



U.S. COMMODITY FUTURES TRADING COMMISSION

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Received
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2009 OCT 23 AM 9:48

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JING BIAN,
Complainant,

v.

MG FINANCIAL, LLC d/b/a
MG FINANCIAL GROUP
Respondent.

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CFTC Docket No. 08-R17

INITIAL DECISION

Introduction

This is a classic case of affinity fraud: an ambitious but naïve immigrant seeking a better paying job gets diverted by a purportedly successful fellow immigrant into a dubious forex training-trading scheme. Jing Bian grew up in the Peoples Republic of China during Mao Zedung’s Great Leap Forward and Cultural Revolution, graduated from Hebie University of Technology in the city of Tianjin with the Maoist equivalent of an industrial engineering degree, became a “worker” in an electronics factory, lived through Deng Xiaoping’s transition to a socialist market economy, and moved to northern California ten years ago at the age of forty-five. During that decade, Bian has worked at a variety of modestly paying service and retail jobs. Bian has not mastered English, has not subscribed to any business publications, and has not received any business or finance training. Bian had no investment experience before she opened her discretionary forex account with MG Financial. Thus, Bian does not remotely qualify as a sophisticated investor as that term is commonly understood.

In response to an advertisement in a Chinese language newspaper that promoted job opportunities for Chinese speakers in “Chinese marketing,” Bian called Mei Fung “Lisa” Zhang, and scheduled an interview at the office of Zhang’s firm, OMG Investment Services. OMG’s office is located on the ground floor of a detached house in a residential subdivision between San Francisco and San Mateo. Neither Lisa Zhang nor OMG has ever been registered with the NFA.

According to Bian, Lisa Zhang claimed that her family was from Shanghai, that she was an agent for forex dealer MG Financial, and that she had taught herself to become a masterful forex trader consistently making \$2,000 a day for her own account. Bian’s principal complaint is that Zhang was not qualified to be a forex trader and that Bian tricked her into opening two accounts with MG Financial by falsely promising to train Bian to become a successful forex trader and broker, by falsely guaranteeing to make huge profits trading forex contracts for Bian as she trained her, and otherwise by failing to provide a fair and balanced disclosure of the risks associated with forex trading. Bian also alleges that, at the OMG office, Zhang printed out MG Financial’s on-line English-language account-opening documents, deceptively downplayed the importance of these documents, filled in the blanks, and simply instructed Bian to “sign here, sign here, sign here” without adequately explaining significant terms in the various agreements and disclosures. Bian asserts that MG Financial failed to supervise Zhang and that MG Financial should be responsible for Zhang’s misconduct because Zhang was acting as its agent.

After about five weeks of losing trades, Bian had become disenchanted by Zhang’s inability to make profits or to teach trading, and Bian revoked OMG’s trading authority. Although Zhang had taught her little, Bian decided to try trading for herself, with similarly disappointing results. Bian seeks to recover her losses when OMG was trading the two accounts, but has expressly waived any claims for her losses suffered while she traded for herself.

MG Financial, a wholly owned subsidiary of Rosenthal-Collins, does not dispute Bian's believable description of Zhang's deceptive solicitation, but asserts that she signed various account-opening documents which included written disclosures and an attestation that she was "sophisticated." MG Financial concedes that it paid Lisa Zhang to solicit and refer new customers, but argues that Zhang did not act as its agent. In support of this assertion, MG Financial relies principally on: one, the fact that after she opened her first account, an MG Financial employee gave Bian the web-link to its Chinese language account-opening documents which included specific disclosures that Zhang was not an agent or employee of MG Financial; and two, the fact that its standard referring broker agreement specifically barred Zhang from holding herself out as an agent or employee of MG Financial. However, this same agreement shows that MG Financial anticipated and encouraged the precise scenario that would play out between Bian and Zhang. That is, that an unregistered and nominally supervised sales agent would be compensated for soliciting and referring a new customer to MG Financial with promises that the new customer could in turn eventually become a sales agent for MG Financial. Thus, MG Financial established the framework for a cheap, self-generating and essentially unsupervised sales force.

