UNITED STATES OF AMERICA Aug 4 10 or AM '98

Before the COMMODITY FUTURES TRADING COMMISSION

MICHAEL B. BUCKLER, JR.,

Complainant,

v.

ING (U.S.) SECURITIES FUTURES & OPTIONS, INC., UNIVERSAL FINANCIAL BANCORP, INC. d/b/a POTOMAC FUTURES, : and WALTER JOSEPH LANDRY,

Respondents.

CFTC Docket No. 97-R073

INITIAL DECISION

Appearances:

Complainant Michael B. Buckler, Jr., pro se

On Behalf of Respondent Walter Joseph Landry: On Behalf of Respondent Potomac Futures d/b/a Universal Financial Bancorp, Inc.:

Jane E. Lowdon, Esq. Attorney at Law 107 West Van Buren Street, Suite 214 Chicago, IL 60606

On Behalf of Respondent ING (US) Securities Futures & Options, Inc.:

Shelly Starr, Esq. ING (US) Securities Futures & Options, Inc. 233 South Wacker Drive, Suite 5200 - Sears Tower Chicago, IL 60606

Before:

Painter, ALJ

PROCEDURAL HISTORY

This reparation claim was filed by complainant Michael B. Buckler, Jr., on May 1, 1997, and forwarded by the Office of Proceedings on July 24, 1997. Complainant alleges that Respondent Landry, complainant's account executive, engaged in unauthorized trading, fraud, misrepresentation, nondisclosure, churning, and breach of fiduciary responsibility, in connection with two separate commodity accounts complainant maintained. Complainant's allegations as to the remaining respondents were based on derivative liability for such misconduct. Complainant requested \$3,664.59 in damages for the futures trading account he opened in 1994 with respondent Vision Limited Partnership ("Vision Account") and \$33,973.05 in damages for the futures trading account he opened in 1996 with ING (US) Securities, Futures and Options, Inc. ("ING Account"), for a total of \$38,682.76 in damages. Complainant subsequently adjusted his damage request to \$37,887.64, in order to exclude cash advance fees and wire fees he sustained in financing his accounts.

On February 25, 1998, a settlement agreement between complainant and respondent Vision Limited Partnership, futures commission merchant for the "Vision Account", was filed with this Court. On February 27, 1998, this Court dismissed complainant's claims arising from his Vision Account. Complainant's request for damages was adjusted to \$34,223.05 in order to account for this settlement.²

¹ Exhibit C-3

² However, this figure is still inaccurate as it includes commissions, transaction fees, an incentive fee payment, and the complaint filing fee. The recoverable out-of-pocket losses sustained by complainant from the ING Account totals \$25,000.

This matter proceeded to hearing on claims arising from the ING Account, carried by futures commission merchant ING (US) Securities Futures and Options, Inc. and introduced by Universal Bancorp Inc. d/b/a Potomac Futures. Respondent Landry was the registered account executive for complainant at all relevant times.

Each of these respondents has filed an answer denying any wrongdoing, and respondent Landry has filed a counterclaim for \$718.00, the debit balance on complainant's ING Account at the time trading ceased.

The trial of this matter took place on March 7, 1998, in Washington, D. C. The parties have filed post-hearing briefs and the matter is ready for decision.

FINDINGS OF FACT

The following findings of fact pertain solely to the futures trading account complainant opened in January of 1996 the ING Account. The account was carried by futures commission merchant ING (US) Securities Futures and Options, Inc. and introduced by Universal Bancorp Inc. d/b/a Potomac Futures, a registered independent introducing broker. Respondent Landry was the registered account executive for complainant at all relevant times.

- 1. Complainant Michael B. Buckler, Jr. ("Buckler") is a thirty-one year old Virginia resident, college educated and employed as a sales director for a small company. (Ex. R-C; Tr. at 8, 84-85.) He has an income between \$25,000 and \$100,000 per year and a net worth of \$100,000 to \$250,000. (Ex. R-C.) Prior to opening the ING account, his only experience in futures trading took place in 1994 through a managed futures account, the Vision Account with Landry as account executive. (Complaint.)
- 2. Respondent Walter J. Landry ("Landry") has been registered with this Commission for approximately ten years. (Tr. at 46.) He is and has been a principal and associated person of Universal Financial Bancorp., Inc., d/b/a Potomac Futures since June 1995. (Ex. R-1; Answer.)
- 3. Respondent Universal Financial Bancorp, Inc. d/b/a Potomac Futures is a Delaware corporation formed in 1995 and registered as an independent introducing broker during all relevant times. (Commission records)
- 4. Respondent ING (US) Securities Futures & Options, Inc. ("ING") is an Illinois corporation registered with this Commission as a futures commission merchant at all relevant times. (Commission records) ING cleared all trades for Potomac Futures. (Tr. at 49; account statements.) Landry was acquainted with one Bob Delia ("Delia"), a vice president of ING and through Delia, Landry entered into an agreement to introduce accounts to ING. (Tr. at 48-50.)

