

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

JOSEPH ZEMEN,
Complainant,

v.

CONCORDE TRADING GROUP, INC.,
ALLAN S. ADER,
ALLAN KANTER, and
KENNETH LEE VOSS,
Respondents.

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CFTC Docket No. 01-R86

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COMMERCIAL

INITIAL DECISION

Introduction

Joseph Zemen claims that a succession of four Concorde Trading Group associated persons – Darryl Cox, Kenneth Voss, Allan Kanter and Allan Ader-- defrauded him out of \$29,646. Zemen alleges that Darryl Cox fraudulently induced him to open an account with Concorde by guaranteeing profits, by falsely representing that his customers had consistently realized tremendous profits, by failing to accurately disclose the commissions charged by Concorde, and by falsely promising to closely monitor Zemen's account and to advise him whenever a trade had gained or lost more than fifteen to twenty percent. Zemen also alleges that Cox convinced him to purchase more options and send in more funds by falsely reporting that his open trades were making money.

Three weeks after the account had been opened, Concorde terminated Cox without notifying Zemen. Only after Zemen persistently and repeatedly complained to Concorde employees that Cox had not returned his calls, did he receive a call from

Kenneth Voss, Cox's co-broker in Concorde's Costa Mesa office. According to Zemen, Voss concealed and compounded Cox's fraud by advising Zemen that his trades were profitable, when in reality the options were nearing expiration and had lost nearly half of their value.

A few days after this conversation with Voss, Concorde would close its Costa Mesa office and terminate Voss, again without informing Zemen. For another two weeks, Concorde employees gave Zemen the runaround before Allan Kanter told him that Concorde had transferred Zemen's account to the Aventura office, where Kanter and Allan Ader were senior co-brokers. Zemen alleges that Kanter and Ader concealed and compounded Cox's and Voss's deceptions, and fraudulently induced Zemen into more high risk trades, by disregarding and deflecting his complaints about Cox and Voss, by misrepresenting and exaggerating their trading experience, and by falsely promising to recoup his losses.

Concord, Voss, Kanter and Ader filed answers generally denying the allegations, and asserting that Concorde's written risk disclosures and account-opening "compliance review" made Zemen "fully aware" of the risks and costs of trading options with respondents.¹ Cox did not file an answer and was found in default by Order dated October 5, 2001.

¹ Initially, Ader had failed to file an answer and was found in default, along with Cox. By Order dated December 13, 2001, Ader's default was vacated, notwithstanding the disingenuous representations in his motion to vacate the default. (See Order dated October 11, 2001.)

After reviewing the parties' documentary submissions and oral testimony,² it has been concluded that the weight of the evidence establishes that Cox, Voss, Kanter and Ader violated Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10; and that Concorde is liable for the violations of Cox, Voss, Kanter and Ader pursuant to Section 2(a)(1)(A) of the Act. All of Zemen's \$29,595 in out-of-pocket losses are attributable to the violations by Concorde, Cox, Kanter and Ader. \$22,753 of this amount is attributable to the violation by Voss. These conclusions reflect the determination that Voss, Kanter and Ader each produced testimony that was generally unconvincing and unreliable. Voss gave particularly evasive and inconsistent testimony concerning his knowledge of the circumstances around Concorde's termination of Cox. Kanter and Ader purported to recall nothing about their conversations with Zemen or about the basis of their trade recommendations. In contrast, Zemen's testimony was generally more forthright, and significantly more believable, when evaluated in light of the surrounding circumstances.

Factual Findings

The Parties

1. Joseph Zemen, a 45 year-old resident of Whiting, Indiana, is a self-employed petrochemical consultant, with a bachelor's degree in industrial chemical engineering. At the relevant time, Zemen had an annual income of about \$100,000, and a liquid net worth of about \$300,000. Zemen's testimony established that he is an articulate, intelligent and

² Zemen's principal documentary submissions included his protest letter to Concorde Trading Group dated December 7, 2000, and the factual description to the complaint, dated August 3, 2001. Little weight has been accorded a declaration by Zemen dated April 20, 2001, that was prepared with the assistance of the CFTC Division of Enforcement and that confused the sequence of orders. In contrast, the factual recitations in Zemen's protest letter, complaint and oral testimony, prepared without the input of any third parties, were more chronologically accurate.

responsible individual. However, before opening his account with respondents, he had no experience with futures or options, and had only limited experience with stocks. At the time that Zemen opened his Concorde account, in December 1999, he was looking for an investment with a reasonable likelihood of a “slightly better” return than the stock market. Zemen also was generally aware that an investment with a higher potential return would have a corresponding higher risk of loss. [See pages 6-9 of hearing transcript; Zemen’s resume (produced December 28, 2001); and account application (produced by Vision Limited Partnership on October 22, 2001).]

2. Concorde Trading Group, Incorporated, which introduced Zemen’s account, was a registered introducing broker from March 1988 until May 21, 2002, with its principal place of business in Aventura, Florida. Arthur John Schlecht, Peter Heinz Rukrigl, and Dennis Richard Gee were the registered principals of Concorde. Concorde has been sanctioned for systemic fraudulent sales practices in three National Futures Association disciplinary actions,³ and one CFTC injunctive action.⁴ Also, Concorde has been named as a respondent in 108 reparations cases, most of which have involved allegations of fraudulent sales and trading practices. [CFTC and NFA records.]