As explained below, after carefully reviewing the parties' documentary evidence and oral testimony, it has been concluded: that Lisa Zhang fraudulently solicited Jing Bian while acting as a sales agent of MG Financial; that MG Financial is liable for Lisa Zhang's misconduct; and that Jing Bian is entitled to an award of \$15,168. These conclusions reflect my determination that Jing Bian produced consistent and plausible oral testimony about her dealings with Lisa Zhang, which MG Financial chose not to rebut despite the fact that it was still in a business relationship with Zhang when it filed its answer to Bian's complaint, and despite the fact that it

remains to this day in a business relationship with another potential rebuttal witness, Ya Qin “Tiffany” Chen.

Factual Findings

The parties

1. Jing Bian is an intelligent, assertive and motivated, but also naïve and unsophisticated, individual. Bian was born in the Peoples Republic of China in 1954, moved to the United States in 1999, and resides in Santa Clara, California. Although Bian has developed a rudimentary grasp of the English language, she principally relies on her native language, Mandarin Chinese, for complex verbal and written communications. As a result, she required a translator at the hearing.

Bian received a diploma from Hebei University of Technology, with a focus on mechanical engineering. After graduating, she was employed as a “worker” in an electronics factory. In the U.S., she worked briefly on the assembly line in an electronics factory, and has worked as an in-home service provider for Santa Clara County and as a sales person in a small retail shop. Bian had no previous investment experience before she first spoke to Lisa Zhang in May 2007.

At the hearing, Bian sometimes answered questions with testy rhetorical questions. Nonetheless, when reminded not to answer a question with a question, she usually provided a responsive reply. Overall, I found that Bian’s testimony to be generally consistent and plausible.

2. MG Financial Group, also known as Money Garden Corporation,¹ is a registered futures commission merchant, located in New York City, New York. MG Financial is a wholly

¹ A “money garden” incorporates feng shui design concepts that are believed to enhance cash flow.

owned subsidiary of Rosenthal-Collins Group, a futures commission merchant headquartered in Chicago, Illinois.

MG Financial is an on-line currency broker that trades forex futures and options directly with retail customers on the secondary over-the-counter currency market. MG Financial charges both a commission and a mark-up by widening the spread between the bid and ask prices that it gives its customers.

MG Financial authorizes unregistered third-party solicitors -- “referring brokers” -- to solicit and introduce new customers to MG Financial. Some referring brokers advertise in Chinese language newspapers.

Jing Dong, the manager of Chinese marketing for MG Financial, communicated with Bian via e-mail and phone. Most of the e-mails were conducted in English, and all of the phone conversations were conducted in Chinese. Dong and Bian briefly spoke on two occasions, first during the account-opening when he asked her to provide a copy of her driver’s license to prove her residential address, and second about five weeks later when she called to terminate OMG’s trading authority.

3. OMG Investment Services (“OMG”) is located in Millbrae, California. The office is located in a residential neighborhood, on the first floor of a detached home that backs onto a freeway and that lies directly under a flight path to San Francisco International Airport. For about five weeks, Bian visited the OMG offices several times a week. As described by Bian, the OMG office had the appearance of a fly-by-night operation: no signs identifying OMG or MG Financial, no décor, no separate reception area, and no trading room with no traders or traders’ desks – just a couple of desks and computer screens for Lisa Zhang’s “trainees.”²

² As discussed below, Zhang told Bian that she traded at night in her “upstairs office” which she never permitted Bian or other trainee-customers to view. Although Bian may have lacked the necessary experience and

OMG was operated, during the relevant time, by Mei Fung “Lisa” Zhang and Ya Qin “Tiffany” Chen. Bian would never meet Tiffany Chen, and would deal exclusively with Lisa Zhang.

