UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

ALEXANDER TIMOTHY J. DARRAH v. FIRST AMERICAN INVESTMENT SERVICES, INC., GREG PETER ALLOTTA, STEVE DAVID KNOWLES, PAUL F. PLUNKETT and ROSEMARY SALVEGGI	:	CFTC Docket No. 05-R042 OPINION AND ORDER

Three respondents appeal from the Administrative Law Judge's ("ALJ") initial decision finding them liable for fraudulent inducement and awarding $1,512,354.48 million in out-of-pocket damages to complainant Alexander Timothy J. Darrah ("Darrah"). *Darrah v. First Investment Servs.*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30, 259 (Initial Decision June 28, 2006) ("I.D."). Respondents Steve David Knowles ("Knowles") and Paul F. Plunkett ("Plunkett") filed a joint brief, urging, among other things, dismissal of the case on jurisdictional grounds. Respondent Greg Peter Allotta ("Allotta") contests only the liability findings.[1]

On review, we affirm the ALJ's jurisdictional finding, affirm in part and reverse in part his liability findings, modify the damages award, and remand this case for further proceedings consistent with this opinion. The initial decision stands against Salveggi and First American,

[1] First American Investment Services ("First American") and Rosemary Salveggi ("Salveggi") joined in Knowles's and Plunkett's notice of appeal. First American failed to perfect its appeal by filing a brief, however, and Salveggi withdrew her appeal citing an inability to pay her attorney.

except that the amount of damages and rate of interest established in the initial decision are modified as provided herein. Darrah's cross-appeal for an award of attorney's fees is denied.

FACTS

Darrah, an English citizen and a long-time resident of France, alleged that respondents defrauded him of funds totaling approximately $1.5 million. Specifically, Darrah claimed that Allotta and Salveggi made false statements concerning their expertise and the supposed existence of First American's institutional customers, concealed the generally poor performance of First American's customer accounts, and engaged in trading on his behalf for the purpose of generating commissions ("churning").

Darrah was introduced to First American in January 2003 through a friend, Dr. Ronald Hay ("Hay"), who told Darrah he was making a great deal of money from trading heating oil at First American and suggested that Darrah do the same. In late January 2003, Darrah called Hays's broker, Salveggi, who confirmed that Hay was making money and persuaded Darrah to open an account, stating that First American was a large national firm with influential financial clients and access to sensitive, nonpublic information. *Id.* at 58,182.

Relying on Salveggi's solicitation, Darrah opened a nondiscretionary account with an initial investment of $20,000. He accepted Salveggi's recommendations for heating oil trades that she said would be boosted by seasonal factors and events in the Middle East. Soon after the account was opened, Salveggi suggested that Darrah trade through Allotta, another associated person at First American whom Salveggi described as a "genius" who specialized in energy trading. *Id.*

Allotta represented that he understood market volatility and would help Darrah make money no matter which way the market moved, while Salveggi persuaded Darrah to follow

Allotta's strategy. In the weeks following his initial small investment, Darrah invested additional, much larger amounts in reliance on Allotta's assurances, including a $900,000 deposit at the end of February, which came from funds withdrawn from his retirement account. *Id.* at 58,182-83. During this period, Darrah received account statements but could not understand them. *Id.* at 58,183 n.13.

On March 12, Darrah became "very uncomfortable" about his account when he learned from Allotta that recently bought heating oil options had been sold, whereupon he asked Salveggi, "Is Greg Allotta any good?" and "[A]ren't we buying the same things over and over again?" Tr. at 150. Darrah consequently paid closer attention to his account and became suspicious and alarmed that his call options had imminent expiration dates and that despite his recent deposit of $900,000, he was being solicited to invest more. Darrah also realized for the first time that the strike prices for his options were significantly out of range of the current market price for oil. *See generally* Tr. at 179-82; *see also* Tr. at 147-48 and Complaint at ¶ 34. Despite his concerns, Darrah made additional deposits totaling $219,669 during the remainder of March and April. *See* account statements submitted with Complaint. By the end of March most of his options had expired worthless, essentially depleting his account. A small amount of trading took place thereafter. The account remained open through June 3, 2003, when it closed with a balance of $314. Complaint at ¶ 50.

Darrah alleged that Salveggi and Allotta were directly liable for their own actions. Complaint *passim*. He asserted that Knowles was liable for his failure to supervise Salveggi and Allotta, as Knowles managed First American on a day-to-day basis yet failed to enforce a proper system of compliance. Complaint at ¶¶ 8, 58. He alleged that Plunkett was liable in his capacity

as the sole director and at least 10 percent shareholder of First American and as the trustee of First American after its dissolution. Complaint at ¶¶ 6-7.

