# UNITED STATES OF AMERICA Before the

# COMMODITY FUTURES TRADING COMMISSION 30 9 18 AM '97

FILED

JOSEF GEMEINDER,

Complainant,

V.

CFTC Docket No. 95-R003

JOHN-EMMANUEL GARTMANN, GRANDVIEW HOLDINGS CORP., and J. MICHAEL KING,

Respondents.

## INITIAL DECISION

Opinion of Painter, ALJ

#### Appearances:

For the Complainant:

Curt Muller, Esq. Anwaltskanzlei Michael-Christian Rossner Hochlstrasse 4 81675 Munich Germany

For the Respondents:

Fred S. Konigsberg, Esq. 5 Park Plaza Suite 600 Irvine, California 92614

## I. INTRODUCTION

On October 5, 1994, Josef Gemeinder sent a reparations complaint to the Office of Proceedings. After Gemeinder provided some additional information, the Office of Proceedings served the complaint on respondents Grandview Holdings Corporation, J. Michael King, and John-Emmanuel Gartmann.

In January 1995, Gemeinder obtained counsel and filed an amended complaint. The amended complaint alleged that (1) Grandview, "acting through Respondent Gartmann," churned Gemeinder's account; (2) the respondents "failed to provide Gemeinder with proper risk disclosure statements"; and (3) Grandview and King failed to properly supervise Gartmann.

The respondents denied all of the allegations in the amended complaint and offered a number of affirmative defenses. On January 10, 1996, the parties entered into a settlement agreement which permitted Gemeinder to re-open his complaint if the respondents did not comply with the settlement terms.

On October 17, 1996, the case was re-opened and set for hearing due to the respondents' acknowledged failure to make any of the payments required under the settlement agreement. The hearing was held in Washington, DC on December 12, 1996. Although he had requested that date, Fred S. Konigsberg, the attorney for the respondents, did not attend the hearing. The respondents apparently knew beforehand that Mr. Konigsberg would not be present

and they agreed to proceed without him. 1/ Mr. Konigsberg has not moved to withdraw as counsel of record. (Transcript [hereinafter "Tr."] at 4, 5.)

## II. FINDINGS OF FACT

## A. The Parties

- 1. JOSEF GEMEINDER is retired and lives in Hamburg, Germany. (Amended Complaint [hereinafter "Amd. Cmplt."] at 3; Tr. at 46.) He is a German citizen and has a limited comprehension of the English language. On March 6, 1991, Gemeinder deposited \$49,989.50 into a futures trading account at Grandview Holdings Corporation. (Complainant's Exhibit [hereinafter "Cmpl. Ex."] A; Tr. at 17.)
- 2. GRANDVIEW HOLDINGS CORPORATION ("Grandview") was registered as an independent introducing broker with the Commodity Futures Trading Commission ("CFTC" or "Commission") during the time period covering Gemeinder's dealings with the respondents. 3/
  (Answer to Amended Complaint [hereinafter "Ans."] at 1.) Grandview was located in office space that was previously occupied by Arthur's Limousine Service. Its long distance telephone calls were

 $<sup>^{1/}</sup>$  According to the respondents, numerous papers were missing from the materials that Mr. Konigsberg sent to them prior to the hearing. (Transcript at 9, 60, 89.)

<sup>&</sup>lt;sup>2</sup>/ Gemeinder's amended complaint stated that he invested \$50,000 with Grandview. (Amd. Cmplt. at 6.) Presumably, \$10.50 was deducted from that amount to pay a wire transfer fee.

 $<sup>\</sup>frac{3}{2}$  In his proposed findings of fact, King represented that Grandview is now defunct and no longer registered with the CFTC. (Proposed Findings of Fact and Conclusions of Law at 2.)

billed to Arthur's. (Tr. at 59-60; Cmpl. Ex. P.)

- 3. J. MICHAEL KING was Grandview's president and was registered as an associated person with the CFTC. (Ans. at 5.) He was also the "chief trader" for Grandview. (Tr. at 23.) He never had any direct contact with Gemeinder. (Ans. at 3.)
- 4. JOHN-EMMANUEL GARTMANN was the Grandview account executive who solicited Gemeinder as a Grandview client and serviced his account. Gartmann was registered as an associated person with the CFTC.4/ King was Gartmann's only supervisor. (Ans. at 3, 5; Tr. at 29.)
- 5. King and Grandview are respondents in a Commission complaint which alleges that they aided and abetted a German brokerage house in a scheme to defraud and cheat European investors. (CFTC Docket No. 95-9.) The facts and circumstances surrounding that complaint are not related to Gemeinder's complaint.