MG Financial ceased doing business with Zhang on December 28, 2008, but continues to do business with OMG, which maintains a corporate trading account for which Tiffany Chen is the designated “referring broker.”

Lisa Zhang, Tiffany Chen, and OMG have never been registered with the NFA. Neither side sought to subpoena Zhang or Chen.

4. Lisa Zhang listed herself as the president of OMG when she filled out an MG Financial corporate account application in 2007. Zhang would be the “referring broker” for Bian’s two “sub” accounts with MG Financial, and would be Bian’s sole contact at OMG, for the five weeks that Bian’s accounts were traded pursuant to a limited power of attorney granting Chen and OMG discretionary trading authority. Since Zhang held the referring broker account, MG Financial would mail the hard version of the account statements to OMG, but not to Bian who could review the on-line versions of the account statements. After convincing Bian to open the first account, Zhang would print out the account-opening documents for Bian, tell Bian where to sign on the documents, complete the documents and send the completed account-opening documents to MG Financial.

5. Tiffany Chen, during the relevant time, was designated as the “trading agent” for a total of seven MG Financial accounts for a total of six customers, including Bian’s two accounts. Lisa Zhang served as the “referring broker” for the same accounts.

sophistication to recognize the shaky and impermanent quality of the OMG offices, a bona fide on-site auditor presumably would have not been so easily fooled.

Following Lisa Zhang's instructions, Bian would execute a limited power of attorney that authorized Ya Qin Chen to act as her "trading agent." As previously noted, Bian would never have any direct contact with Ya Qin "Tiffany" Chen. Bian also would never actually observe either Chen or Zhang place any trades.

When she signed the power of attorney, Bian would mistakenly assume that Ya Qin Chen was the full name for Lisa Zhang and not another person, because: Zhang had dealt with Bian strictly on a first-name basis; Zhang had promised that she would personally be trading Bian's account; Zhang had treated the power of attorney as a mere formality for her to trade the account; Zhang had curtly told Bian where to sign on the various account-opening documents and then filled in the blanks; and Zhang forwarded the documents to MG Financial after Bian had signed them. Since Tiffany Chen never appeared to be in the OMG office during the day and since Lisa Zhang told Bian that she traded at night, Bian would continue to believe for some time that it was Lisa Zhang who was trading her two discretionary accounts. This is underscored by the fact that when Bian first contacted MG Financial to revoke the power of attorney, she would tell MG Financial that she wanted "to revoke Lisa's trading authority."

The Money Garden Corporation Referring Broker Agreement

6. On February 21, 2007, Lisa Zhang signed a standard Money Garden Corporation

Referring Broker Agreement:

[Referring broker ("RB")] may refer/introduce a customer to [The Money Garden Corporation doing business as MG Financial Corporation ("MGFC")] for the purpose of enabling that customer to trade on the electronic spot foreign exchange platform provided by MGFC.

Paragraph 1 of the RB agreement.

Although the RB agreement did not include an exclusivity clause, it did include incentive clauses which encouraged exclusivity, by providing that MG Financial would begin paying commissions only after Zhang had referred a minimum of three customers, and by escalating the size of the commissions as the number of accounts increased. Paragraph 13 of the RB agreement showed that MG Financial anticipated that referred customers could become referring brokers:

“Any Referred Customer may also become a RB and is entitled to collect commissions for customers s/he refers to MGFC.”

The RB agreement also provided: that MG Financial could review and approve OMG’s promotional materials; that MG Financial could contact referred customers “to verify that no misrepresentations or ‘hard-sales’ tactics were employed in encouraging the referred customer to open an account or to trade;” that the referring broker must “abide by MGFC’s business code of conduct” and make only honest and accurate representations about MGFC’s electronic exchange services; that the referring broker must be “familiar fully with the forms of contract, procedures and practices of [MG Financial];” and that the referring broker must never hold itself out as an employee of [MG Financial]. However, MG Financial has produced no evidence: that it interviewed Bian to determine if Zhang had used misleading or abusive sales tactics, that it ever conducted any on-site inspection of OMG, or that it ever took any active steps to assure that Zhang did not use the similarity in the company names to mislead prospective customers about the relationship between OMG and MG Financial.