Recently, in this and several other reparations cases, Concorde entered into and then breached settlement agreements. In the instant case, Concorde’s refusal to explain its breach supports the conclusion that when Concorde convinced Zemen to enter into a

³ *In re Concorde Trading Group, et al.*, 92-BCC-20, Decision Accepting Settlement Offer (NFA March 5, 1993) (\$25,000 fine and enhanced supervisory procedures); *In re Concorde Trading Group, et al.*, 95-BCC-5, Decision Accepting Settlement Offer (NFA October 14, 1998) (\$120,000 fine and enhanced supervisory procedures); *In re Concorde Trading Group, et al.*, 01-BCC-14, Decision Accepting Settlement Offer (NFA May 21, 2002) (termination of registration).

⁴*In re Concorde Trading Group, et al.*, Civ. 93-1567, Consent Order of Permanent Injunction (S.D. Florida July 19, 1996) (\$1.5 million restitution and enhanced supervisory procedures).

settlement agreement on the eve of the scheduled hearing, it did so in bad faith with the intention to delay and disrupt this proceeding. [See Notice dated February 25, 2002.]

Concorde principally compensated its account executives and branch office managers with a percentage of the commissions collected from its customers. In this connection, Concorde charged commissions based on the number of contracts traded, and Concorde's research department favored recommendations to trade cheaper out-of-the-money options. Thus, as described below, Concorde provided the motivation and the means for its account executives to recommend trading strategies designed to maximize commission income to the detriment of their customers. Here, Cox, Kanter and Ader would maximize their commission income to the detriment of Zemen's account by recommending the purchase of multiple, cheaper, out-of-the-money options. Out of the \$10,545 in commissions and fees that was charged to Zemen's account, \$780 was retained by the carrying broker Vision Limited Partnership; \$5,669 was paid to Concorde; \$2,710 was paid to Cox; \$928 was paid to Kanter; and \$468 was paid to Ader.⁵ Voss did not receive any share of the commissions. [Rukrigl affidavit.]

3. Darryl Sylvester Cox, a California resident, was a registered associated person with Concorde from August 3, 1999 to December 27, 1999, and worked in Concorde's Costa Mesa, California branch office. Before working for Concorde, Cox had been an associated person with American National Trading Corporation, Madison Financial, and Newell Discount. Cox is currently not registered. [NFA records; and Rukrigl affidavit.]

In the five months that he worked for Concorde, Cox opened and managed 23 accounts, none of which realized overall net profits. These accounts realized a total of

⁵ The commissions and fees resulted in a commission-to-investment ratio of about 34%, with commission-to-premium-paid ratios of about 34% for the trades recommended by Cox, 34% for the trades recommended by Kanter, and about 33% for the trades recommended by Ader.

\$297,378 in net losses, and generated \$139,753 in commissions and fees. [Vision Limited Partnership “Year-to-Date Profit-Loss Summary Report” dated December 31, 1999 (produced October 21, 2001).]

As described in the findings below, Cox would solicit the Zemen account, and would act as Zemen’s account executive from December 2, to December 20, 1999. Cox would convince Zemen to deposit a total of \$25,773, and would recommend the first four trades in the Zemen account. These trades all involved the purchase and sale of substantially out-of-the-money February heating oil calls and substantially out-of-the-money February and March coffee calls. The heating oil calls would be sold for a loss on January 13, 2000; and the coffee calls would expire worthless on January 18, 2000. The trades recommended by Cox would realize an aggregate net loss of \$22,753, and would generate \$6,021 in commissions and fees.

4. Kenneth Lee Voss, a California resident, was a registered associated person with Concorde from August 3, 1999 to December 27, 1999, and worked with Cox in Concorde’s Costa Mesa, California branch office. Voss was subsequently registered with U.S. Options Corporation and American National Trading Corporation, and is currently registered with Secure American Trading LLC. [NFA records; Rukrigl Affidavit.]

As described in the findings below, on or about December 30, 1999, after Concorde had terminated Cox, Voss would advise Zemen that that he “should not worry” about his account because his trades were doing “fine,” when in reality all of the coffee and heating oil calls had sufficiently declined to wipe out almost half of Zemen’s \$25,773 investment. A couple of weeks later, the coffee options would expire worthless, and the

heating oil options would be sold. Had Zemen liquidated the account when he spoke to Voss on December 30, 1999, he could have reduced his losses by about \$10,069.

5. Allan Kanter and Allan Ader worked as co-brokers in Concorde's Aventura, Florida office. Allan Kanter, a Florida resident, was a registered associated person with Concorde from February 1991 to June 2001. Before working for Concorde, Kanter had been a registered associated person with Chicago Commodity Corporation, Churchill Group, Incorporated, Grandview Holding Corporation, First Sierra Corporation, The Winner Group, Incorporated, and Trinity Financial, Incorporated. All of these firms have been closed down and permanently barred from the industry by the NFA or the CFTC for sales practice fraud.⁶ Kanter is currently a registered associated person with Trading Corporation of America. [NFA records.]

Allan Steven Ader, also a Florida resident, was a registered associated person with Concorde from January 1999 to July 2000. Before working for Concorde, Ader was a registered associated person with Commonwealth Financial Group for five years. Commonwealth also was closed down and permanently barred from the industry for sales practice fraud. In connection with his employment by Commonwealth, the National Futures Association found that Ader had engaged in fraudulent sales practices, and imposed a \$10,000 fine and an 18-month suspension of his registration.⁷ Ader also has been named as a respondent in 27 CFTC reparations cases, many of which involved allegations that Ader had falsely represented that he was a successful stock index options

⁶ Also, these firms were named in a total of 155 reparations complaints, most involving claims of fraudulent sales and trading practices. [CFTC and NFA records.]

