UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

MARIA ANGELICA BACLINI, et al., Complainants, v. CITIGROUP GLOBAL MARKETS, INC. and, DALILA COSTA-LEROY Respondents.	:	CFTC Docket No. 07-R036 - 07-R050

Opinion of George H. Painter, Administrative Law Judge

Appearances:

On behalf of Complainants Maria Angelica Baclini, et al.

J.B. Grossman, Esq.
Grossman Greenberg, LLC
150 North University Drive,
Suite 200
Fort Lauderdale, Florida 33324

On behalf of Respondent Citigroup Global Markets, Inc.

Sean J. Coughlin, Esq.
Managing Director and Counsel
Office of the General Counsel
CITI
111 Wall Street
17th Floor
New York, New York 10005

On behalf of Respondent Dalila Costa Leroy

Richard J. Babnick, Jr., Esq.
Sichenzia Ross Friedman Ference, LLP
61 Broadway
32nd Floor
New York, New York 10006

INITIAL DECESION

Procedural History

On, or around, June 8, 2007, Complainants filed 15 individual Complaints against Respondents Citigroup Global Markets, Inc. and Dalila Costa-Leroy. On November 18, 2008, the Commission consolidated the Complaints, and remanded the matter back to this court for review (Order to Consolidate, Nov. 18, 2008).[1] On May 4, 2009, a hearing was held. The parties have submitted their post-hearing briefs and the matter is now ready for a decision.

Introduction

Complainants' claims against Respondents Citigroup Global Markets, Inc. ("Citigroup") and Dalila Costa-Leroy ("Costa-Leroy") arise from a December 2005 purchase and sale of 1,570 February 2006 Gold Futures contracts. The purchase of these contracts was initiated by the Complainants foreign advisor Ultrader Asset Management ("Ultrader"), which had discretionary authority over the Complainants' accounts.

The Complainants allege: (1) that Respondents violated the anti-fraud provision Section 4b of the Commodity Exchange Act ("CEA") by wrongfully reallocating losing trades into the Complainants' accounts, (2) that Respondents perpetrated this alleged fraud by changing the beneficial ownership of assigned trades in violation of Regulation §1.35, (3) that Respondents further violated Section 4b by intentionally failing to disclose the details surrounding the transactions at issue, and (4) that Respondents violated Regulation §166.3 by failing to diligently

[1] The Complainants, in order of docket number, are as follows: Maria Angelica Baclini & Hector Hugo Sandiano (Docket No. 07-R036); Jorge Nelson Batalles (Docket No. 07-R037); Juan Bautista Albertengo (Docket No. 07-R038); Gerado Jose Tedeschi (Docket No. 07-R039); Nora Alicia Cantoni & Damian Martinucci (Docket No. 07-R040); Edgardo Maximo Geminelli (Docket No. 07-R041); Pedro & Maria Mogetta (Docket No. 07-R042); Gustavo Redmondino & Christine Wagner (Docket No. 07-R043); Maria & Gabriel Lazzarini (Docket No. 07-R044); Guillermo De La Torre & Adriana Sebastianelli (Docket No. 07-R045); Nora & Georgina Remondino (Docket No. 07-R046); Daniela Cornet & Jose Luis Ginitrini (Docket No. 07-R047); Alberto Raul Pesaola (Docket No. 07-R048); Carlos Marcelo Farruggia (Docket No. 07-R049); and Raquel Nora Rottai & Antonio Gustavo Trillo (Docket No. 07-R050).

supervise the managing of Complainants' accounts.[2] 7 U.S.C. 6b; 17 C.F.R. § 1.35(a-1)(5)(iii)(A); and §166.3 (2009). Complainants claim that as a result of Respondents alleged violations they suffered a combined loss of $1,583,756.73.

In an affidavit submitted to the court, Miguel Bruzon, principal of Ultrader, admitted fault for both the trades and allocations.[3] Neither Ultrader nor Mr. Bruzon are registered with the CFTC and therefore are beyond the reach of the CFTC's jurisdiction.