Delia revised and approved all advertisements used by Potomac in soliciting customers. (Tr. at 100.)

- 5. Complainant had no contact with Landry from January 1995 to December 1995 when Landry solicited complainant to open a futures account under Landry's management through Potomac with ING as the carrying futures commission merchant. To induce complainant to reenter the futures market, Landry told complainant that the Vision Account had been too small and that he, Landry, could do better managing a larger account for complainant; that ING was a quality firm compared to Vision Limited Partnership; that Landry, operating his own firm, expected to have a better shot at making an account profitable; that Landry, a Ph.D. with a degree in law, could manage risk very, very effectively. (Tr. at 10-14.)
- 6. In a letter sent to complainant in December 1995, Landry solicited complainant to open an account with ING, through Potomac. Landry represented that Potomac "... enjoys direct access to the major trading floors in contrast to other IBs which often must go through a trading desk which delays entry of orders and reports of fills"; that he (Landry) was "... particularly proud of our managed futures operations, and we enclose our latest information sheet on those operations." (Ex. C-2.)
- 7. This solicitation letter, was specifically reviewed and approved by Bob Delia, who served as vice president of ING. (Tr. at 101.) (Tr. at 59, 113-114.) Landry further testified that Delia had requested that all Potomac promotional materials be submitted to ING for approval, a request with which Landry complied. (Tr. at 121.)
- 8. Appended to Ex. C-2 is a document styled "Potomac Futures Business Information."

 This document purports to show that from August 1995 to November 27, 1995, Potomac's managed futures accounts showed a net profit of 79.15%. The document suggests that this high

figure was the net return to "clients" as distinguished from a single client. Landry testified that one customer, a Mr. Klipstein, was the sole customer of Potomac during the time in question, and that Klipstein was a former legal client of Landry and a resident of Louisiana. (Tr. at 114-116.) The document also declares that "Potomac Futures is a Division of Universal Bancorp, Inc..." In point of fact, Universal is a registered introducing broker, doing business as Potomac Futures. In sum, Potomac Futures is not a division of Universal. It is Universal.

- 9. ING reviewed and approved this attachment, and knew at all times that the information contained therein was false and/or misleading. (Tr. at 59, 113-114.) The letter and its attachment are rife with false and/or misleading statements designed to induce the unwary into doing business with respondents.
- 10. Respondent Landry told complainant that complainant's Vision account lost money because the account's balance was so small (relative to other accounts that respondent was handling) and because the Canadian elections had not produced the outcome he had anticipated with trading involving the Canadian dollar. (Landry Ans. at ¶ 18, 20; Tr. at 11, 34, 52-54, 61, 68.)
- 11. Respondent Landry said he could manage the risk very effectively and do a much better job for complainant than before. (Complaint; Tr. at 12.) Respondent Landry also agreed to let complainant open an account with \$10,000, as an exception to the \$15,000 minimum he typically required. (Exh. C-2; Tr. at 16, 61-62.)
- 12. Complainant's decision to reinvest was based on his conversations with respondent Landry as well as the literature he had received. (Tr. at 42.) Complainant "knew that there was a risk associated with trading commodities" but was swayed by respondent Landry's representations. (Tr. at 84.) He believed respondent Landry's explanation as to why the Vision

account failed since the reasons were so specific. He was impressed with the astounding profit record respondent claimed he had earned for his clients. (Tr. at 42, 68, 84; Ex C-27.)

Respondent Landry told complainant to let the profit returns he earned be the evidence of his success. (Complaint.)

- 13. Respondent acknowledged complainant's fear about losing any more money and assured complainant that the account would be managed very conservatively, stating that "things would be entirely different" this time. (Complaint; Tr. at 10-11, 16, 34.)
- 14. On December 29, 1995, complainant filled out account opening documentation from respondent ING, including the mandated risk disclosure statement. (Tr. at 17-18, 63-66, 71; R-Exh. C.) Complainant was told by respondent Landry that trades went through respondent ING. (Tr. at 17.) Also included in the documentation was an incentive fee agreement entitling respondent Landry to an incentive fee based on 20% of the gross profits as of the last day of the quarter. (R-Exh. R-G; Tr. at 28, 79.) Complainant also filled out a form granting respondent Landry power of attorney to trade his account on a discretionary basis. (Tr. at 69-70.)
- 15. Complainant planned to open an account with \$6,000³ and to increase the balance to \$10,000 as quickly as possible to allow respondent Landry the trading room he needed. (Complaint; Tr. at 16, 62.) The managed account was opened in January of 1996 and complainant had deposited \$6,000 by the end of January. (Landry-Ans. at ¶ 25-26; Tr. at 9, 16-17, 105-06.)
- 16. Respondent Landry, throughout the life of the account, informed complainant to ignore margin call slips received by complainant. (Tr. at 28-30.) Complainant never contacted

³ \$1,000 on January 3, and \$5,000 on January 26. (Tr. at 17, 62, 72.)

respondent ING during the life of his account about the margin call slips he received. (Tr. at 30-32, 82.)