## B. The Solicitation

6. Gartmann and Gemeinder had known each other for about two years prior to Gartmann contacting Gemeinder on behalf of Grandview. Gartmann had assisted Gemeinder in his efforts to recover money from Stottler, a company that had filed for bankruptcy protection. (Tr. at 9.) He also had assisted Gemeinder in trying to prove that he had been defrauded by an entity known as Welshire. (Tr. at 40, 76; Cmpl. Ex. I.)

<sup>4/</sup> After the hearing, Gartmann informed the ALJ that he is no longer registered with the CFTC. (Letter from John-Emmanuel Gartmann to Administrative Law Judge Painter, dated February 28, 1997.)

- 7. As part of his solicitation, Gartmann told Gemeinder that King's customers had earned a 400% rate of return and that King had placed well in the "United States Investing Championship" ("championship" or "contest"). 5/ Gartmann sent copies of the championship standings to Gemeinder. Gartmann wanted Gemeinder to rely on the standings when deciding whether or nor to invest with Grandview. (Ans. at 6; Tr. at 41, 44, 47, 98.)
- 8. Gartmann did not actually know of any Grandview customers who enjoyed a 400% return. Nor did he make any attempt to see the account statements allegedly sent to the contest organizers. Gartmann testified that he had no reason to verify the figures in the standings. (Tr. at 42-44, 100.)
- 9. I find that Gartmann knew that the standings did not accurately reflect the rate of return for Grandview's customers.

  I find that Gartmann knew that the standings would mislead prospective customers such as Gemeinder.
- 10. Gemeinder invested with Grandview on the condition that King make all of the trading decisions for his account. Gemeinder and Gartmann agreed to an arrangement whereby Gartmann would accept trading authority on behalf of King, but only trades recommended by King would be put on Gemeinder's account. On February 28, 1991, Gemeinder executed a trading authorization form which designated Gartmann as Gemeinder's agent for purchasing and selling commodities. (Ans. at 6; Tr. at 19-20, 23; Cmpl. Exs. E.)
  - 11. Gartmann knew that German was "[Gemeinder's]

 $<sup>\</sup>frac{5}{}$  See infra Findings of Fact ¶¶ 13-15.

- language." He spoke German in their telephone conversations and wrote all of his letters to Gemeinder in German. (Tr. at 17, 24; Cmpl. Ex. E.)
- 12. Every form and disclosure document provided to Gemeinder was written in English. (Cmpl. Exs. B, C, D.)

## C. The United States Investing Championship

- advertisement that appeared on page 30 of the December 3, 1990 issue of Investor's Daily. The heading on the advertisement reads: "UNITED STATES INVESTING CHAMPIONSHIP." Underneath the heading is the caption: "LEADERS AFTER TEN MONTHS (1990)." The advertisement displays standings for five different "divisions." Grandview Holdings is in second place in the "Futures Division" with a 351.6% increase since January 1, 1990. Below the standings is the statement: "Past results are not indicative of future performance." This statement is not as conspicuous as the actual standings.
- 14. The bottom of the advertisement provides the phone numbers of the five leaders in each division along with the address and phone number of the "Financial Traders Association." Presumably, the Financial Traders Association is the organization which administered the contest. (Cmpl. Ex. N.)
- 15. Complainant's Exhibit M is a copy of an advertisement that appeared on page 18 of the February 4, 1991 issue of Barron's. The advertisement displays the 1990 "FINAL STANDINGS" for the United States Investing Championship. It is configured in the same arrangement as Complainant's Exhibit N. Michael King is listed as

the second best performer in the Futures Division with a 438% rate of return. $\frac{6}{}$ 