As a procedural matter, nonresidents of the United States must post a bond to file a reparations claim unless the plaintiff's corresponding home jurisdiction does not require a similar bond from foreign plaintiffs. Darrah sought a waiver of the bond requirement based on the lack of a bond requirement for nonresidents under French law. He supported his request with a legal opinion issued by a French attorney. Respondents moved to dismiss, contending Darrah was not entitled to a waiver. They asserted that the French counsel's opinion acknowledged only the absence of a bond requirement in French law, and that Commission precedent requires an affirmative provision in foreign law that a bond is not required.

The case was assigned to an ALJ, who promptly denied the motion to dismiss for failure to file a bond. Discovery proceeded, which gave rise to disputes leading to Darrah's demand for attorney's fees.[2] The ALJ convened a hearing on February 27, 2006, at which all parties appeared.

At the hearing, Darrah testified and presented corroborating testimony from Hay and other acquaintances, presented two expert witnesses and called all individual respondents as adverse witnesses.[3] He submitted numerous items of documentary evidence, including First American's Policies and Procedures Manual.

Salveggi and Allotta testified for respondents. Salveggi stated that she made only one trade recommendation for Darrah before referring him to Allotta, but continued to maintain frequent contact with him, and that he never complained about the commissions he paid. Tr. at

[2] Darrah sought attorney's fees based on respondents' failure to produce trading records of the February 28 trades funded with his $900,000 deposit, despite his repeated requests.

[3] Knowles refused to testify, asserting his Fifth Amendment right not to incriminate himself.

354-57. Allotta said Darrah began trading with small amounts and invested increasingly large sums in an attempt to make more money. Tr. at 365. He said Darrah was distraught when his account suffered severe losses in March 2003, but continued to trade. Tr. at 366. Respondents called no other witnesses.

INITIAL DECISION

The ALJ ruled in favor of Darrah on his claims of fraudulent inducement and churning, finding that "Respondents placed Darrah's funds in a series of deep-out-of-the-money crude oil option 'strangles' that garnered them massive commissions without having any foreseeable chance of implementing Darrah's trade goals." I.D., ¶ 30,259 at 58,179 (footnote omitted); *see also id.* at 58,184. He found specifically that, out of the approximately $1.5 million Darrah invested, over $1.05 million was paid in commissions and fees, and that Darrah's total damages amounted to $1,512,354.48. *Id.* at 58,191.

The ALJ credited Darrah's testimony and that of his expert and fact witnesses, finding in particular that "Darrah's demeanor and self-report were entirely credible." *Id.* at 58,181; *see also id.* at 58,180 ("Darrah's version of events, supported by the testimony of other First American clients and Darrah's financial experts, is far more plausible and compelling than Respondents' unsupported version."). In contrast, he found Allotta's testimony and demeanor to be inconsistent and neither open nor credible. *Id.* at 58,182. The ALJ drew adverse inferences from Knowles's assertion of the Fifth Amendment. *Id.* at 58,187, 58,190.

The ALJ found that Darrah was an unsophisticated investor, who lacked the capability to evaluate complex futures and options strategies or to independently formulate a coherent trading strategy, and who received the standardized risk disclosure for options trading rather than the specific disclosure required by Commission Regulation 33.7(b)(6) for deep-out-of-the-money

options.[4] *Id.* at 58,186-87. The ALJ found moreover that the risk disclosure Darrah did receive was countered by respondents' "intentional and continual false statements and promises." *Id.* at 58,187. Accordingly, the ALJ found that respondents, using false assurances, omissions and unsubstantiated claims regarding windfall profits, were able to defraud Darrah into opening and substantially funding his account. The ALJ made detailed findings and provided an extensive analysis regarding respondents' solicitation and subsequent trading of Darrah's account. *See generally Id.* at 58,182-90. He relied on Darrah's experts to find that the trading strategy was unreasonable and poorly executed, leaving Darrah no realistic chance of earning a profit. *Id.* at 58,183-84, 58,189.

In finding churning, the ALJ concluded that respondents exercised de facto control over Darrah's nominally nondiscretionary account. *Id.* at 58,188. He relied on the testimony of Darrah's experts in finding that the account was traded excessively to generate large commissions for respondents' benefit, with no regard for Darrah's investment objectives. *Id.* at 58,189 (holding that the experts were "conclusive in finding that the sole purpose of the deep-out-of-the-money, short term and sometimes unmatched option 'strangles' was the generation of commissions for Respondents").