⁷ *In re Commonwealth Financial Group, Inc., et al.*, 94-BCC-13 (NFA BCC April 4, 1997); *affirmed sub nom. Commonwealth Financial Group, Inc. v. National Futures Association*, [1996-1998 Transfer Binder] Com. Fut. L. Rep. (CCH) ¶ 26,993 (CFTC March 18, 1997).

trader who specialized in recouping losses.⁸ Ader is currently registered with Executive Commodity Corporation. [NFA records.]

Kanter and Ader both routinely recommended to their customers trades selected by Concorde's research department, which was headed by Ader. In these circumstances, it is not unreasonable to conclude that Kanter and Ader knew in January and February 2000 that the heating oil and coffee calls that Zemen had traded on Cox's recommendation had never been profitable in December 1999. Thus, when Zemen informed Kanter and Ader that he had received reports from Cox and Voss that his heating oil and coffee calls had been profitable throughout December, Kanter and Ader both possessed sufficient knowledge to understand that Cox and Voss had deceived Zemen.

In early January 2000, after Concorde closed its Costa Mesa office and terminated Voss, it would transfer Zemen's account to Kanter and Ader at Concorde's Aventura office. As discussed in the findings below, Kanter and Ader would disregard the fact that Cox and Voss had misled Zemen about the liquidation value of the heating oil and coffee options, and would promise Zemen that they would recoup his losses if he continued to trade with them. Kanter would recommend the purchase of substantially out-of-the-money soy meal and heating oil call options that would realize a total net profit of \$547, and would generate \$1,939 in commissions. Ader would recommend the purchase of substantially out-of-the-money S&P index call options that would realize a total net loss of \$6,885, and would generate \$2,585 in commissions and fees. Thus, the trades recommended by Kanter and Ader would realize an aggregate net loss of \$6,338, and would generate an aggregate of \$4,524 in commissions and fees.

⁸ Thus, Ader was named in over 20% of the 125 reparations complaints brought against Commonwealth.

Cox solicits and begins trading the Zemen account

6. Respondents have not produced the testimony of anyone with first-hand knowledge of Cox's dealings with Zemen. Accordingly, the findings concerning Cox's conduct are based on Zemen's credible oral and written descriptions, as well as the tape-recorded trade authorizations conducted by Cox.

In late November or early December 1999, Cox cold-called Zemen. Although Cox never expressly used the word guarantee, he purposefully created the unmistakable, but utterly false, impression that Cox and Concorde's research department would consistently select trades that were certain to generate tremendous profits with little downside risk. Cox told Zemen that commodity options were a "better investment" than stocks, that Concorde had one of the best research departments in the industry, and that his customers typically had been tripling and quadrupling their investments. Cox did not mention any customers who had lost money, and did not remotely allude to the fact that all of his customers, and almost all of Concorde's customers, had actually lost money. Cox did not meaningfully explain the mechanics of trading options. For example, he never discussed concepts like break-even price and out-of-the-money options. Cox also deceptively gave Zemen the impression that Concorde would charge a \$195 commission per trade, when Concorde actually charged \$195 per option contract.⁹ In this connection, Cox also did not explain that he would be recommending high-risk trading strategies that

⁹In doing so, Cox took advantage of the fact that the Concorde "Commodity Options Fee Rider" provided a less than clear disclosure of the commissions and fees. In contrast to the unambiguous disclosure that Concorde would charge a \$195 commission "per futures contract" (underling added for emphasis), Concorde's options disclosure interchangeably used terms like "options transaction," "options position," "option," and "flat fee," none of which clearly indicated that the \$195 commission would be charged per option contract. This ambiguity would be perpetuated during Concorde's cursory account-opening "compliance review," and each time that Cox, Kanter and Ader recommended trades and obtained Zemen's authorization.

generated burdensome commission charges through the purchase of substantially out-of-the-money options.

Zemen was initially skeptical of Cox's claims, because before they spoke Zemen had assumed that greater profit potential and greater risks typically go hand in hand. However, Cox overcame Zemen's skepticism by repeatedly insisting that he and Concorde's research department had been consistently picking trades that made huge profits for their customers. Cox also downplayed the risk warnings in the account-opening documents¹⁰ and in the tape-recorded account-opening "compliance" review as mere formalities to be disposed of before Zemen would begin reaping the triple and quadruple profits on the trades selected by the Concorde research department. Thus, Zemen eventually concluded that Cox actually had been making big profits for all of his customers. However, Zemen still stressed to Cox that he would be relying on him to closely monitor the account, and obtained Cox's promise to advise him whenever a trade had lost or gained fifteen to twenty percent, so that he could decide whether or not to limit a loss or to capture a profit. Zemen then signed the account-opening documents and deposited \$5,000. Zemen eventually would deposit a total of \$30,773.¹¹ [See pages 9-42 of hearing transcript; pages 1-3 of "Complaint Summary"; Zemen's letter to Arthur Schlecht dated December 7, 2000 (exhibit to complaint); paragraph b of Rukrigl affidavit; and pages 2-4 of Concorde's and Kanter's joint answer.]