- 16. Grandview traders seem to have an uncanny knack for placing well in the championship. In 1987, Dennis Marlow, an associated person of Grandview, was the sixth ranked trader in the Futures Division with a 471.4% rate of return. On June 21, 1994, the Business Conduct Committee of the National Futures Association ("NFA") charged Marlow with making a number of false and deceptive statements about the standings to prospective Grandview customers. Grandview and King were also named in the complaint. King was charged with failing to adequately supervise Marlow in violation of NFA Compliance Rule 2-9. (Cmpl. Ex. R; NFA Case No. 94-BCC-007.)<sup>2/</sup>
- 17. King steadfastly declared that the championship results were "a correct record of the trading that took place during that period." (Tr. at 64.) (emphasis added) He was markedly less assured of himself when asked to explain exactly what "trading" was chronicled by the championship administrators. King did not know whether the standings reflected the performance of customer accounts or Grandview accounts. (Tr. at 65, 104.)
  - 18. King maintained that he "had nothing to do" with the

 $<sup>\</sup>frac{6}{}$  The first place trader had an astounding 1,195% return. (Cmpl. Ex. M.)

Z/ King submitted a written offer of settlement which was orally accepted by an NFA Hearing Panel. The next day, King attempted to withdraw the offer. The Hearing Panel, which may or may not have been aware of King's efforts to withdraw his offer, issued a written decision accepting the offer. The NFA Appeals Committee affirmed the Hearing Panel's decision. On review, the Commission vacated the settlement and remanded the matter back to the NFA. Grandview Holdings Corp. v. National Futures Association, CFTC Docket No. CRAA-96-1, slip. op. (CFTC Mar. 18, 1997).

publication of the standings. He testified that he did not pay for their publication and did not send any Grandview records to the contest administrators. (Tr. at 65-66, 103.)

- by the name of Michael King in the United States Investing Championship, King initially replied, "I don't know how it got there." King then decided to finger someone (other than himself) as the party responsible for providing the 438% figure. He stated that an accountant, whose name he could not remember, sent trading records to the contest administrators. (Tr. at 103-104.) After the hearing, King submitted an "audit performed by the [accountant] for the performance in the trading contest." (Letter and attached papers from J. Michael King to The Honorable George H. Painter, dated January 4, 1997.) This so-called "audit" has been made part of the record. 9/
- 20. I find that King knowingly caused false and misleading information about his and Grandview's trading performance to be sent to the contest administrators. I find that King knew that the administrators would publish the trading results.
- 21. King disavowed any role in sending the standings to Gemeinder. When asked whether he caused Gartmann to send the standings, King flatly replied "No, sir." According to King,

<sup>&</sup>lt;sup>8</sup>/ King did not send a copy of the "audit" to Gemeinder's counsel as instructed to do so by the ALJ. (Tr. at 104-105; Gemeinder's Proposed Findings of Fact and Conclusions of Law.) King's failure to serve the "audit" on Gemeinder did not prejudice Gemeinder since the "audit" did not substantiate the contest results. See infra p. 13-14.

Gartmann just happened to see the standings and then, on his own, decided to send the standings to Gemeinder. (Tr. at 67.)

- 22. Gartmann testified that King gave him the standings. (Tr. at 98.) I find that King directed Gartmann to send the standings to prospective customers. I find that King intended that the standings be used to deceive prospective customers about his trading abilities and his profit-making potential.
- 23. I find that King's testimony consisted of lies, half truths, evasions, misrepresentations, contradictions, equivocations, and feigned memory lapses.
- 24. In general, Gartmann did not testify in a forthright and candid manner. I find that Gemeinder's version of events was far more credible than Gartmann's and King's.

## D. The Commissions

- 25. Gartmann controlled the level and frequency of trading in Gemeinder's account. (Tr. at 10, 13, 29, 32.) He earned commission income from the trades he placed for the account. (Tr. at 14-16.) Gartmann only placed trades on the account that had been recommended by King (Tr. at 23, 24-25; Cmpl. Ex. E.)
- 26. The first transaction in Gemeinder's account was executed on March 11, 1991. His account generated \$49,286.72 in commissions from March 11, 1991 through March 31, 1992. Gemeinder closed his account on December 21, 1993 with a balance of \$609.88.2/ His account produced approximately \$54,000 in

According to Gemeinder, he withdrew \$1,000 from the account on or about January 12, 1993. (Supplemental Sheet attached to original Complaint; Amd. Cmpl. at 6.)

commissions while it was open. (Cmpl. Ex. A.)