The ALJ also described in detail the respondents' registration and disciplinary histories, emphasizing that First American, Knowles and Allotta were subject to a restraining order issued in an injunctive action brought by the Commission that required the preservation of all existing records. *Id.* at 58,180. The ALJ deemed respondents' inability to produce floor tickets that Darrah requested during discovery particularly egregious in light of the restraining order,

[4] Regulation 33.7(b)(6), 17 C.F.R. § 33.7(b)(6), cautions that a prospective buyer should be aware that the chance of a deep-out-of-the-money option purchase becoming profitable "is ordinarily remote."

describing the failure to produce as a "conscious disregard" of a judicial order. *Id.* at 58,184; *see also Id.* at 58,186 n.16.

The ALJ concluded that Knowles and Plunkett failed to act in good faith in establishing and maintaining First American's compliance structure and supervising its associated persons. *Id.* at 58,190. The ALJ concluded further that Knowles and Plunkett had constructive knowledge of "ongoing" fraud at First American, inasmuch as the testimony of Darrah's associates demonstrated that the fraudulent conduct visited upon Darrah was not unique. *Id.*. The ALJ found no evidence that Knowles and Plunkett implemented procedures and practices contained in First American's Policies and Procedures Manual, such as establishing dollar limits on trading to cap a customer's exposure, obtaining management approval for investments exceeding ten percent of a customer's net worth, and submitting deep-out-of-the-money trades for compliance review. *Id.* at 58,184-85. The ALJ accordingly held that Knowles's and Plunkett's supervisory failures induced the violations of its associated persons. *Id.* at 58,190.

The ALJ found Salveggi and Allotta directly liable for violating Section 4b(a) of the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. § 6b(a) (fraud); CEA Section 4c(b), 7 U.S.C. § 6c(b) (options fraud); and Regulation 33.10(a), 17 C.F.R.§ 33.10(a) (options fraud). He found First American liable as a principal for the conduct of its employees under CEA Section 2(a)(1)(B), 7 U.S.C. § 2(a)(1)(B). He found Knowles and Plunkett liable as controlling persons under CEA Section 13(b), 7 U.S.C. § 13c(b). The ALJ awarded Darrah his entire out-of-pocket losses of $1,512,354.48, plus interest and the filing fee. He did not address Darrah's request for attorney's fees. *Id.* at 58,190-91.

THE PARTIES' APPEALS

On appeal, Allotta contends the record shows that Darrah was a sophisticated investor who preferred high risk investments and authorized the risky deep-out-of-the-money options trading strategy after receiving the appropriate risk disclosure. He asks the Commission to vacate the ALJ's findings that he acted with scienter, and that he traded Darrah's account excessively without regard to Darrah's trading goals. Allotta contends further that the ALJ improperly drew adverse inferences against him due to First American's failure to produce documents that Allotta did not possess and had no responsibility to maintain.

Knowles and Plunkett renew their argument that the case should have been dismissed for Darrah's failure to pay the nonresident bond. They also argue that the ALJ erred in finding controlling person liability, asserting that Section 13(b) of the Act applies only to cases brought by the Commission and is not available to complainants in the reparations forum. They contend that even if Section 13(b) does apply, the record does not establish the elements of controlling person liability. Knowles and Plunkett argue as well that the ALJ erroneously relied on the respondents' disciplinary history unrelated to this case in finding them liable.

Darrah responds that the decision is supported by the weight of the evidence and applicable law and should be affirmed. Darrah also requests clarification of the rate of the interest awarded, suggesting that the 1.3 percent rate contained in the initial decision was a typographical error, and requests attorney's fees related to the discovery disputes.

DISCUSSION

Jurisdiction

Section 14(c) of the Act, 7 U.S.C. § 18(c), requires complainants who are nonresidents of the United States to furnish a bond as a jurisdictional prerequisite to filing a reparations case. *Adham v. Drexel Burnham Lambert*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH)

¶ 23,156 at 32,389 (CFTC July 9, 1986). The Commission has authority to waive the bond, however, when the complainant "is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond." Section 14(c) of the Act, 7 U.S.C. § 18(c). Commission Regulation 12.13(b)(4), 17 C.F.R. § 12.13(b)(4), which implements Section 14(c), provides that a waiver request must be in writing and be accompanied by "sufficient proof" of reciprocity. Respondents argue that Commission precedent construing Section 14(c) requires an affirmative statement of reciprocity in the foreign jurisdiction's law. Darrah simply asks us to affirm the ALJ's finding that his waiver showing was sufficient.