- 17. Respondent Landry would call orders in directly to respondent ING's clerks on the exchange floor instead of the trading desk at respondent ING's house. (Tr. at 124-26.)

 Respondent Landry engaged in block trading with some of his customers, including complainant, which enabled him to allocate trades. (Landry-Ans. at ¶ 33; Tr. at 107, 124-26.)
- 18. In February, respondent Landry informed complainant that he needed to change his managed account to a non-managed account, per respondent ING's request.⁴ (Complaint; Landry-Ans. at ¶ 27; Tr. at 18-19, 106.) The reason for this request by respondent ING was that complainant's managed account balance had dropped to \$2,700. (Tr. at 75, 106.)
- 19. Complainant signed authorization to change the account from managed to non-managed, effective at the close of business on February 29, 1996, while depositing an additional \$2,000. (Complaint; Landry-Ans. at ¶ 28; R-Exh. F; Tr. at 19-20, 74.)
- 20. Prior to changing the account to non-managed, complainant expressed concern about having a self-directed account, reiterating to respondent Landry that he knew nothing about currency future trading. (Complaint; Tr. at 19.) Respondent Landry assured complainant that he would still be advising the account, including the analysis and placing of trades the only difference was the complainant would be approving what respondent recommended. (Complaint; Tr. at 20-22.) Even though the account was labeled as self-directed, there was no substantive difference since complainant was not directing the trading in the account. (Tr. at 19, 21-22.) Complainant agreed to all trades respondent Landry suggested he make. (Complaint.)

⁴ The reason for this, unexplained to complainant, was due to the fact that the account's balance had dropped below \$5,000. (Tr. at 74-75.)

- 21. At the end of May 1996, respondent Landry requested complainant to change his account back to managed status. (Landry-Ans. at ¶ 30; Tr. at 21-22, 107.) Complainant signed the appropriate forms sent by respondent to alter the account, effective at the close of business on May 31, 1996. (R-Exh. F; Tr. at 22, 75-76.) Included in this form was the language "I have concurred in all trades proposed by Walt Landry since February 29, that it is not convenient to reach me sometimes and I would like it to be a managed account as before." (R-Exh. F; Tr. at 76-77.)
- 22. On June 11, 1996, respondent Landry informed complainant that the authorization form needed to be redone due to a clerical error. Complainant executed the form resent by respondent Landry which reiterated and referenced the earlier letter requesting that the account be changed back to managed status as of May 31, 1996. (Landry-Ans. at ¶ 30; R-Exh. F; Tr. at 77.)
- 23. Complainant deposited \$2,000 in his account on June 4, 1996. (Landry-Ans. at ¶ 31.)
- 24. On July 12, 1996, complainant's account was debited \$749.23 which was paid to respondent Landry in accordance with the incentive fee agreement complainant signed in his account opening documents. (R-Exh. G; Tr. at 79.)
- 25. On July 16, 1996, complainant was informed by respondent Landry that his \$10,000 investment had been wiped out. (Tr. at 33.) In addition, respondent said there was a \$5,000 deficit in the account which would need to be paid by complainant.⁵ (Tr. at 33.) When complainant asked what had happened, respondent Landry said that "the markets had just snapped at him. He couldn't understand it." (Tr. at 33-34.)
- 26. Complainant asked about his chances of getting his investment back. (Tr. at 34-35.) Respondent Landry said he was certain he could recoup complainant's losses, that he could

⁵ Complainant received a statement from respondent ING reiterating the same. (Tr. at 34.)

- "trade out of the loss," if he was given \$15,000 (\$5,000 to pay the debit and \$10,000 to start trading again). (Tr. at 34-36.)
- On July 17, 1996, complainant wired a total of \$13,000 to respondent ING. (Landry-Ans. at ¶ 37; Tr. at 36, 80.) On July 22, 1996, complainant deposited an additional \$2,000. (Landry-Ans. at ¶ 37; Tr. at 36, 80.)
- 28. Within two weeks, on July 31, 1996, respondent Landry left voice mail messages at complainant's home and office saying that complainant's account had taken a hit the previous night and more money was needed in his account to satisfy a margin call. (Landry-Ans. at ¶ 39; Tr. at 37-38.) Later that morning, when complainant phoned respondent Landry, he was informed that another \$2,700 was needed to be put into the account, at which time complainant stated that he had no more money to invest and instructed respondent to close the account. (Landry-Ans. at ¶ 39-40; Tr. at 38.)
- 29. The following morning, August 1, 1996, the remaining positions were liquidated and the account was closed. (Tr. at 39, 80-81.)
- 30. On August 2, 1996, respondent Landry informed complainant that the debit balance was \$718.66 which would be reflected in a statement mailed to respondent. (Landry-Ans. at ¶ 41; Tr. at 39.) Complainant received a statement from respondent ING stating said debit balance. (C-Exh. 3; Tr. at 39-40.)
- 31. On August 13, 1996, respondent Landry called complainant to check if he had received the final account statement and stated that ING would hold complainant's debit balance against Landry's commissions until the debit was paid by complainant. (Tr. at 40.)