- 27. Trades involving 29 different futures contracts were placed on Gemeinder's account. A review of his account statements reveals a large number of day trades and in-and-out trades. (Cmpl. Ex. A.)
- 28. The respondents offered no explanation for the trades put on Gemeinder's account. I find that Gemeinder's account was traded for the purpose of generating commissions and without regard for his trading objectives.

## E. Correspondence Between Gemeinder and Gartmann

- 29. Gartmann Exhibit 1 is a letter written from Gemeinder to Gartmann, dated October 21, 1991. In the letter, Gemeinder stated that he had lost half of his investment and asked whether he should close his account. (Tr. at 83-84.) Gartmann advised him to continue trading. (Tr. at 90.)
- 30. Complainant's Exhibit G is a letter written from Gemeinder to Gartmann, dated February 25, 1992. In the letter, Gemeinder recalled how Gartmann convinced him to trade with Grandview due to King's success in the championship. (Tr. at 33-34.)
- 31. Complainant's Exhibit H is a letter written from Gemeinder to Gartmann, dated April 9, 1992. In the letter, Gemeinder summarized a telephone conversation in which Gartmann had promised to return Gemeinder's entire investment by the end of June or the beginning of July. (Tr. at 36-37.)
  - 32. Complainant's Exhibit I is a letter written from

Gemeinder to Gartmann, dated August 23, 1993. In the letter, Gemeinder wondered "how a broker who in 1990 was up 438% and was second in the investing championship" could reduce a \$50,000 investment to zero. Gemeinder suspected that "either the 438% [was] manipulated" or the championship account "was not managed" by King. At the end of the letter Gemeinder implored Gartmann to "please tell me soon the entire truth." (Tr. at 40-41.)

33. In July, 1993, Gemeinder and Gartmann had several phone conversations during which Gemeinder discussed filing a complaint with the CFTC. (Amd. Cmpl. at 6; Ans. at 8.) Gartmann discouraged him from doing so and promised that Grandview would pay him \$2,500 per month if he kept his account open. (Tr. at 41, 51-52; Cmpl. Ex. I.)

#### III. DISCUSSION

## A. Fraudulent Solicitation

#### 1. The Pleadings

Gemeinder's amended complaint does not explicitly allege that the respondents violated Section 4b(a) of the Commodity Exchange Act ("Act") by fraudulently soliciting him to open an account at Grandview. Under Commission Rule 12.307(c), an issue "not raised by the pleadings but reasonably within the scope of a formal decisional proceeding" can be considered part of the pleadings provided that the issue is "tried with the express or implied consent of the parties." The parties must also "have adequate

notice and opportunity to address the new matters. "10/

The respondents had adequate notice that the propriety of using the championship standings to solicit funds from Gemeinder would be at issue. In a supplement to his original complaint, Gemeinder explained how Gartmann recommended Grandview on the basis of Grandview's and King's participation in the championship. 11/Paragraphs five and six of his amended complaint discussed how Gartmann used the Championship results to convince Gemeinder that King was an expert trader whose skills would be utilized to trade his account. The results were also attached as exhibits to the amended complaint.

Before any evidence was presented at the hearing, Gemeinder's attorney enumerated all of Gemeinder's claims, including fraudulent solicitation. The respondents stated that they were aware of the fraudulent solicitation allegation. They offered no objection. (Tr. at 6-7.) Their failure to object acted as an implied consent to the trying of the fraudulent solicitation claim. 12/

During the hearing, the respondents had ample opportunity to address the fraudulent solicitation issue. After the hearing, King submitted the "audit" to support his contention that the

Miller v. First Commodity Corp. of Boston, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,577 at 33,518 (CFTC Apr. 21, 1987) (interpreting a prior version of Rule 12.307(c)).

 $<sup>\</sup>frac{11}{2}$  Telefax from Joseph Gemeinder to R. Britt Lenz, filed October 24, 1994.

Horelick v. Murlas Commodities, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,500 at 39,367 n. 6 (CFTC Oct. 2, 1992) (proper to rule on a claim not mentioned in complaint since respondent did not object when claim was raised and litigated).

championship results were accurate.