We review subject matter jurisdiction *de novo*. *Tootle v. Secretary of the Navy*, 446 F.3d 167, 173 (D.C. Cir. 2006); *Frey v. EPA*, 403 F.3d 828, 833 (7th Cir. 2005). Respondents rely on *Haekal v. Refco*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,162 at 45,542 (CFTC Sept. 26, 1997), in support of their position that Darrah was required to furnish a bond. After the instant case was briefed, however, the Commission revisited Section 14(c) in *Vargas v. FX Solutions*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,319 (CFTC Feb. 24, 2009). *Vargas* clarified the standard of proof required for a bond waiver and is now controlling authority.

In *Vargas* the Commission acknowledged the inherent difficulty of establishing entitlement to a waiver when the law of a foreign jurisdiction contains neither an express provision requiring nonresidents to furnish a bond nor an affirmative statement to the contrary. *Id.* at 62,670-71. The Commission held that, in such circumstances, where a diligent search of the law has been made and no relevant authority is found, the law's silence on the matter will be treated "as compelling proof that no bond is required." *Id.* at 62,671.

Darrah supported his waiver claim by submitting a Declaration from Antoine Juaristi ("Juaristi"), a partner in the Paris office of a London-based law firm. In the Declaration, Juaristi cites his expertise as a litigator in French courts and states that he examined relevant articles of the French New Civil Procedure Code, where a bond requirement presumably would be found and is not.[5] The Declaration concludes that neither the code "nor any provision of French law requires the payment of a bond or security by a resident of the United States, a resident of France or of any other country in order to bring a civil claim against a citizen of France before a French court." Juaristi's statement that no bond is required is something that he, as an experienced French litigator, would be expected to know or ascertain with certainty.[6] This showing constitutes sufficient proof of reciprocity under *Vargas*. We therefore affirm the ALJ's ruling waiving the bond.

Liability

We affirm in part and reverse in part the ALJ's comprehensive liability findings. We adopt the ALJ's factual findings as they are amply supported by the weight of the evidence. Respondents raise no serious challenge to them and ask merely to have the evidence reweighed in their favor.

We also find no error with respect to the ALJ's application of the law to Darrah's claims against Allotta and Salveggi. The elements of a fraudulent inducement claim are: (1) a material misleading statement and/or omission; (2) made with scienter; (3) on which complainant

[5] These provisions discussed in the Declaration set forth the elements of the procedure for instituting "claims in contentious matters," including initiation of the complaint before a judge (article 53); notice and summons (articles 54-55); contents of the summons (article 56); filing of a joint petition by opposing parties (article 57); an option for arbitration (article 58); and defendant's answer (article 59).

[6] Parties making a showing under Section 14(c) are not required to present expert testimony that would pass muster under Fed. R. Evid. 702. The Commission's administrative processes are not bound strictly by the provisions regarding expert witnesses contained in the Federal Rules of Evidence. Moreover, federal evidentiary standards for determining whether an individual is an expert are ill-suited to an inquiry under Section 14(c), which involves neither scientific nor specialized technical knowledge.

reasonably relied; and (4) which proximately caused complainant's damages. *Moss-Thomas v. East Coast Commodities*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,322 at 62,685 (CFTC Mar. 3, 2009).

The facially misleading sales pitch that Darrah received regarding energy price trends is consistent with representations found to be fraudulent in other cases. *E.g.*, *Moss-Thomas*; *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 (CFTC Dec. 18, 1997); *Scheufler v. Gerald, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,171 (CFTC Sept. 30, 1997); *Commonwealth Fin. Group. v. NFA*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,993 (CFTC Mar. 18, 1997). Salveggi and Allotta further misled Darrah regarding the nature and high risk of Allotta's trading strategy. As the ALJ found, the strategy – repeated purchases of deep-out-of-the-money strangles – virtually guaranteed losses. Relying on the reliable documentary submissions and testimony, including expert testimony, the ALJ concluded: "Respondents intentionally divested Darrah of funds by misleading him about options trading, about the effect of trading in deep-out-of-the money 'strangles,' and about the history and effectiveness of First American and its brokers." I.D., ¶ 30,259 at 58,180. We find Allotta's arguments that he acted without scienter inconsistent with the record.