¹⁰ Respondents produced the following account-opening documents signed by Zemen: (1) a Vision Limited account application and customer contract, including a signed acknowledgment that Zemen had received a standard CFTC rule 1.55 futures risk disclosure statement; (2) a Concorde "For Our Mutual Protection" disclosure that featured specific warnings, required by the NFA consent orders, such as that the risk of loss could not "necessarily" be reduced by diversification and stop-loss orders; and (3) a Concorde "Commodity Options Fee Rider."

¹¹ Zemen would deposit \$5,000 on December 3, \$13,800 on December 9, \$5,000 on December 21, \$1,970 on December 30, and \$5,000 on February 7. On February 29, Vision would refund the \$1,127 account balance.

7. Concorde conducted a cursory account-opening compliance review that consisted of questions formatted for yes or no answers and that appears to have been designed to gloss over, rather than cure or detect, the sort of omissions and misrepresentations made by Cox, Kanter and Ader. For example, although Zemen was asked if Cox had adequately explained the risks and whether Cox had “guaranteed” profits, he was not asked to describe what Cox had specifically said about the relative risks and rewards of trading with him and Concorde. Nor was Zemen asked to describe his understanding of those risks and rewards. Also, as noted above, the commission charge of \$195 per option contract was not clearly disclosed.

8. For the first trade, Cox told Zemen that Concorde’s research department expected conditions in the Middle East to limit supply and thus cause the price of heating oil to “take off,” and Cox recommended that Zemen purchase ten substantially out-of-the-money February heating oil 7100 call options.¹² During the taped trade authorization for this trade, Cox said that the commission for the trade would be \$195, but did not say that the total commissions would be \$1,950, did not state the amount of the premium, and did not state the total cost of \$11,076, which considerably exceeded the \$5,000 that Zemen had initially deposited. Cox mentioned that the options were “out-of-the-money.” However, Cox did not define that term, and did not explain why he had selected substantially out-of-the-money options over available in-the-money options.

On December 7 -- before Zemen had received the written confirmation statement that reported that he had actually paid \$1,950, rather than \$195, in commissions – Cox told Zemen that the February heating oil calls had increased by \$2,500. Actually, that day the highest price at which Zemen’s February heating oil call traded was 20 points

¹² On December 3, 1999, the February heating oil future stood at 6526.

below the purchase price of the options.¹³ When Zemen asked Cox if he should sell the heating oil calls in order to capture the purported profit, Cox convinced him to hold by promising even greater profits. Cox also said that drought conditions were driving up the price of coffee, and that Cox's other customers were "making a killing" on coffee options. Zemen then approved Cox's recommendation to buy February coffee calls, and agreed to send in an additional \$13,800, to cover the cost of the coffee trade as well as the balance of the cost of the heating oil trade. During the taped trade authorization for this coffee trade, Cox said that the commission would be \$195, but again did not state that the total commissions would be \$975, did not state the amount of the premium, and did not provide the total cost of \$7,638. As with all of respondents' tape-recorded trade authorizations, Cox mentioned that the options were "out-of-the-money," but did not explain the significance of that term.

When Zemen received the first confirmation statement that reported the \$1,950 commission charge, he called Cox to complain that he had understood that the commission would only be \$195. Cox told Zemen that he was sure that he had accurately disclosed the commissions and apologized for any confusion. Moreover, Cox assured, the heating oil and coffee options had already recouped the cost of the commissions, and would soon reap such huge profits as to justify, and render irrelevant, the amount of the commissions.

On December 15, 16, 17 and 20, all of Zemen's options were trading below their purchase price or their break-even price. However, on each of these dates, Cox falsely represented that the open option positions in Zemen's account were profitable, and thus convinced Zemen to approve additional trades, and to deposit an additional \$6,973.

¹³ Price information provided by CFTC Division of Economic Analysis from exchange data bases.

On January 13, 2000, Zemen would sell the heating oil options; and on January 18, 2000, the coffee options would expire worthless. The trades recommended by Cox would realize an aggregate net loss of \$22,753, and generate \$6,021 in commissions and fees. [See pages 9-35 of hearing transcript.]

Voss "updates" Zemen

9. With the exception of Voss's unconvincing testimony, respondents have not produced any evidence about the handling of Zemen's account between December 20, 1999 and January 13, 2000. Accordingly, the findings concerning this period are based on Zemen's credible oral and written descriptions.

December 20, 1999, would be the last time that Zemen spoke to Cox, because soon afterwards Concorde terminated Cox. Subsequently, for the next three weeks, Concorde and its employees would: one, delay notifying Zemen of Cox's termination; two, conceal the reasons for Cox's termination; three, disregard his demands that Concorde designate a new account executive; four, misrepresent the status of Zemen's trades; five, delay informing Zemen that Concorde had closed its Costa Mesa office and transferred his account to the Aventura office; six, deflect his protests about Concorde's failure to provide a reliable broker after it had terminated Cox and after it had closed the Costa Mesa office; and seven, disregard the fact that Cox and Voss had repeatedly misled Zemen into believing that his heating oil and coffee trades had been in profits.