Solicitation by Zhang

7. In late April 2007, Bian noticed an advertisement in the Chinese language newspaper, Sing Tao Daily:

Hiring people with Chinese marketing experience. Pay is offered during training. No prior experience [sic] or English needed. Require patience, love, passion and

responsibility. Must be legal to work in U.S. Full time and part time are fine.
Please call [OMG's phone number] if you have interest.

As can be seen, the ad did not mention forex, OMG, MG Financial, or Zhang. Bian called the number, and made an appointment with Zhang.

8. Approximately five times over the next week, Bian visited Zhang at OMG's office in Millbrae, California. Bian never saw Zhang or anyone else trading during her visits. Over the course of these visits, Zhang told Bian that she and OMG were in the business of forex trading and were affiliated with MG Financial, and that Zhang was the "most advanced" forex trader at OMG and MG Financial. Zhang claimed that she was from Shanghai, boasted that she was a successful forex trader, consistently making \$2,000 a night for herself (which translates into approximately half a million dollars a year, an astronomical figure in Bian's eyes), guaranteed that she would make money for Bian, and promised to train Bian how to profitably trade for herself and for her own customers. When Bian noted the lack of any apparent trading activity in the OMG office, Zhang assured her that she did most of her trading upstairs at night.³

Zhang offered a cursory explanation of the supply-demand factors that affected currency exchange rates, but did not clearly explain basic material facts, such as: that she was in reality essentially unsupervised by MG Financial; that she was not in fact a successful trader; and that most retail forex customers, including her own, lose money. Zhang also failed to explain that Bian would be trading on the secondary OTC inter-bank currency market, and that the odds would be stacked against her because for each trade MG Financial would compensate itself by expanding the bid-ask spread at the same time that it was acting as the counter-party. In other words, Zhang convinced Bian to open a forex account with a highly imbalanced representation of the relative risks and rewards of trading forex with MG Financial.

³ This was substantiated by the web log-in summary produced by MG Financial, which established that a significant percentage of trades in Bian's accounts were placed between 6 pm and 8 am Pacific time.

9. Once Bian decided to open an account, Zhang printed out the on-line English language version of the MG Financial English language account-opening documents, and told Bian where to sign. Zhang then filled out an application form, customer agreement, customer acknowledgement, and limited power of attorney giving Tiffany Chen authority to trade the account. Zhang downplayed the significance of these documents and made no effort to explain in Chinese the significant passages in these documents before she sent them directly to MG Financial.

MG Financial similarly appeared to treat these documents as a mere formality. For example, on the MG Financial application, Bian clearly indicated that she was a novice trader of modest means -- checking off that she had zero years experience with currencies, securities, stock options, and commodity futures and options, that she had been employed for three years as a retail saleslady, and that her annual income and net worth were between \$50,000 and \$100,000. In contrast, the MG Financial Customer Acknowledgment form signed by Bian stated: “The undersigned hereby attests and certifies to be a sophisticated investor fully aware of the risks involved in foreign exchange trading.” [Underlining added for emphasis.] This patent inconsistency between Bian’s obviously modest means and total lack of trading experience, and her “attestation” that she was a sophisticated investor did not warrant a mention by the MG Financial employees who conducted cursory conversations with Bian.

Bian also checked off the yes box in response to the question: “Were you referred to MG Financial Group by a Referring Broker?” Beneath that line the following fine-print disclosure was set out:

RB has advised me of the following:

1. RB has clearly expressed to me that he is not employed by MGFG and that my account will be maintained with MGFG and traded on the platform of MGFG.