Based on the foregoing, Gemeinder's amended complaint is deemed to include a claim for fraudulent solicitation in violation of Section 4b(a) of the Act.

## 2. Material Misrepresentations

The solicitation of Gemeinder as a Grandview customer had one purpose: to convert Gemeinder's funds into Grandview proceeds. Gemeinder was an obvious "mark" for Gartmann and King. His previous contacts with Gartmann had led him to believe that Gartmann had "moral integrity." (Tr. at 37; Cmpl. Ex. H.)

Before Gartmann could induce Gemeinder to invest with Grandview, he had to convince him that King was a prosperous trader. 13/ Hence, Gartmann provided him with the U.S. Investing Championship standings, a grandiose embellishment of King's eminence as a trader and his profit-making potential. The standings conveyed the impression that in 1990, King was the second best futures trader in the entire United States and his customers earned a 438% rate of return. This type of information would be material to a reasonable person contemplating an investment. 14/

At the hearing, King abandoned any pretense of trading prowess. He readily disparaged his trading record and repudiated his standing among traders in the United States. He said that he had experienced "bad years, many bad years . . . sometimes [the

 $<sup>\</sup>frac{13}{2}$  Gartmann had just started working at Grandview and thus could not tout his own trading record. (Tr. at 43-44.)

<sup>14/</sup> In re Citadel Trading Co., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,188 (CFTC May 12, 1986).

trading] was horrible." (Tr. at 102.) He conceded that "many other traders . . . have a better performance" and that none of his public customers had enjoyed a 400% rate of return. (Tr. at 66, 103, 106.) Incredibly, he could not even say for certain whether he had a "good year in 1990." (Tr. at 66-67.)

Not surprisingly, Gemeinder was never privy to such a candid description of King's deficiencies. The standings did not have an asterisk by King's name coupled with the notation: "Despite his second place ranking, Michael King does not know whether or not he had a good year in 1990. Many other traders perform better than him. King can be a horrible trader and has had many bad years. His average customers do not earn a 400% return."

The standings brazenly misrepresented King's trading expertise. They also amounted to a guarantee of profitability. Notwithstanding the minuscule disclaimer about past results not being indicative of future performance, the standings would still induce a customer to anticipate a significant return from an investment with King. King's 1990 results were so extraordinary that even if he had an "off year" as compared to 1990, a customer could reasonably expect that it would still be a profitable year. Representations which mislead a customer into thinking that "some profit is inevitable" are fraudulent. 15/

The "audit" submitted by King to substantiate the contest results demonstrates that King's propensity for deception has not

 $<sup>\</sup>frac{15}{}$  Munnell v. Paine Webber Jackson & Curtis, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,313 at 32,863 (CFTC Oct. 8, 1986).

waned since the initiation of this litigation. In a cover letter attached to the "audit," King stated that the "audit" was performed for the trading contest. Yet, the "audit" never mentions the contest. In fact, it was prepared eighteen months after the contest ended.

The auditor did not even correctly spell the name of the person being audited. Throughout the "audit", he referred to King as "J. Micheal King." If something as straightforward as King's name presented a problem for the auditor, one can only cringe when envisioning him examining the detailed financial statements from which he formed an opinion about King's performance record (assuming of course that King actually provided financial statements and that the auditor in fact examined them).

Far from validating his performance in the contest, the "audit" only confirms King's penchant for dissemblance. The "audit" does not alter the conclusion that the contest standings perverted King's trading skills as well as his profit-making potential.

## 3. Scienter

A respondent must act intentionally or recklessly in order to incur liability under Section 4b(a) of the Act. 16/ King knew that on average, his customers did not earn a 438% rate of return in 1990. He was also well aware that he was not in the upper echelon of United States traders. By causing the standings to be sent to

<sup>16/</sup> Hammond v. Smith Barney, Harris Upham & Co., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC Mar. 1, 1990).

Gemeinder, King intentionally created a false impression about his past performance and his status among United States traders. His conduct constitutes a violation of Section 4b(a).