On December 21, 22 and 23, Zemen called Concorde and left messages for Cox, but no one at Concorde told him that Cox was gone or offered to have another broker speak to him. Not until the next week – on December 27 – would a Concorde employee finally reveal to Zemen that Cox no longer worked at Concorde. Cox then requested that

Concorde assign a new broker to his account, and was forced to repeat the request several more times on December 28, 29, and 30, before his call was transferred to Voss, who offered an “update” on the account.¹⁴

On December 30, all of the heating oil and coffee options were trading well below the purchase price, and the account liquidation value had declined to \$13,638. Thus, Zemen had lost almost half of his investment, and the trading losses had far exceeded the 15%-20% loss threshold that he had discussed with Cox. Also, by December 30, Voss had heard office “rumors” that Cox had been terminated because his dealings with his customers had been less than “totally kosher,” and Voss had been told by his supervisor, Craig Wiginton, that Zemen had been trying for several days to reach Cox and then had been insisting on speaking to a new Concorde broker.

Voss, Zemen credibly testified, did confirm that Cox had left Concorde, but did not otherwise discuss the circumstances around Cox’s departure. Also, Voss neither asked about what Cox had said to Zemen, nor asked about Zemen’s trading objectives. However, Zemen, on his own initiative, told Voss that he had been frustrated by Concorde’s failure to provide a reliable broker for over a week, because he had been relying on Cox to closely monitor the account and to notify him if losses or profits on a trade had exceeded fifteen to twenty percent. Zemen also informed Voss that Cox had reported that all of his trades were profitable. In response, Voss did not provide the specific liquidating value for the open trades and did not inform Zemen that the losses on all of his trades had already far exceeded twenty percent. Rather, Voss essentially

¹⁴ The precise date of this conversation cannot be determined. Zemen and Voss both testified that they spoke one time – either just before or just after the New Years holiday -- but could not recall the precise date. In this connection, Voss testified that right after he spoke to Zemen he left on vacation, and that he did not learn until he returned from vacation that Concorde had closed the Costa Mesa office and had terminated him.

advised Zemen to hold the options and strongly implied that the trades were profitable by reassuring Zemen that he “should not worry about his account” because the trades were “doing fine.” Voss also told Zemen that either he or another Concorde broker would stay in touch with him.

Zemen credibly testified that if Voss had given him fair and accurate information about the deteriorating value of the trades, he would have immediately liquidated the account. Had Zemen liquidated the account on December 30, 1999, he could have reduced his losses by about \$10,069.¹⁵ [See pages 35-40 and 43-55 of hearing transcript.]

10. Soon afterwards, without notifying Zemen, Concorde terminated Voss, closed the Costa Mesa office, and transferred the Zemen account to Allan Kanter and Allan Ader in its Aventura office.

Kanter and Ader promise to recoup Zemen's losses

11. For the first two weeks in January 2000, Zemen called Concorde's California branch office, and then Concorde's headquarters office in Florida, but could not get a straight answer about a new broker or about the status of his trades. Meanwhile, the coffee options had declined to shelf value (and would expire worthless a few days later). Finally, on January 13, 2000, when Zemen called, he was referred to Kanter, who revealed that Zemen's account had been transferred to the Aventura office. Zemen told Kanter that he had been relying on Cox to advise him of any 20% loss or gain. Zemen also told Kanter that he was upset that Concorde had not given him timely or accurate information about the termination of Cox, about the closing of its California office or about the status of his account, and as a result he assumed that he had probably missed

¹⁵ \$10,069 represents the difference between the \$13,639 account liquidation value on December 30, 1999, and the \$3,570 premium collected on January 13, 2000, when Zemen sold the heating oil options.

out on the profits reported by Cox and Voss and supposedly enjoyed by Concorde's other better-serviced customers.

In reply, Kanter acknowledged that Concorde should have acted quicker in assigning a new broker, but disregarded the fact that Cox and Voss had obviously misled Zemen with false reports that the heating oil and coffee trades had been profitable. Rather, Kanter told Zemen that he could "only look ahead," and that he should trust Kanter, because Kanter had been in the business "over twenty years" and would help Zemen recoup his losses with additional trades. Kanter then advised Zemen to sell the February heating oil calls because they were "going nowhere," and to buy four substantially out-of-the-money July soy meal 170 call options, because soybeans were going to "take off."¹⁶ A few days later, on February 1, after the February heating oil calls had briefly spiked up, Zemen complained to Kanter about the missed opportunity, and Kanter recommended that Zemen buy an April heating oil call, liquidate the July soy meal 170 calls, and short four July soybean 185 calls. The trades recommended by Kanter, all involving substantially out-of-the-money options, would realize an overall net profit of \$547, and generate \$1,939 in commissions. [See pages 56-80 of hearing transcript.]

12. On February 3, Zemen called Concorde and was told that Kanter was out of the office, but that Kanter's co-broker, Allan Ader, was available to help him. Zemen repeated to Ader what he had told Kanter, *i.e.*, that he assumed that he had been denied an opportunity to capture the profits reported by Cox and Voss, because Concorde had mishandled his account after it had terminated Cox and after it had closed the Costa Mesa

¹⁶ On January 13, 2000, the July soy meal future stood at 155.

office. Zemen expressed similar disenchantment about the lost opportunity with the heating oil.

In reply, Ader agreed that mistakes had been made that had prevented Zemen from enjoying the prowess of Concorde's research department. However, like Kanter, Ader disregarded the fact that Cox and Voss had falsely reported the liquidation value of the heating oil and coffee calls. Rather, Ader promised to recoup Zemen's losses and that there would be no more mistakes because he was the head of Concorde's research department and had over ten years of experience. Ader told Zemen that the stock index options were "hot" and that if he wanted to recoup his losses more quickly, he should buy March S&P index options -- again substantially out-of-the-money -- and fund the purchase by selling the soybean options purchased a few days earlier and by sending in more money. Zemen approved the recommended trades, and deposited another \$5,000. The options recommended by Ader would generate \$2,585 in commissions and fees, and would be stopped out a few days later, for \$6,885 in losses. Zemen then closed his account.