- 32. Respondent Landry contacted complainant again on August 31, 1996, and reiterated to complainant that ING would take the loss amount out of Landry's commissions until it was paid by complainant. (Landry-Ans. at ¶ 42; Tr. at 40, 96.)
- 33. On September 17, 1996, the debit balance was satisfied out of respondent Landry's commissions pursuant to his subordination agreement with Respondent ING. (Landry-Ans. at ¶ 42; Tr. at 96.)
- 34. To date, complainant has not paid any portion of the claimed debit balance which his account accrued. (Tr. at 81-82, 111.)
- 35. On February 6,1997, complainant called respondent Landry to inquire about the discrepancy between the 1099-B form he had received in early January from respondent ING and the actual losses his account had sustained. (Complaint.) Respondent Landry was unable to explain the discrepancy. (Complaint.)
- 36. When complainant also inquired as to how business was going, respondent Landry said that he had made organizational changes at the end of 1996, explaining that his "new strategy was to go for much slower growth in all of his trading and to strive for long term appreciation with low risk." (Complaint) Complainant was confused since he believed that this was the strategy that respondent Landry had been following with him. (Complaint) This was the last conversation complainant had with respondent Landry prior to hearing. (Complaint.)

DISCUSSION

Fraudulent Inducement

When complainant was contacted by respondent Landry in December 1995, he was extremely hesitant to reinvest money in futures trading, having lost most of his \$3,000 investment with his Vision account under Landry's management in 1994. Complainant told respondent Landry that he had limited financial resources and could not afford to lose money again, but respondent Landry succeeded in having complainant open a second account with ING by grossly misrepresenting the likelihood that complainant would suffer another loss.

The determination to be made by this Court is "whether the preponderance of the evidence establishes that respondent['s] solicitation misrepresented either the likelihood [of] profit or the likelihood [of] loss" if complainant traded with respondent Landry. Bishop v. First Investors Group of the Palm Beaches, Inc., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,004, at 44,480 (CFTC Mar 26, 1997). We are to look to "the overall message conveyed by a solicitation from the perspective of a reasonable customer to determine if a misrepresentation has been made." Id. (citing Hammond v. Smith Barney, et al., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617, at 36,657 (CFTC Mar. 1, 1990).

Even though complainant testified that he was aware of risks associated with futures trading in general, he was unaware that any such risks existed with the ING Account. During respondent Landry's phone solicitations in December of 1995 Landry cited specific factors which caused complainant's past investment to fail, in essence making complainant's earlier unprofitable experience appear to be an anomaly. According to Landry, complainant's Vision Account had been too small and second, the Canadian elections had not produced the results in currency trading that he had anticipated. In addition, respondent Landry drew contrasts between

the past and the present, stating that his current futures operation and the clearing firm used were superior alternatives to the setup under complainant's Vision Account. Respondent Landry also steadfastly maintained that risk could be minimalized and assured complainant that trading would be extremely conservative. In sum, the only conclusion to be drawn from respondent Landry's "presentation" was that complainant's experience would be totally different.

Despite the aforementioned, complainant was still not completely sure about re-investing, so respondent Landry sent him promotional material. As if respondent had not downplayed the risks enough, the attachment to respondent Landry's solicitation letter touted an annualized "net return to clients" of 79.15% that was "based on operations from August 1, 1995 to November 28, 1995." Respondent Landry told complainant to let this be the evidence of his success. As complainant testified, these profit returns persuaded him to open his second account. Unknown to complainant, however, this return was based on only one client whose account had been open for only three months. August 28, 1995 to November 30, 1995. There can be no question that this profit return portrayal was objectively deceptive and therefore misleading. Morris v. Stotler & Co., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,080, at 38,047 (CFTC June 27, 1991) (citing Levine v. Refco, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,488, at 36,115 (CFTC July 11, 1989).6

Respondent Landry intentionally misrepresented the risks of trading to complainant and intentionally misrepresented the profit potential of his other "clients." As the Commission has recognized, the evaluation of a respondent's subjective state of mind is a credibility judgment.

In re ContiCommodity Serv., Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶

⁶ In that case the Commission stated that a misrepresentation occurs when there is an aggressive downplaying of risks and portrayal of profits to clients so as to be objectively deceptive.