Further, the fact that Darrah received a written risk disclosure does not insulate respondents from liability. "Providing a customer with [the required] risk disclosure statement … does not shield a respondent from liability for affirmative misrepresentations of risk." *Levine*, ¶ 24,488 at 36,115; *see also O'Hey v. Drexel Burnham, Inc.*, [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,754 at 31,141 (CFTC Sept. 25, 1985) ("We have consistently held that the effect of a pro forma risk disclosure, even if written, can be vitiated by

accompanying oral misrepresentations.") and *Haas v. Chicago Commodities, Inc.*, No. 86-R258, 1989 WL 242209 (C.F.T.C.) (Oct. 3, 1989) (respondent disguised his fraud with lulling conduct, including the representation that certain trades were "sure things").[7] Moreover, Darrah's level of education and other investment experience do not mean that he had a sufficient background to understand or evaluate the nature and risk of complex futures and options trading strategies. The complainants in *O'Hey* were attorneys; one of the complainants in *Levine* was an insurance agent and the other held a graduate degree in management science.

The ALJ rejected as unsupported by the record, respondents' claims that Darrah was a customer who sought high risk investments. A novice futures and options trader, Darrah had no experience on which to evaluate respondents' solicitation. The mere fact that Darrah invested large sums of money in a relatively short time does not mean he sought high risk investments. Indeed, Allotta represented to Darrah that option strangles hedged his risk.

Similarly, we find no error with the ALJ's analysis of Darrah's churning claim. The necessary elements of churning—de facto control of the account by respondents and excessive trading done in furtherance of generating commissions for the respondents rather than to benefit the complainant—are self-evident on the record. *See Ferriola v. Kearse-McNeil,* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,172 at 50,154 (CFTC June 30, 2000) (discussing churning).[8]

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[7] In addition, as the ALJ found, Darrah did not receive the specific risk disclosure required by Commission Regulation 33.7(b)(6) for deep-out-of-the-money options.

[8] We agree with Allotta's argument that he lacked primary responsibility for maintaining records subject to the restraining order and that the respondents' failure to produce Darrah's account statements did not rest with him. We therefore give no weight to any findings or conclusions of the ALJ that may appear to suggest otherwise. That determination, however, does not affect Allotta's liability to Darrah for fraud and churning because those claims have been established by the weight of the evidence, as discussed above.

The ALJ erred, however, in awarding the full amount of the requested damages. There came a time when Darrah reasonably should have questioned respondents' representations. As Darrah testified, about six weeks after he opened his account, he began to question Allotta's trading strategy after a large position was liquidated soon after it was established. Thus alerted, Darrah gave his account more scrutiny and found cause for alarm. Darrah became suspicious, but nevertheless deposited additional funds. As Darrah acknowledged, he simply threw good money after bad. Accordingly, we cannot find that the money Darrah deposited after March 12 resulted in losses proximately caused by respondents' misrepresentations. Similarly, there are no churning damages after that date because respondents no longer exercised de facto control of Darrah's account. We therefore modify the ALJ's damage award by subtracting the amounts invested after March 12. *See Muniz v. Lassila*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,225 at 38,650-51 (Jan. 17, 1992) (cutting off damages at the point where reasonable reliance ends).

We also reverse the ALJ's finding that Knowles and Plunkett are liable under CEA Section 13(b) as controlling persons. Controlling person liability is not available as a private cause of action in the reparations forum. Section 13(b) states explicitly that it applies to an "action brought by the Commission." The plain language of the statute and Commission precedent bind us and no further discussion of Section 13(b) or its elements is needed.[9] *Hedrick v. Estrada*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,331 at 62,759 n.5 (CFTC March 25, 2009), citing *Brooks v. Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,379 at 39,276 n.16 (CFTC Aug. 27, 1992).

[9] CEA Section 13(b), 7 U.S.C. § 13c(b); *Michelson v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 619 F. Supp. 727, 739 (S.D.N.Y. 1985).

Nevertheless, Knowles and Plunkett may be held liable to Darrah for failing to supervise Allotta and Salveggi pursuant to Commission Regulation 166.3.[10] In his complaint, Darrah charged Knowles with failure to supervise and named Plunkett as a respondent based on his status as a principal. The respondents thus were on notice of Darrah's claims against them in their individual capacities. While the initial decision details First American's supervisory system, Plunkett's and Knowles's respective roles in that system, and the role those failures may have played in Darrah's losses, it does not specifically address this claim or the specific elements of it. Accordingly, we remand this matter for further proceedings on this claim alone.