13. After he closed his account, Zemen wrote a letter to Arthur Schlecht complaining about the conduct of Cox, Voss, Kanter and Ader. Schlecht responded by telling Zemen that he was "out of luck."

Conclusions

Fraudulent solicitation and lulling by Cox

The preponderance of the evidence establishes that Cox, in violation of Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10,¹⁷ fraudulently induced Zemen into opening the account and approving the initial trades, and fraudulently lulled Zemen into approving additional trades and depositing additional funds. During the account solicitation and account opening, Cox used a combination of blatantly false and deceptive misrepresentations and omissions to create the utterly false impression that Zemen could reasonably expect large returns with little risk. Cox falsely stated that all of his customers had consistently realized tremendous profits, when he knew that all of his customers, and most of Concorde's customers, had actually experienced substantial losses. Cox enhanced the deceptiveness of this false assertion by misrepresenting that Concorde had one of the best research departments in the industry, and by falsely promising to closely monitor Zemen's account and to advise him if a trade had gained or lost more than fifteen to twenty percent. Cox's subsequent false reports that Zemen's trades were profitable establish that he never intended to honor his promise to advise Zemen if any option had lost 15 to 20 percent. Cox failed to provide a fair and adequate risk disclosure by failing to disclose accurately the burdensome commissions charged by Concorde, by not mentioning any customers who had lost money, and by downplaying the written risk disclosures and Zemen's concerns about risk with blatantly false

¹⁷ Section 4c(b) provides that: "No person shall . . . enter into or confirm the execution of any transaction involving any . . . option . . . contrary to any . . . regulation of the Commission." CFTC rule 33.10 provides that: "It shall be unlawful for any person directly or indirectly -- (a) to cheat or defraud or attempt to cheat or defraud any other person; (b) to make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof; (c) to deceive or attempt to deceive any other person by any means whatsoever -- in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction."

statements that all of his clients were making huge profits. It is “rudimentary” that these sort of misrepresentations and omissions about profit potential and risks are material. *In re JCC*, [1994-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,059 at 41,576 n.23 (CFTC 1994), *affirmed* 63 F.3d 1557 (11th Cir. 1995).

By principally compensating its account executives and branch office managers with a cut of the commissions, Concorde supplied Cox with the necessary motivation to convince Zemen to approve trading strategies that emphasized Cox’s interests over Zemen’s interests. Cox, following the suggestions of Concorde’s research department, favored trades in positions that were substantially out of the money (“OTM”), even when comparable in-the-money (“ITM”) positions were available. These trades recommended by Cox significantly increased respondents’ income, because Concorde charged Zemen commissions based on the number of contracts traded, rather than the value of the position, and because more OTM options could be purchased since the premium for an OTM option is lower than the premium for a comparable ITM option.

Here, respondents have offered no explanation or evidence that shows that the recommendations to purchase OTM options with Zemen’s were consistent with Zemen’s objective to make trades with a reasonable likelihood of profits. Moreover, no patently plausible rationale can be discerned. The “increased leverage” rationale typically raised by respondents who recommend OTM options can almost never be justified for customers whose trading objective includes a reasonable chance of profit. First, the value of a low-priced option is almost always less responsive to price changes in the underlying commodity or asset. Second, the total premium value represents the amount of risk, regardless of the number of contracts. And third, the profit potential of an OTM option,

as measured by its delta, is lower than that of an ITM option of the same type. *See Ferriola v. Kearsse-McNeill*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,172, at 50,154-50,155 (CFTC 2000). For these reasons, the Commission has emphasized that “when customers are paying commissions on a per-contract basis, an account executive seeking to serve his customer’s interests will purchase the lower-cost ITM position.” *Id.*, at 50,155. Thus, Cox’s promises of certain profits when he convinced Zemen to trade OTM options failed to reflect the reality that the strategy of buying OTM options, compared to buying comparable ITM options, was significantly more risky and less profitable, and that the only real guarantee was that respondents’ stream of commission revenue would be unnecessarily increased.

Cox’s promises of certain profits similarly failed to reflect the detrimental effect of Concorde’s burdensome commissions on profit potential. Here, the commissions and fees charged to Zemen’s account resulted in a commission-to-premium-paid ratio and a commission-to-investment ratio in excess of thirty percent, which represented a formidable barrier to profit potential. Thus, Cox’s unrestrained profit projections were materially deceptive:

Because the size of a firm’s commissions and fees affects the profit potential of an investment, it affects the kinds of representations that can be made about profitability. . . . All else being equal, customers of a firm with a high commission or fee structure will have a more difficult time making a profit than those who employ a less expensive firm. As a result, the firm charging higher commissions and fees is more limited in what it can claim regarding profit potential.

Johnson v. Fleck, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,957, at 37,502 (CFTC 1990) (Chairman Gramm concurrence). Finally, Cox fraudulently lulled Zemen into approving additional OTM trades and depositing additional funds by falsely

reporting that his open positions were profitable and that his other customers were making a “killing.” See *Modlin v. Cane*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,059, at 49,500 (CFTC 2000) (“Lulling perpetuates the effect of the initial wrongdoing.”)