2. RB has advised me of the wisdom of demo trading before undertaking live trading.
3. RB has informed me that s/he will be paid commission by MGFG if I am accepted as a customer of MGFG and such.
4. RB has not guaranteed any returns or made any other false claims concerning the level of expected returns for spot foreign currency trading.
5. RB has advised me that foreign currency trading is highly speculative and carries serious financial risk.

This language was repeated in paragraph 37 of the customer agreement. However, as noted above, Zhang did not explain this disclosure in Chinese or determine whether Zhang had gained a meaningful understanding of the disclosure. Similarly, none of the MG Financial employees who spoke to Bain carefully explained these matters in Chinese, nor asked Bian to describe in her own words what Zhang had told her about these matters.

The risk disclosure statement was set out in paragraph 35 of the customer agreement and stated in pertinent part: “TRADING IN LEVERAGED CONTRACTS SUCH AS FOREX CURRENCY CONTRACTS IS NOT SUITABLE FOR ALL MEMBERS OF THE PUBLIC, BUT ONLY FOR FINANCIALLY SOPHISTICATED INDIVIDUALS AND FINANCIAL INSTITUTIONS.” [Capitalization in the original; underlining added for emphasis.] However, the term “sophisticated” was not defined anywhere in this or any other MG Financial document; and neither Zhang nor any MG Financial employee explained this disclosure in Chinese before or after Bian signed the agreement. In any event, Bian did not remotely match even the most jaded definition of sophisticated investor.

Also, at Zhang's suggestion, Bian provided the e-mail address at a computer terminal in Zhang's OMG office for receipt of trade confirmations and monthly summaries.⁴

After Bian submitted her application, an MG Financial customer service representative noticed that she was a Chinese citizen, and provided the link to MG Financial's Chinese page, so that she could view the documents with a Chinese translation. However, neither Zhang nor any MG Financial employee reviewed with Bian the significant portions of the Chinese language versions of these documents or followed up to confirm that she had read and understood them.

10. During the first five weeks of trading, Bian visited the MG office approximately every other day to get reports on her trades and to get training. Typically, Zhang gave her verbal reports on trades. After about three weeks of generally losing trading, when Bian expressed concern about mounting losses, Zhang advised her to open a second account which she claimed would make it easier for her to recoup the losses.

11. After another two weeks of more unsuccessful trading, Bian shared with another customer her dissatisfaction with Zhang's trading and training, and learned that the other client/student had revoked Zhang's trading authority. Bian decided to do the same. When she contacted MG Financial, she learned that it was a different person, a Tiffany Chen, who had formal authority to trade her accounts. MG Financial told her to instruct Tiffany to close out the positions and to fax to MG Financial a revocation of the trading authorization. Apparently, Zhang got wind of this, because for a few days whenever Bian visited Zhang's office Zhang gave her the runaround, and continued trading. In one notable instance, after being told that Zhang was not in the office, Bian hid outside the OMG office for over an hour until she caught Zhang leaving the office. When Zhang noticed Bian, she leapt into her car and hurriedly drove away.

⁴ MG Financial steered customers toward receiving electronic statements by charging \$5 for trade confirmations, \$15 for monthly statements, and \$25 for quarterly statements.

Nonetheless, Bian persisted and after a few days succeeded in getting Zhang to close out her positions and Bian faxed to MG Financial her revocation of Tiffany's and OMG's trading authority. Bian had no further contact with Lisa Zhang or OMG.