⁷ The percentage was also an annualized figure which was based on trading for a period of four months.

25,038, at 37,879 (CFTC April 17, 1991). Quite simply, respondent knew that the only way to obtain complainant as a customer again was to misrepresent the risks and profit potential associated with currency futures trading. Landry had been an associated person for over ten years prior to handling complainant's account and had first hand knowledge of the unpredictability of the futures market. He is a highly educated individual who holds a law degree and Ph.D. Landry was well aware that his portrayal of what complainant was to look forward to was nothing short of a gross distortion of the realities of currency futures trading.

It is uncontroverted that complainant was an inexperienced commodity investor. What is also evident is that complainant was extremely impressed with respondent Landry's trading expertise which resulted in complainant placing a large amount of trust and confidence in Landry. Complainant looked favorably on respondent's trading ability not only because he had been trading currency futures and options for quite some time, but because respondent was also a lawyer, held a Ph.D. in government, and had worked as a foreign service officer, the combination of which Landry represented gave him unique insight into the currency market. The Commission has noted that a customer's reliance on a trader's portrayal of risks is reasonable when such customer has a lack of experience in the futures market coupled with the fact that the trader is held in such high esteem. Schreider v. Rouse Woodstock, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,196, at 32, 514 (CFTC July 31, 1986). Unfortunately, this case illustrates how such a customer can be easily deceived. As complainant testified, he believed respondent Landry's explanation why the Vision Account failed since it was so specific – the investment had been too small, and the canadian elections had not had the impact

respondent had anticipated.⁸ Never did respondent Landry state the reality – that futures trading is inherently risky no matter how great the investment is or how conservative a trading strategy may attempt.

Complainant must also establish by a preponderance that respondent's misconduct proximately caused the losses which complainant suffered – that is, when complainant suffered the damages he was relying on the false information provided by respondent. Steen v. Monex International, Ltd., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) \$\frac{1}{2}\$ 25,245, at 38,723 (CFTC Mar. 3, 1992)(citation omitted); Gilbert v. Lind-Waldock & Co., [1994-1996 Transfer Binder] Comm Fut. L. Rep (CCH) \$\frac{1}{2}\$ 26,720, at 43,991 (CFTC June 17, 1996)(citation omitted). Complainant trusted respondent's ability to minimize risks and totally relied upon respondent to conduct trading in his account. But for respondent's oral assurances, coupled with the profit return touted by respondent, complainant would not have opened the ING Account. Camp v. First Nat'l Monetary Corp., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) \$\frac{1}{2}\$ 23,190, at 32,504 (CFTC July 24, 1986).

Fraudulent Lulling

Respondent Landry's second fraudulent act occurred in July of 1996, when respondent Landry lulled complainant to deposit an additional \$15,000. Complainant was told by respondent Landry in July that he had lost his entire \$10,000 investment, in addition to incurring a \$5,000 debit balance. At this point complainant may have known that futures trading was not risk free, but respondent assured complainant that his losses could be recouped if more money

⁸ "[A] customer does not have a duty to investigate the truth of statements made to him but may ordinarily rely on the honesty of his account executive." <u>Gilbert v. Lind-Waldock & Co.</u> [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,720, at 43,991 (CFTC June 17, 1996).

⁹ Proximate cause exists when "(1) respondent's violative conduct was a substantial factor in bringing about complainant's loss and (2) the loss was a reasonably probable consequence of respondent's conduct." <u>Steen v.</u>

was invested. Kacem v. Castle Commodities Corp., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,058, at 45,032 (CFTC May 20, 1997); Bishop v. First Investors Group of the Palm Beaches, Inc. ¶ 27,004, at 44,840 (CFTC Mar. 26, 1997).

Lulling occurs by a respondent in furtherance of a preexisting fraud, in this case the fraudulent inducement that occurred. Domenico v. Rufenacht, Bromagen & Hertz, Inc. [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,934, at 34277 (CFTC Sept. 30, 1987)(citation omitted). Complainant, desperate to recover the \$10,000 investment he had lost, wired \$15,000 immediately. In order to produce these funds, complainant was required to completely deplete his savings account and used cash advances from his credit cards. It has been noted that "[c]ustomers faced with such losses often are prone to make poor decisions in a desperate attempt to recoup losses. As losses can occur with astonishing speed, disoriented customers can be receptive to lulling or unreasonable recommendations by their brokers that lead to even more losses." Wirth v. T & S Commodities, Inc. [1990-1992 Transfer Binder] Comm.

Fut. L. Rep. (CCH) ¶ 25,271, at 38,879 n.1 (CFTC Apr. 6, 1992)(West, dissenting)(quoting Muniz v. Lassila, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,225, at 38,653 (CFTC Jan 17, 1992) (West, concurring).