Cross-Appeal for Attorney's Fees

We deny Darrah's cross-appeal for attorney's fees. Darrah requested a fee award in his post-hearing brief in the amount of $151,000 based on respondents' failure to produce records concerning the February 28, 2003 trades funded by his $900,000 deposit. The ALJ's decision is silent on this point. Promptly after the initial decision was issued, Darrah filed a motion to amend it to include attorney's fees, which we treated as a notice of appeal.[11] To support his request, Darrah attached to his motion a computer printout of legal fees billed by his attorney from an unspecified date in 2005 through July 2006, totaling $165,575.

However, Darrah has not demonstrated that the amount he seeks was "reasonably incurred." His fee request below consisted of one sentence in his post-hearing brief. The

[10] Commission Regulation 166.3, 17 C.F.R. § 166.3, requires each Commission registrant, except an associated person who has no supervisory duties, to diligently supervise the handling by his or her partners, officers, employees, and agents of all commodity interests carried and other activities relating to the business as a commission registrant. A violation of Regulation 166.3 is actionable in a reparations proceeding. *Bunch v. First Commodity Corp. of Boston*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,352 at 39,168 (CFTC Aug. 5, 1992). To determine whether a violation has occurred, we assess: (1) the nature of the system of supervision; (2) the respondent's role in that system; and (3) whether the respondent performed that role in a diligent manner. In addition, it must be shown that the respondent's breach of duty played a substantial role in the wrongdoing that proximately caused the damages of the complainant. *Id.* at 39,168-69.

[11] Order Pursuant to Delegated Authority (July 18, 2006).

computer printout submitted with his motion to amend merely lists the total number of hours worked per month instead of by particular task. His subsequent appeal brief did not provide greater specificity. In addition to our inability to ascertain the time spent in fruitless discovery, as opposed to other tasks, we do not know if the legal fees charged are customary for this type of case in the jurisdiction where the attorney practices. While Commission precedent does not set forth guidelines for the calculation of attorney's fees, federal courts have held that a party seeking attorney's fees must show that the requested hourly rates and number of hours claimed are reasonable. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). Darrah has failed to carry his burden of proof on this issue and is not entitled to a fee award.

Interest Rate

As requested by Darrah, we clarify the rate of interest awarded in the initial decision. The Commission awards interest at the rate prescribed in 28 U.S.C. § 1961, which is the weekly average one-year, constant maturity Treasury yield for the calendar week preceding the date of the judgment. *Newman v. Bache Halsey Stuart Shields, Inc.*, [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,432 (CFTC Nov. 19, 1984); Commission Regulation 12.407(d), 17 C.F.R. § 12.407(d). The weekly average rate for the week ending June 23, 2006 was 5.24 percent.[12] Interest shall run at that rate from June 30, 2003, until the award is paid in full.

CONCLUSION

For the reasons set forth herein, we hold that the requirements for a waiver of the nonresident bond have been satisfied. We affirm the ALJ's findings of fraudulent inducement and churning. We remand this matter for further proceedings concerning Darrah's failure to supervise claims against Knowles and Plunkett. We limit the ALJ's damage award to amounts

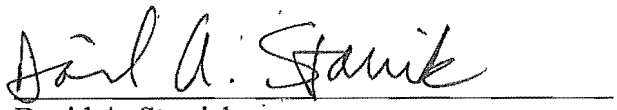
[12] <http://www.federalreserve.gov/releases/h15/20060626/>.

deposited by Darrah prior to March 12, 2003. Darrah shall therefore recover $1,292,685.48, plus the filing fee and interest at the rate of 5.24 percent.[13] The initial decision stands against Salveggi and First American, except that the amount of damages and rate of interest established in the initial decision are modified as provided herein. Our modified award shall run jointly and severally against Allotta, Salveggi, and First American; the ALJ shall determine whether Knowles and Plunkett shall also be jointly and severally liable for failure to supervise Allotta and Salveggi. Darrah's cross-appeal for attorney's fees is denied.

All other arguments raised by the parties have been considered. Those not specifically addressed herein lack merit or are procedurally improper and do not warrant extended discussion or lack sufficient weight to alter the outcome of these appeals.

IT IS SO ORDERED.

By the Commission (Chairman GENSLER and Commissioners SOMMERS, CHILTON and O'MALIA) (Commissioner DUNN not participating).



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: December 9, 2010

[13] We note that the losses Darrah suffered attributable to fraudulent inducement exceeded those attributable to churning, which are limited to commissions paid. Therefore, while we addressed the churning claim, we did not use the commissions paid as a basis for calculating damages.