12. For the first account, Bian deposited a total of \$12,000 (\$10,000 on May 7, and \$2,000 on June 29, 2007), and withdrew \$4,583 (on July 3, 2007), for a net loss of \$7,417. For the second account, Bian deposited a total of \$13,000 (\$10,000 on June 1, and \$3,000 on June 29, 2007), and withdrew \$5,249 (on July 3, 2007), for a net loss of \$7,751. Thus, Bian's out-of-pocket losses with Zhang and OMG totaled \$15,168.⁵

Conclusions

The applicability of CEA respondeat superior provision to retail forex transactions

In 2000, Congress enacted comprehensive amendments to the Commodity Exchange Act ("the Act"). Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 stat. 2763, ("CFMA"). Certain CFMA amendments clarified the application of the Act to foreign currency transactions and authorized futures commission merchants ("FCMs") to engage in off-exchange foreign currency ("forex") transactions with members of the general public. *See* Sections 1a(20), 2(c)(2)(B), and 2(c)(2)(C) of the Act. As a result, registered FCMs could now trade forex futures and options directly with their customers, in addition to acting as brokers and placing trades on organized, and more regulated, futures exchanges.

Under the CFMA amendments, forex transactions handled by FCMs are subject to some, but not all, substantive provisions of the Act. Section 2(c)(2)(C) of the Act establishes the scope of the Commission's jurisdiction over forex transactions and makes retail forex trades subject to specified core substantive provisions in the Act: Sections 4b (prohibiting fraud in connection

⁵ Amounts have been rounded to the nearest dollar.

with futures trades), 4c(b) (prohibiting fraud in connection with options trades), 6(c), 6(d), 6c and 6d (authorizing investigations and enforcement actions for violations of substantive provisions), 13(a) (prohibiting the aiding and abetting of violations of the Act), and 13(b) (imposing controlling person liability). However, Section 2(c)(2)(C) does not foreclose the applicability of other provisions of the Act that define the terms and guide the operation of Section 2(c)(2)(C), including, for example: one, the definitions of “contract of sale,” “commodity,” and “future delivery,” which are terms used in Section 4b, but defined elsewhere in the Act (Sections 1a(4), 1a(7) and 1a(19) of the Act); and two, the CFTC’s authority to register FCMs which derives from Section 8a(1) of the Act. Similarly, Section 2(a)(1)(B) of the Act, the respondent superior provision, which does not directly prohibit behavior, but deems the acts, omissions or failures of one class of persons to be the acts, omissions or failures of another class of persons, has no practical effect except when applied in conjunction with other provisions of the Act, particularly the substantive prohibitions preserved by Section 2(c)(2)(C).

A primary purpose of Section 2(a)(1)(B) is to ensure that FCMs bear responsibility for the wrongdoing by their agents and employees. *See, e.g., CFTC v. Commonwealth Financial Group, Inc.*, 794 F.2d 573, 581-582 (S.D. Fla. 1996). Without 2(a)(1)(B), Section 2(c)(2)(C) would not operate as Congress had intended. *See Cannon v. University of Chicago*, 441 U.S. 677, 694-703 (1979) (Congress is presumed to be aware of the prevailing legal context against which amendments to existing laws are enacted.) Mechanistically excluding the *respondeat superior* principles of Section 2(a)(1)(B) from retail forex transactions would unreasonably permit an FCM to act with impunity, farming out business functions to unregulated and unsupervised introducing agents, while reaping the benefits and avoiding the responsibility when the introducing agents perform the functions in a prohibited or fraudulent manner. Such an

irrational, untenable result would be contrary to the structure and purpose of Section 2(c)(2), which affords unsophisticated investors a modicum of protection by limiting their counter-parties to licensed and regulated entities who are subject to certain prohibitions, including fraud. In other words, allowing FCMs to delegate functions and obligations to unregulated introducing agents would be inconsistent with Congress' reason for allowing FCMs to trade with unsophisticated customers in the first place. Conversely, holding FCMs responsible for their agents' wrongdoing creates incentives for FCM's to be more selective and proactive in hiring and supervising agents, and provides a greater opportunity for effective redress if an outside entity working for an FCM defrauds a customer. Therefore, it is concluded here that the *respondeat superior* principles of Section 2(a)(1)(B) apply to retail forex transactions.