## 4. Accomplice Liability

A respondent is liable as an accomplice if he knew of the other respondent's wrongdoing and intentionally assisted it. 12/ Gartmann knew that the standings were a deception designed to mislead potential customers into thinking that King was a master trader who had achieved astonishing results for his customers. He intentionally assisted in King's deceit by sending the standings to Gemeinder. Gartmann wanted Gemeinder to believe that King could replicate his championship results for Gemeinder. This would lead to Gemeinder investing with Grandview and Gartmann earning commissions as his account executive.

## 5. Proximate Cause and Damages

Gemeinder is entitled to recover the amount of his loss that was proximately caused by King's violation and Gartmann's violation. A violation is the proximate cause of a loss if the violation "was a substantial factor in bringing about" the loss and "the loss was a reasonably probable consequence of [the] respondents' conduct.

In the context of a fraudulent solicitation claim, a

<sup>17/</sup> Korn v. Great American Commodities, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,397 at 39,357 (CFTC Oct. 2, 1992).

<sup>18/</sup> Section 14(a)(1)(A) of the Act.

Sansom Refining Co. v. Drexel Burnham Lambert, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) 24,596 at 36,562 (CFTC Feb. 16, 1990).

misrepresentation would be a "substantial factor" in bringing about a loss if it had a significant influence on the complainant's decision to invest. In this case, Gemeinder only agreed to invest with Grandview after receiving assurances that King's expertise would be utilized to trade his account. The championship standings were the reason that Gemeinder had such a high regard for King's trading skills. (Tr. at 33, 79; Cmpl. Ex. G.) Thus, they were a substantial factor in Gemeinder's decision to invest with Grandview.

The second element of proximate cause is the requirement that the complainant's damages be a reasonably probable consequence of the respondents' involving fraudulent conduct. In cases solicitation, the Commission's examination of this requirement has focused on whether it was justifiable (or reasonable), under the circumstances, for the complainant to initially rely on the misrepresentation, and then continue to rely the misrepresentation throughout the period in which he incurred losses. 20/

Gemeinder had no reason to initially question the validity of the standings. There was nothing on the face of the standings which would have caused him to doubt that King was a masterful trader who had generated a 438% return for his customers in 1990.

Muniz v. Lassila, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) 525,225 at 38,651 (CFTC Jan. 17, 1992). Justifiable reliance provides "some objective corroboration" to the customer's contention that he did in fact rely on the misrepresentation. W. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER AND KEETON ON THE LAW OF TORTS § 108 at 749-750 (5th ed. 1984). "In some sense, it merely restates the requirement that the [misrepresentation] actually cause the injury." Indosuez Carr Futures, Inc. v. CFTC, 27 F.3d. 1260, 1265 (7th Cir. 1994).

Furthermore, Gartmann had vouched for King's trading skills and Gemeinder trusted Gartmann because of their past dealings. (Tr. at 36-37, 41; Cmpl. Exs. H and I.)

After one year of trading, Gemeinder could assess the correlation between King's 1990 championship performance record and King's one-year performance record for Gemeinder's account. On March 31, 1992, one year after Gemeinder had started trading, his account had a balance of \$2,479.85. This figure should have convinced Gemeinder that the championship standings did not accurately reflect King's trading expertise. Gemeinder's continued reliance on the validity of the standings beyond March 31, 1992 was unjustifiable. 21/

Gemeinder lost \$47,520.85 in his first year of trading. Gartmann and King are responsible for that loss. Grandview is also liable for the loss under Section 2(a)(1)(A)(iii) of the Act. $\frac{22}{}$ 

## B. The Risk Disclosure Statement

Gemeinder alleged that the respondents violated the law by failing to provide him with German language risk disclosure statements. There are no provisions in the Act or in the Commission Regulations which mandate that risk disclosure statements be written in the primary language of the investor. If

<sup>21/</sup> See Lassila, at 38,651 (doubtful that complainant continued to be influenced by fraudulent solicitation after he became aware of the disparity between the predicted results for a certain time period and the actual results for that period)

<sup>22/ \*</sup>Both King and Gartmann [were] agents of Respondent Grandview. \* Respondents' Pre-Hearing Memorandum at 2.

Gemeinder's allegation is cognizable, then it would have to be under Section 4b(a) of the Act for failure to disclose all material information about the risk of loss in commodity futures contracts. The argument would be that Gemeinder's risk disclosure statements did not actually disclose any risk since Gemeinder could not understand written English. 23/

This decision will not address whether the respondents' failure to provide German language risk disclosure statements violated Section 4b(a). Even if it were a violation, it would not have been the proximate cause of Gemeinder's loss. German language risk disclosure statements would not have alerted Gemeinder to the fraudulent nature of the championship standings.

