave respondents an opportunity to submit evidence supporting the affidavit's claim that trading was unusually hectic on September 22, 1999, respondents chose to bypass that opportunity.

Based on our independent review of the record, we conclude that the information reflected in Ralph's account statements for September 22 and 23, 1999 amounts to a *prima facie* showing that Lind-Waldock executed Ralph's market liquidation order when it was no longer effective. Consequently, the burden of producing reliable evidence that the information reflected on Ralph's September 22 and 23, 1999 account statements was erroneous shifted to Lind-Waldock. In effect, the Judgment Officer credited the explanation Lind-Waldock offered in the Schlicter affidavit. Because there is no reliable basis for crediting the affidavit, the Judgment Officer erred as a matter of law. *See West v. First Sierra Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,901 (CFTC Nov. 24, 1993).

CONCLUSION

In light of this analysis, we dismiss the complaint against respondent Kunst and otherwise vacate the Initial Decision and remand for a telephonic hearing consistent with the requirements of Commission Rule 12.209(b).²¹

IT IS SO ORDERED.

By the Commission (Acting Chairman NEWSOME and Commissioners HOLUM, SPEARS, and ERICKSON).

Catherine D. Dixon
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 7, 2001

²¹ We note that the theory of damages Ralph advocates is inextricably tied to the credibility of his version of the events at issue. Nevertheless, even if the Judgment Officer finds his version of events incredible, he may be eligible to recover damages under the general theory applicable to wrongful liquidations. *See, e.g., Stiller v. Shearson Loeb Rhoades, Inc.*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,974 at 28,181-3 (CFTC Jan. 4, 1984).