Complainant clearly did not understand that the chances of recovering his loss were minimal, and made an additional \$15,000 readily available to respondent Landry only because of respondent's fraudulent lulling. As such, proximate cause exists for these losses as well. Bishop v. First Investors Group of the Palm Beaches, Inc. [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,004 at 44,841 (CFTC Mar. 26, 1997). This money was wiped out within two weeks, at which time complainant closed his account.

Monex International, Ltd. [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,245, at 38,723 (CFTC Mar. 3, 1992)(citation omitted).

In defense, respondent Landry argues that complainant was fully apprised of the risks associated with futures trading since he received and signed the necessary risk disclosure documentation. Respondent, however, is not immune from claims of fraud because complainant received pro forma risk disclosures, as contained in the opening account documents. Id. Hannay v. First Commodity Corp. of Boston, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,936 at 34,282 (CFTC Sept. 21, 1987). 10

In addition, respondents argue that complainant was well aware of the risks inherent in commodity trading, having lost most of his earlier investment with his Vision Account. Even though complainant may have known about the risks associated with futures trading, based on the oral misrepresentations and fraudulent profit return that respondent Landry employed in December of 1995, complainant believed that his ING Account was not susceptible to these risks. As for his subsequent loss in July of 1996 of his \$10,000 investment in his ING Account, respondent was without explanation as to what had gone wrong but assured complainant that he could trade out of such losses if more money was invested. This Court refuses, as other courts have refused, to find that complainant should have "seen through [respondent's] assurances to understand that the losses he had experienced reflected the true risk of commodity futures

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With respect to the disclosure statement, it has been noted that the statement "does not warn the customer to disbelieve representations that certain trading strategies can limit losses, that the broker's scheme can overcome inherent market risks, or that certain commodities are less volatile. Those unfamiliar with the workings of markets are unlikely to understand that no broker can eliminate or diminish risk. The customer may be led to believe that the course of trading on which he or she embarks is not susceptible to the extreme risk that the statement warns 'can' or 'may' accompany trading. Further, the statement uses terms of art that require explanation, without which the significance of the warning to the particular customer may not be understood. Thus, it is not logically inconsistent to believe the warning on the risk disclosure statement while at the same time believing representations.

Clayton Brokerage Co. of St. Louis, Inc. v. Commodity Futures Trading Commission and Webster S. Sturcken, 794 F.2d 573, 580-81 (11th Cir. 1986). The court refused to say that, as a matter of law, a customer who reads the disclosure statement understands the risk of trading and, therefore, makes reliance on a broker's misrepresentations unreasonable. <u>Id</u>. at 581.

trading." Clayton Brokerage Co. of St. Louis, Inc., v. Commodity Futures Trading Commission 794 F.2d 573, 580 (11th Cir. 1986). Respondent Landry was well aware, and utilized to his advantage, the fact that complainant had the utmost trust and confidence in him.

LIABILITIES OF OTHER RESPONDENTS

The Act imposes respondeat superior liability pursuant to Section 2(a)(1)(A)(iii); 7 U.S.C §2. Respondent Potomac Futures, the introducing broker of respondent Landry, is directly liable for the acts of its principal and employee respondent Landry, and therefore liable for violations of Section 4b of the Act. Scheufler v. Daniel Stuart, Gerald, Inc., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,171 at 45,577 (Sept. 30, 1997); Kacem v. Castle Commodities Corp., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,058, at 45,032 (CFTC May 20, 1997); Bishop v. First Investors Group of the Palm Beaches, Inc. and Michael F. Staryk, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,004 at 44,841 (CFTC Mar. 26, 1997).

It is true that respondent ING, the futures commission merchant carrying complainant's trades, had no contractual obligations for approving solicitation material used by Potomac, a non-guaranteed introducing broker. The reality, however, is that respondent ING, through the acts of its vice president Bob Delia ("Delia"), played an active role in the solicitation of customer accounts and must share liability for the fraud committed in connection with such solicitation. As this Commission has noted, "'[w]hen a futures commission merchant assists a purportedly independent operator hoping that the operator will solicit more business for the merchant, it is hard not to find that the operator is the merchant's agent when he solicits." Wirth, et al. v. T & S Commodities, Inc. [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,271, at 38,876

¹¹ See generally Scheufler v. Daniel Stuart, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,171 at text and n.8 (Sept. 30, 1997).

(CFTC Apr. 6, 1992)(quoting Stotler & Co. v. Commodity Futures Trading Commission, 855 F.2d 1288, 1292 (7th Cir. 1988) (emphasis added). No doubt, such was the incentive for Delia to act and take an affirmative role in respondent Landry's solicitation efforts. As respondent Landry testified, ING cleared all trades placed by him. 13

The unrebutted testimony of respondent Landry made clear that Delia requested review of all solicitation material used by respondent Landry, making alterations he deemed to be necessary, with which complainant complied. In addition to the fact that respondent ING did not produce any evidence to the contrary, there was evidence corroborating Landry's testimony. Complainant submitted two radio ad copies used by Landry and Potomac, which displayed Delia's comments about its contents, including approval for use as well as his signature. Quite clearly, Delia had ultimate control over the final content of promotional material. Respondent Landry's further unrebutted testimony was that the specific material used to induce complainant in this case, the letter sent to complainant and the attachment including the fraudulent profit return percentage, was approved by Delia.