Scope of Section 2(a)(1)(B) of the Commodity Exchange Act

The *respondeat superior* provision of the Act, Section 2(a)(1)(B), provides that the actions of agents, when performed within the scope of the agency, are deemed the actions of the agent's principals: "The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust as well as of such official, agent, or other person." This provision "enacts a variant of the common law principle of *respondeat superior*." *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986). However, the statutory language broadens the scope of *respondeat superior* under the Act. Liability under the provision extends to "any official, agent, or other person acting for" another person or entity (underlining added for emphasis). The reference to "other person acting for" another person or entity thus implies that *respondeat superior* under the

Act applies to persons who act for others, but who do not fall within the usual definition of “agent.”

Determining whether one person is an agent acting for another “turns not on any one fact, or talismanic formula, but on an overall assessment of the totality of the circumstances.” *Berisko v. Eastern Capital Corp.*, Comm. Fut. L. Rep. (CCH) ¶ 22,772, at 32,223 (CFTC 1985); *see Lobb v. J.T. McKerr & Co.* Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 36,441 n. 13 (CFTC 1989) (term “agent” under CEA is not implicitly limited to common law definition of agent); *Reed v. Sage Group, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 23,943 (CFTC 1987) (relevant circumstances establishing agency include exclusive dealing, support provided one party by the other, use of one party’s forms by the other, and adhesion contracts governing one party’s relationship with the other); and *Bogard v. Abraham-Reitz & Co.* Comm. Fut. L. Rep. (CCH) ¶ 22,273 at 29,393 (CFTC 1984) (Section 2(a)(1) respondent superior extends to independent contractors not controlled by principal); *see also Stotler & Co. v. CFTC*, 855 F.2d 1288, 1292 (7th Cir. 1988); and *Dohmen-Rameriz v. CFTC*, 837 F. 2d 847, 858 (9th Cir. 1988) (affirming CFTC decision that control was not needed to establish agency under CEA).⁶ As a result, no single factor or set of factors are necessary to establish agency for purposes of the Act, as long as the indicia of an agency relationship are sufficiently strong: that is, that one party is acting for another in the context of a relationship that goes beyond marketplace interaction.

Here, the totality of the circumstances shows that Lisa Zhang was acting for MG Financial when she solicited Bian, and that Zhang and MG Financial had a working relationship

⁶ The U.S. Court of Appeals for Eleventh Circuit has recently rejected the Commission’s totality of the circumstances test for agency. *CFTC v. Gibraltar Monetary Corp., Inc.*, 2009 WL 2150900 (11th Cir. 2009). However, while *Gibraltar* is the law in that circuit, it does not control in this case, where neither party resides in that circuit and where any eventual appeal will properly be to the U.S. Court of Appeals for the District of Columbia. *Dubois v. Alaron Trading Corporation*, Com. Fut. L. Rep (CCH) ¶ 28,406, n. 16 at 51,026-51,027 (CFTC 2000). Since, the Court of Appeals for the District of Columbia has not addressed the Commission’s totality of the circumstances test for agency, the Commission’s interpretation controls in this case.

that went well beyond the mere fact that she introduced customers. First, Zhang told Bian that OMG was closely affiliated with MG Financial and that she was an agent of MG Financial. Second, the account-opening documents were prepared exclusively by MG Financial. Third, the detailed referring broker agreement, drafted by MG Financial, specified that Zhang would promote MG Financial services, and encouraged her to refer prospective customers exclusively to MG Financial by providing a sliding scale of commissions that increased with the number of trades and number of customers. Fourth, the referring broker agreement required Zhang and OMG to abide by MG Financial's business code of conduct and to master MG Financial's form contracts and disclosures, procedures and practices; and thus to assess the qualifications of prospective MG Financial customers, under standards set by MG Financial, before referring them.