## C. Churning

#### 1. Control

Gemeinder signed trading authorization forms which gave Gartmann control over the level and frequency of trading in his account. Gartmann, however, shared control of the account with King. King determined which orders would be placed; Gartmann wrote all of the order tickets.

## 2. Excessive Trading

In one year of trading, Gartmann and King generated commissions which almost equaled Gemeinder's \$50,000 investment. Their "pattern" of trading can best be characterized as indiscriminate. Each month, they traded a new concoction of

<sup>23/</sup> See Wang v. Trans-American Commodity Corp., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,651 at 30,755 (ALJ Jul. 1, 1985) (English language risk disclosure statements provided to complainant who could only read Chinese).

options and futures contracts. Their trades involved twenty-nine different contracts. Many of the positions they put on were liquidated that same day or soon thereafter, and then reestablished.

The striking amount of commissions generated by King and Gartmann, combined with their haphazard manner of trading and their failure to offer a rationale for that trading, leads to the conclusion that King and Gartmann intentionally churned Gemeinder's account. 24/ Grandview is liable for their conduct under Section 2(a)(1)(A)(iii).

Gemeinder is entitled to recover his out-of-pocket loss. $\frac{25}{}$ This amount comes to \$48,390.12.

## D. Affirmative Defenses

#### 1. Statute of Limitations

The settlement agreement permitted Gemeinder to re-open his complaint if the respondents failed to make any of the required payments within ten days of a scheduled payment date. Gemeinder had this right "notwithstanding any then applicable defense based on any applicable statute of limitations." (Settlement Agreement at 2-3.) When Gemeinder re-opened his complaint, the statute of limitations defense already raised in the respondents' answer was

<sup>24/</sup> In order to prevail on a churning claim, a complainant must establish that a respondent acted intentionally or with a reckless disregard for the complainant's interest. The respondent's state of mind will usually be evident from the nature of the trading. Evanston Bank v. ContiCommodity Services, Inc., 623 F. Supp. 1014, 1024 (N.D. Ill. 1985).

<sup>25/</sup> Stiller v. Shearson, Loeb, Rhoades, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,789 at 27,155 (CFTC Jul. 11, 1983).

the "then applicable" defense. Under the terms of the settlement agreement, this defense could not be used to thwart an adjudication of the merits of Gemeinder's complaint.

2. Waiver, Estoppel, Ratification, Failure to Mitigate

The respondents asserted a number of affirmative defenses in a boiler plate fashion. (Ans. at 12.) They offered no evidence to support these defenses. $\frac{26}{}$ 

#### IV. CONCLUSIONS OF LAW

- 1. King violated Section 4b(a) of the Act by fraudulently soliciting Gemeinder to invest with Grandview.
- 2. Gartmann aided and abetted King's fraudulent solicitation in violation of Section 13(a) of the Act.
- 3. Both King and Gartmann churned Gemeinder's account in violation of Section 4b(a) of the Act.
- 4. Grandview is liable for the illegal acts of King and Gartmann under Section 2(a)(1)(A)(iii) of the Act.

## ORDER

1. Respondents Grandview, King, and Gartmann are ordered to pay \$48,390.12 in damages to Gemeinder plus accrued interest and the \$250 filing fee. The interest rate shall be 5.55% and the accrued interest shall be calculated from December 21, 1993 (the

<sup>26/ &</sup>quot;Ratification and estoppel [have] limited practical utility as defenses" to churning. Lehman v. Madda Trading Co., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) 22,417 at 29,869 (CFTC Nov. 13, 1984). They are "generally [not] applicable in the context of fraudulent inducement." Munnell v. Paine Webber Jackson & Curtis, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) 23,313 at 32,863 (CFTC Oct. 8, 1986).

day Gemeinder closed his account) to the date of payment.

2. The respondents are jointly and severally liable for the payment of Gemeinder's monetary award.

Issued May 30, 1997

George H. Painter

Administrative Law Judge

Attorney-Advisor: Anthony Saler