In light of the aforementioned, it is quite clear that respondent ING, acting through Delia, entered into an agency relationship with respondent Landry which encompassed the solicitation of new customers on behalf of respondent ING. Wirth v. T & S Commodities, Inc. [1990-1992] Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,271, at 38,876 (CFTC Apr. 6, 1992). The fraudulent lulling by respondent Landry in July was merely a continuation of attempts to solicit

¹² The Commission has also stated that "even if [the alleged agent] were an independent contractor whose conduct . . . was not controlled by [the respondent futures commission merchant], that status would not itself preclude his being the [respondent futures commission merchant's] agent." <u>Id.</u> at (quoting <u>Bogard v. Abraham-rietz & Co.</u>, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,273, at 29,393 (CFTC July 5, 1984)).

¹³ Respondent Landry's solicitation letter stated that all trades were cleared through respondent ING and as such "enjoys direct access to the major trading floors in contrast to other IB's which often must go through a trading desk which delays entry of orders and reports on fills." Respondent Landry was able to place trades direct to respondent ING's clerks on the exchange floor.

business on behalf of respondent ING and therefore within the agency relationship that existed. Respondent ING is therefore liable, pursuant to Section 2(a)(1)(A) of the Act, for respondent Landry's fraudulent inducement and lulling in violation of Section 4b of the Act, as such misconduct pertained to the solicitation of business. ¹⁴ Id.

DAMAGES

Despite prevailing in a claim of fraud, complainant has inaccurately calculated his damages. Currently, complainant requests \$34,223.05 in damages in connection with his ING account. Although he only invested a total of \$25,000 in this account, he has mistakenly added to this (in essence double-counting) monthly commission charges (\$7,607.27), account transaction fees (\$616.55), and respondent Landry's incentive fee payment (\$749.23) which was disbursed from his account. Complainant has also added \$250 as reimbursement for the CFTC Complaint filing fee.

Fraud in the inducement entitles the complainant to a return of out-of-pocket losses, "those funds that were <u>submitted to the account</u> as a result of the inducement." <u>D.E. Goodrich v. GNP Commodities, Inc.</u> [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,358 at 35,525 (CFTC Nov. 21, 1988) (emphasis added)(citations omitted). Complainant's total out-of-pocket losses for his ING account consisted of \$25,000.00. Commission fees, transaction fees and respondent Landry's incentive fee were all paid out of complainant's account – and therefore are already included as part of complainant's \$25,000.00, investment.¹⁵

¹⁴ Having found respondent ING derivatively liable for respondent Landry's fraudulent acts pursuant to Section 2(a)(1)(A) of the Act, it is unnecessary to discuss the merits of complainant's claim of respondent ING's liability for fraudulent acts pursuant to 7 U.S.C. § 13(a).

¹⁵ See generally Scheufler v. Daniel Stuart, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27. 171 at text and n.8 (Sept. 30, 1997).

Since the goal in reparations is to make the injured party whole, and because the award is compensatory in nature, complainant is also awarded prejudgment interest. Camp v. First

National Monetary Corp. [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,190 at 32, 505 (CFTC July 24, 1986) (citation omitted). Interest is awarded on this amount, calculated at 5.375% percent per annum from January, 1996, to the date of payment, in addition to an award of \$250 in filing fees. Scheufler v. Daniel Stuart, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,171, at 45,578 (CFTC Sept. 30, 1997).

OTHER CLAIMS BY COMPLAINANT

Complainant alleges that respondent Landry engaged in unauthorized trading of his account, in violation of Rule 166.2, 17 C.F.R. § 166.2, during the few months when complainant's account was switched to nondiscretionary. Complainant is correct in so far as when his account was changed to nondiscretionary, complainant possessed the legal right to control trading in his account. There is a difference, however, between legal control and actual control. Lehman v. Madda Trading Co., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,417, at 29,867 (CFTC Nov. 13, 1984). Allegations of unauthorized trading are without merit since this Court deems that complainant's account during these months was constructively discretionary and precludes a finding of unauthorized trading. In consideration of the relationship between the two parties, complainant surrendered de facto control over trading to respondent Landry. Id. Even complainant admits in his Post-hearing Reply Brief that de facto control was surrendered during the months his account was non-discretionary, although he admits this to advance his churning claim. Reply Brief at 15.