The intentional nature of Cox’s fraud is underscored by the blatant and pervasive nature of his misrepresentations and omissions, as well as his knowledge of Zemen’s inexperience and Zemen’s reliance on him to provide trading advice.

Fraudulent lulling by Voss

The preponderance of the evidence establishes that Voss deceived Zemen and perpetuated Cox’s fraud, in violation of Sections 4c(b) of the Commodity Exchange Act and CFTC rule 33.10, when he falsely reported that Zemen’s trades were profitable. Before Voss spoke to Zemen, Voss already knew: that Cox had probably been terminated because he had acted against his customers’ best interests even by Concorde’s lax standards; that Zemen had been seeking advice for several days; and that Zemen’s options had substantially deteriorated and were approaching expiration. In addition, once Voss spoke to Zemen, he discovered that Cox had promised to advise Zemen when any option position had dropped fifteen to twenty percent, and that Cox had broken that promise when he falsely told Zemen that his trades were profitable. In these circumstances, Voss had to know that Zemen would be relying him to provide, at a minimum, accurate and useful information about the status of the trades in his account. In order to provide such information, Cox had to disclose not just the current liquidation value of the option positions and the fact that the positions had lost much more than twenty percent, but also the fact that that Cox had misinformed Zemen about the status of

the trades. However, in sharp contrast, Voss chose to provide a vague, but definitely positive, “update” that Zemen “should not worry about his account,” because his trades were “doing fine.” By strongly implying that the trades were profitable and withholding accurate information, Voss deceived Zemen about his trading losses, and thus concealed and perpetuated Cox’s fraud. *See Bishop v. First Investors Group of the Palm Beaches*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,004, at 44,841-44,842 (CFTC 1997). The intentional nature of Voss’s violation is underscored by the patently deceptive nature of Voss’s misrepresentation and by Voss’s awareness that Zemen was relying on no one but him to provide fair and accurate information.

Fraudulent lulling by Kanter and Ader

The preponderance of the evidence establishes that Kanter and Ader deceived Zemen and perpetuated Cox’s and Voss’s frauds, in violation of Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10, when they deliberately disregarded the fact that Cox and Voss had falsely reported that his trades had been profitable, and when they induced Zemen to continue trading by falsely promising to recoup his losses. The fact that Kanter and Ader both routinely recommended to their customers trades selected by Concorde’s research department, and that Ader headed the research department, supports the conclusion that Kanter and Ader knew that the heating oil and coffee calls in Zemen’s account had never been profitable in December 1999. Thus, when Zemen informed them that he had received reports from Cox and Voss that his heating oil and coffee calls had been profitable throughout December, Kanter and Ader knew that Cox and Voss had deceived Zemen.

However, Kanter disregarded the fact that Cox and Voss had obviously misled Zemen with false reports that the heating oil and coffee trades had been profitable, and deflected Zemen's protests by telling him that he could only "look ahead." Kanter also made no effort to cure the false mix of information provided by Cox and Voss. Kanter's unrestrained representation that he was capable of recouping Zemen's losses because Kanter had been in the business "over twenty years" was misleading because he had been registered for only half that time with a string of firms that had been disciplined for sales fraud and whose customers typically had not enjoyed meaningful profits. Thus, Kanter fraudulently induced Zemen to continue trading by concealing Cox's and Voss's fraud and perpetuating the false overall impression that Concorde's research department would select profitable trades. *See Bishop, supra*. Kanter's unrestrained promise to recoup losses with more trades was deceptive because it failed to reflect the fact that Concorde's burdensome commissions significantly hindered profit potential and the fact that the recommended OTM options were more risky than comparable ITM options. Finally, in the absence of any justification from Kanter, his advice to sell the heating oil calls, because they were "going nowhere," and to buy four soy meal calls because soybeans were going to "take off," followed by his advice to buy another heating oil call a few days later, appears to have been primarily motivated by a desire to generate commission income from an account he had inherited. *See Hinch v. Commonwealth Financial Group, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,056, at 45,021-45,022 (CFTC 1997). This conclusion is underscored by the fact that Kanter convinced Zemen to purchase out-of-the-money options that generated significantly more commissions than comparable in-the-money options.

Ader similarly disregarded, and failed to disclose, the fact that Cox and Voss had obviously misled Zemen with false reports that the heating oil and coffee trades had been profitable. By concealing the fact that Cox and Voss had lied to Zemen about the value of trades, and by failing to cure the false mix of information provided by Cox and Voss, Ader also perpetuated Cox and Voss's fraud, and fraudulently induced Zemen to continue trading with Concorde. Ader also deceptively implied that he knew how to select consistently profitable trades by confidently promising to recoup Zemen's losses and emphasizing that he had been in the business "over twenty years." This representation was misleading because Ader had been registered for only half that time, and with a firm, Commonwealth Financial Group, which had been sanctioned for pervasive fraudulent sales practices, and because Ader himself had been severely sanctioned for his own fraudulent sales practices at Commonwealth. Thus, Ader's failure to cure Cox and Voss's fraud, coupled with his misleading claims of expertise, similarly perpetuated the false overall impression that Concorde's research department would select profitable trades. Also, Ader's unrestrained promise that he could quickly recoup Zemen's losses was also deceptive because it failed to reflect the underlying reality that Concorde's onerous commissions significantly hindered profit potential and that the recommended OTM options were more risky than comparable ITM options. Finally, in the absence of any justification from Ader, his advice to sell Kanter's trades and deposit more money because stock index options were "hot," also appears to have been primarily motivated by a desire to generate commission income from an account he had inherited.