The fact that MG Financial chose to forgo on-site audits of Zhang and the fact that MG Financial's form agreement denied the agency agreement cannot defeat a finding of agency, based on the actual rights, duties and behavior of Zhang and MG Financial. *Almond v. Lincolnwood, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 23,776 at 34,043-44 (CFTC 1987). Similarly, the fact that Chen and OMG, and by extension Zhang, acted as Bian's trading agent does not bar the conclusion that Zhang and OMG acted as MG Financial's agent for purposes of soliciting customers. Generally, a party can be the agent of another party for some purposes without being an agent for all purposes, and under the CEA a person can be the agent of both a FCM and a customer. *See, e.g., Wirth v. T&S Commodities, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 25,271 at 38,875 n. 29 (CFTC 1992). Here, although Zhang and MG Financial had an adversarial trading relationship since Zhang's customers and MG Financial acted as counterparties, Zhang and MG Financial shared a strong mutuality of interest with respect to the solicitation of these customers.

Thus, as long as Zhang was acting for MG Financial when she solicited Bian, Zhang's solicitation fraud is deemed to be the solicitation fraud of MG Financial.

Solicitation Fraud by Lisa Zhang

Bian has established by a preponderance of the evidence that Lisa Zhang violated Section 4b(a) of the Commodity Exchange Act. Zhang gave a materially unbalanced presentation of the relative risks and rewards of trading OTC forex futures by downplaying the high risk of loss and by essentially guaranteeing profits. For example, Zhang falsely promised Bian that she would train Bian to become a qualified forex trader, when in fact the training was disorganized and rudimentary. Zhang represented that she was an experienced and successful forex trader, which the evidence strongly suggests she was not. Zhang strongly implied that profits were guaranteed by falsely claiming that she consistently made two thousand dollars a night for herself trading forex. Zhang also failed to disclose that MG Financial customers were significantly disadvantaged by the fact that it would be simultaneously acting as the counter party and compensating itself by widening the bid-ask spread that it gave its customers. The intentional nature of Zhang's misrepresentations and omissions is underscored by their blatant deceptiveness.

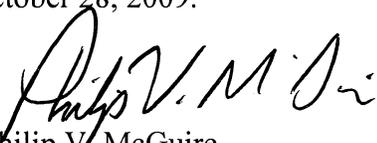
Bian's decision to open first one and then two accounts, to deposit additional funds and to continue trading was consistent with her assertions that he relied on Zhang's confident, but false and unrealistic, message that she would quickly realize large profits with minimal accompanying risk. The conclusion that Bian reasonably relied on Zhang's misrepresentations and omissions to her detriment is supported by the fact that she was unsophisticated, with absolutely no investment experience and no familiarity with the forex market. Respondent's written disclosures of general risks by themselves did not cure the false impression of guaranteed large

profits created by Zhang, where the overall effect of Zhang's intentionally deceptive statements substantially outweighed and vitiated the written risk warnings, where the disclosures were in English, where neither Zhang nor the MG Financial employees explained the disclosures in Chinese before Bian signed them, and where the MG Financial employees did not provide the web-link to MG Financial's Chinese page until the conclusion of the initial conversation with Bian, and did not follow up to confirm that Bian had read and understood the Chinese language version of these disclosures. In these circumstances, the proper measure of damages for Zhang's violations is Bian's out-of-pocket losses: \$15,168.

ORDER

Jing Bian has established that Mei Fung "Lisa" Zhang, acting as an agent for MG Financial Group, violated Section 4b(a) of the Commodity Exchange Act, that these violations proximately caused \$15,168 in damages, and that MG Financial Group is liable for these violations pursuant to Section 2(a)(1)(B) of the Act. Accordingly, MG Financial, LLC d/b/a MG Financial Group is ordered to pay to Jing Bian reparations of \$15,168, plus interest on that amount at 0.36% compounded annually from May 7, 2007, to the date of payment, plus \$125 in costs for the filing fee.

Dated October 28, 2009.


Philip V. McGuire,
Judgment Officer