

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

TERRY KOROUS,

Complainant,

v.

CFTC Docket No. 01-R077

**RICHARD BRIAN BERTSCHE,
RICHARD HALL FITZGERALD, II,
PETER FRANCIS RONDONI,
and TOP STEP TRADING, INC.**

Respondents.

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DISMISSAL ON SETTLEMENT
and
DEFAULT AWARD

Complainant Terry Korous filed the instant reparations action against Respondents Richard Hall Fitzgerald, II, Richard Brian Bertsche, Top Step Trading, Inc., and Peter Francis Rondoni on or about 5 July 2001. The allegations included, *inter alia*, unauthorized trading and churning. Only Respondent Fitzgerald answered the Complaint.

By motion dated 28 June 2002¹, Complainant moved the Court for a dismissal on settlement with respect to Respondent Fitzgerald, and for a default award against Respondents Bertsche, Rondoni, and Top Step Trading. The matter is now ripe for decision.

Dismissal on Settlement

Complainant and Respondent Fitzgerald have reached a settlement agreement and have submitted a Stipulation to Dismiss with Prejudice.²

¹ Complainant's Motion for Entry of Default Award.

² Dated 11 June 2002.

The Court is informed that Fitzgerald shall pay Complainant nineteen thousand five hundred dollars (\$19,500)³ as part of the settlement agreement.

Accordingly, the Complaint against Respondent Richard Hall Fitzgerald, II, is hereby **DISMISSED WITH PREJUDICE**.

Default Award

Because Respondents Bertsche, Rondoni, and Top Step Trading failed to answer the Complaint, they are in **DEFAULT**, and the allegations against them are deemed admitted.⁴

Complainant's motion for a default award claims that the "total amount" of "damages suffered by Complainant" is \$75,343.⁵ As detailed in Complainant's Summary of Account Activity and Losses,⁶ this "total amount" reflects losses incurred in two separate accounts.⁷ The accounts, No. 1 and No. 2, suffered losses of \$58,334 and \$17,009, respectively.

The original Complaint was based *only on the losses suffered in account No. 1*.⁸ Complainant's motion for default award, therefore, is flawed in that it claims an additional \$17,009 in damages not previously asserted. A complaint may be amended only by leave of the Court, and only after filing of the appropriate motion. Complainant's last-minute attempt to claim new damages fails on both timeliness and procedural grounds. A motion for default judgment is not the appropriate instrument (or time) by which to amend a complaint filed almost one year ago.

Accordingly, we calculate Complainant's award based only on the losses suffered in account No. 1 (\$58,834), less his settlement with Respondent Fitzgerald (\$19,500).

³ Complainant's Motion for Entry of Default Award at ¶ 3.

⁴ Reparation Rule 12.22(a), 17 C.F.R. § 12.22(a).

⁵ Motion for Entry of Default Award at ¶ 4.

⁶ In the Supplemental and Amended Affidavit of Terry Korous, attached to the Motion for Entry of Default Award as Exhibit A.

⁷ Complainant claims he transferred approximately \$18,000 to Respondents, thinking it would be placed in his original account, No. 1, and that the funds were instead placed in a second trading account, No. 2, without his knowledge. Motion for Default Award at ¶ 4.

⁸ The account was "discovered by Complainant as he prepared for trial in this matter." Motion for Entry of Default Award at ¶ 4.

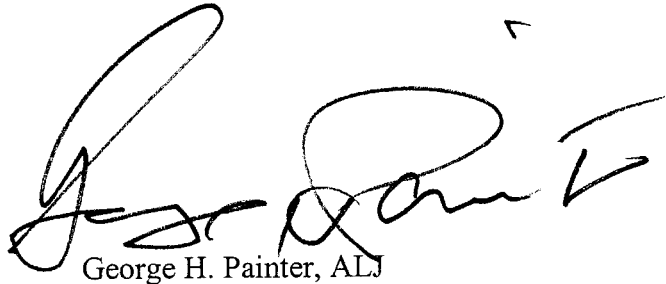
Although we will not now credit Complainant's new assertions, we make no judgment as to their merits. Complainant is free to file a new reparations claim over the handling of the funds in account No. 2.

ORDER

Respondents Richard Brian Bertsche, Peter Francis Rondoni, and Top Step Trading, Inc., are in **DEFAULT**. They are **ORDERED** to pay Complainant Terry Korous the sum **Thirty-eight Thousand Eight Hundred and Thirty-four Dollars** (\$38,834), plus interest at the rate of 2.10 % per annum, calculated from 2 February 1999 to the date this award is paid. Respondents Bertsche, Rondoni, and Top Step Trading are jointly and severally liable for payment of this judgment.

SO ORDERED,

this 3rd day of July 2002,



George H. Painter, ALJ