The intentional nature of Kanter's and Ader's fraud is underscored by their deliberate disregard of Cox's and Voss's fraud, their deceptive claims of trading

expertise, their baseless promises to recoup losses, and their knowledge that Zemen was relying on them to provide fair and reasonable trading advice.

Reliance and proximate causation

Zemen's decision to invest a considerable sum of money was consistent with his testimony that he relied on Cox's message that Zemen was certain to make quick and large profits with minimal accompanying risk, and that he relied on Cox's promise to closely monitor the account. Zemen's intelligence, education and work experience do not bar finding that he reasonably relied on Cox's misrepresentations and omissions to his detriment, especially where he had no previous experience in the futures and options markets and where Cox had overcome Zemen's initial skepticism with false and deceptive statements about the consistent profits enjoyed by his customers. *Ricci v. Commonwealth Financial Group, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,917 (CFTC 1996). Concorde's written disclosures of general risks by themselves did not cure the false impression of guaranteed profits created by Cox's pervasively deceptive solicitation, where the overall effect of the oral representations substantially outweighed and vitiated the written risk warnings. *Ferriola*, at 50,153; *Bishop*, at 44,841; and *Levine v. Refco*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,488, at 36,115-36,116 (CFTC 1989). Similarly, Concorde's perfunctory compliance review cannot be used as "advance exoneration" of respondents' fraud, especially where the compliance review was obviously not designed to cure or to discover the sort of misrepresentations made by Cox, and failed to provide a fair and accurate disclosure of Concorde's burdensome commission structure. *JCC, Incorporated v. CFTC*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,492, at 43,217-

43,218 (11th Cir. 1995). The proper measure of damages for Cox's fraudulent solicitation and lulling, where Cox exposed Zemen to a steady stream of fraudulent acts, is Zemen's total out of pocket losses: \$29,595.

Zemen's reliance on Voss's fraud was established by Zemen's credible testimony that he told Voss that he had been relying on Cox to advise him if any option trade lost over fifteen to twenty percent. Voss's failure to disclose to Zemen that his trades had actually suffered substantial losses not only deprived Zemen of a fair and reasonable opportunity to limit his losses and to evaluate whether to continue trading, but also concealed and perpetuated Cox's fraud, and thus was a proximate cause of Zemen's losses on the trades recommended by Cox. However, since the evidence in the record is insufficient to establish a nexus between Voss's violation and Kanter's and Ader's violations, the proper measure of damages for Voss's violation is limited to the total losses on the trades recommended by Cox: \$22,753.

The fact that Zemen knew of his losses by the time that he spoke to Kanter and Ader does not preclude finding that he relied on their misrepresentations and omissions, where Kanter and Ader perpetuated Cox's false message that Concorde's research department knew how to select consistently profitable trades by concealing and failing to cure Cox's and Voss's deceptions, by misrepresenting their trading experience, and by falsely promising to recoup losses. *See Ricci, supra*; and *Bishop, supra*. Thus, in the absence of any persuasive evidence that Zemen was aware of the ongoing misrepresentations, the proper measure of damages for Kanter's and Ader's violations is Zemen's total out-of-pocket losses: \$29,595.

ORDER

Joseph Zemen has established by the weight of the evidence: that Darryl Cox fraudulently induced Zemen into opening the account and approving the initial trades, and fraudulently lulled Zemen into approving additional trades and depositing additional funds, in violation of Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10; that Kenneth Voss deceived Zemen and perpetuated Cox's fraud, when he falsely reported that Zemen's trades were profitable, in violation of Sections 4c(b) of the Commodity Exchange Act and CFTC rule 33.10; that Allen Kanter and Allen Ader deceived Zemen and perpetuated Cox's and Voss's fraud, when they deliberately disregarded the fact that Cox and Voss had falsely reported that his trades had been profitable, and when they induced Zemen to continue trading by falsely promising to recoup his losses, in violation of Sections 4c(b) of the Commodity Exchange Act and CFTC rule 33.10; and that Concorde Trading Group, Incorporated is liable for its agents' violations pursuant to Section 2(A)(1)(a) of the Act. The violations by Cox, Kanter and Ader proximately caused a total of \$29,585 in damages. Voss's violation proximately caused \$22,753 (out of the total \$29,753) in damages. Accordingly, Allan Steven Ader, Allan Kanter and Concorde Trading Group are ORDERED to pay to Joseph Zemen reparations of \$29,595, plus prejudgment interest on that amount at 2.32 % compounded annually from December 3, 1999 to the date of payment; and Kenneth Lee Voss is ORDERED pay to Joseph Zemen reparations of \$22,753, plus prejudgment interest on that amount at 2.32 % compounded annually from December 3, 1999 to the date of payment. Voss is jointly and severally liable with Ader, Kanter and Concorde for the award up to \$22,753, plus the interest on that amount, and the \$125 filing fee. Ader,

Kanter and Concorde are jointly and severally liable for the entire \$29,595 award, plus the prejudgment interest on that amount.

Dated June 18, 2002,

A handwritten signature in black ink, appearing to read "Phil McGuire". The signature is written in a cursive style with a large initial "P" and "M".

Phil McGuire,
Judgment Officer