¹⁶ The Commission has also stated that "even if [the alleged even] were an independent contractor whose conductwas not controlled by [the respondent futures commission merchant], that status would not itself preclude his being the [respondent futures commission merchant's] agent." <u>Id.</u> at quoting <u>Bogard v. Abraham-Reitz & Co.</u>, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH)¶ at 22,273, at 29,393 (CFTC July 5, 1984)

It is well established that complainant was an unsophisticated customer and unable to independently assess any trades that respondent suggested. Morris v. Stotler (citing Lehman v Madda Trading Co., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,417, at 29,867 (CFTC Nov. 13, 1984)). It is uncontroverted that the account was switched to non-managed status in February of 1996 solely because respondent ING required managed accounts to have at minimum a \$5,000 balance. The fact that complainant specifically requested assurances from Landry that nothing would change in terms of trading decisions is further evidence that the account was non-managed in label only.

In addition, complainant has made it abundantly clear in his complaint, his pleadings, and his testimony that he was totally reliant on respondent's trading decisions, having complete trust and confidence in respondent. This Court is unaware of any instance when complainant acted in contradiction to respondent's advice or did not acquiesce to trades placed by respondent without advance authorization. <u>Id.</u> This Court is confident that complainant "neither wished nor intended to exercise control" over his account at any time. In light of the aforementioned, complainant cannot now attempt to argue that the account was truly non-managed, and that Landry engaged in unauthorized trading.

Allegations of churning, in violation of Section 4b of the Act, 7 U.S.C. § 6(b) will not be entertained by this Court. Although a churning claim is separate from a fraudulent inducement claim, the awards from each are not cumulative; complainant is only entitled to a single recovery for the larger amount.¹⁷ In this case, complainant's fraudulent inducement claim entitles him to

¹⁷ Heublein v. International Trading Group, Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,591, at n.1 (CFTC Oct. 2, 1992).

out-of-pocket losses, totaling \$25,000, and far exceed an award of commissions, to which complainant generally would be entitled under a successful churning claim.¹⁸

Complainant's claim of breach of fiduciary duty will not be discussed, as such a claim is merely another way to pursue a fraud claim pursuant to Section 4b, which complainant has successfully done.

As for claims involving complainant's 1099-B form, this Court finds the discrepancy¹⁹ to be completely irrelevant. Although complainant seemed to be obsessed about this, as some sort of "smoking gun," the discrepancy has little significance in calculating damages.

RESPONDENT'S COUNTERCLAIM

As for the counterclaim filed by respondent Landry and respondent Potomac Futures for the debit balance in complainant's ING Account, the claim is without merit since respondents have no authority to bring such a claim. Only ING, the Futures Commission Merchant, had standing to bring such a claim. Accordingly, Landry's counterclaim is **DISMISSED**.

¹⁸ Generally, a successful churning claim entitles a complainant to an award of commissions paid for the churned trades. <u>Lehman v. Madda Trading Co.</u>, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,417, at 29,867 (last page of opinion) (CFTC 1984). Total commissions during the life of complainant's account only amounted to \$7,607.27.

¹⁹ There is a \$526.40 discrepancy between complainant's losses and the figure appearing on the 1099-B form.

CONCLUSIONS OF LAW

Based on the aforementioned, this Court makes the following conclusions as a matter of law:

- 1. Respondent Landry's portrayal of risks associated with futures trading was a fraudulent misrepresentation in violation of section 4b of the Act.
- 2. Respondent Landry's promotional material which touted a profit return to clients of 79.15% was a fraudulent misrepresentation in violation of section 4b of the Act. Respondent ING (U.S.) Securities, Futures & Options, Inc. violated section 4b of the Act by authorizing and approving Landry's fraudulent promotional material.
- 3. Respondent Landry's assurance to complainant that losses sustained in the account could be recouped if additional money was deposited was a fraudulent act in violation of section 4b of the Act.
- 4. Respondent Landry was a principal and associated person of Universal Financial Bancorp., Inc. d/b/a Potomac Futures, an introducing broker, at the time he solicited complainant to open the account with ING. Respondents Landry and Universal Financial Bancorp Inc., d/b/a Potomac Securities, are directly liable for violations of section 4b (a)of Act and Regulation 33.1 as described in the findings of fact set forth above.
- 5. The unlawful acts of respondents Landry, Universal Financial Bancorp., Inc. d/b/a Potomac Futures, and ING (U.S.) directly caused damages to the complainant in the amount of \$25,000.00.

ORDER

Respondents Walter Joseph Landry, Universal Financial Bancorp, Inc., d/b/a Potomac Futures and ING (U.S.) Securities Futures and Options, Inc. are hereby **ORDERED** to pay to complainant Michael B. Buckler, Jr., the sum of \$25,000 plus interest at the rate of 5.375% per annum from August 1, 1996 to the date the award is paid, plus the filing fee of \$250.00. Respondents are jointly and severally liable for payment of this judgment.

Issued this 4th day of August, 1998

George H. Rainter

Administrative Law Judge