A formal hearing, pursuant to Part 12 of the General Regulations under the Commodity Exchange Act, was held on the matter, and several witnesses were called to testify. Complainants who testified included: Gerardo Tedeschi, Dr. Juan Albertengo, Dr. Antonio Trillo, Gustavo Remondino and Guillermo De Law Torre. Witnesses associated with Citigroup included: Respondent Costa-Leroy, Liza Contreras, Laura Attardi, Alex Troso, and Timothy Ratty. Further testimony came from Carlos Ridao, Complainants' independent investment advisor, and Lenoard Rosen, C.P.A., Complainants' expert witness. Respondents' expert, Henry Ferguson, provided direct, written testimony and was made available at the formal hearing for cross examination. Complainant's counsel chose not to cross examine him.

Based on the evidence, this court concludes that Respondents did not perpetrate fraud upon the Complainants, nor did they fail to diligently supervise the Complainants' accounts.

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[2] Compl. Post-Hr'g Br. 3

[3] While Part 12 of the Rules Relating to Reparation Proceedings governs these proceedings, Section 10.67(f) of the Rules of Practice is instructive. Section10.67 provides: "Affidavits may be admitted by the Administrative Law Judge only if the evidence is otherwise admissible and the parties agree that affidavits may be used." At the formal hearing, Respondents' counsel and Complainants' counsel stipulated, with agreement from the ALJ, that all exhibits, except Respondent Citigroup's exhibits 175-177 and Costa-Leroy's exhibits 153-154, were received into evidence. Additionally, Mr. Bruzon's affidavit is relevant, material and reliable in accordance with Section 10.67(a) of the Rules of Practice. Therefore, Mr. Bruzon's declaration (Complainants' Exhibit 15, Respondent Costa-Leroy's exhibit 150) was entered into evidence (Tr. 99). However, Mr. Bruzon's declaration is not heavily relied upon in this analysis and is not dispositive of any issue.

Findings of Fact

The findings of fact set forth below are based upon reliable testimony and documentary evidence. In particular, the testimony of Ms. Costa-Leroy, Ms. Liza Contreras, and Mr. Anthony Troso was found to be credible, reliable, and honest. In contrast, for the reasons discussed below, this court found the testimony of Mr. Ridao to be patently unreliable when presented with the evidentiary and documentary evidence at the hearing. Therefore, the testimony of Mr. Ridao is accorded little weight in this decision.

The Parties

1. The Complainants are 15 individual Argentinean investors, with various levels of trading experience.[4] Complainants were all former clients of Respondents and residents of Argentina (Compl.).

2. Respondent Citigroup, during all relevant times, was a registered Futures Commission Merchant ("FCM"), with its principal place of business at 388 Greenwich Street, New York, NY 10023 (Resp't Citigroup Answer 2). Respondent Citigroup is the parent company of the wholly owned broker-dealer Smith Barney. *Id.*

3. Respondent Dalila Costa-Leroy, during all relevant times, was a registered Associated Person ("AP") for Respondent Citigroup (Resp't Costa-Leroy Post-Hr'g Br. 3). Ms. Costa-Leroy was the registered representative who managed Complainants' Citigroup accounts (Tr. 117).

Related People and Entities

[4] The designation "CX" refers to the Complainants' Exhibits; the designation "RX" refers to Respondent Citigroup's Exhibits; and the designation "RCLX" refers to Respondent Costa-Leroy's Exhibits.

4. An Argentine business entity called Ultrader Assets Management ("Ultrader") was the "foreign advisor" and "eligible account manager" which exercised discretionary trading authority over the Complainants' accounts. 17 C.F.R. §1.35(a-1)(5)(D)(2009). Miguel Bruzon was the principal of Ultrader, and handled several of the transactions at issue (Tr. 194).

5. Carlos Ridao was an "investment advisor" hired by the 15 individual Argentine investors. Mr. Ridao introduced Complainants to Ultrader and Mr. Bruzon (Tr. 192, 193, 194). Mr. Ridao received discretionary authority to manage Complainants' accounts on January 11, 2009 – nearly a month after the transactions at issue took place. (Tr. 163; CX 9). Furthermore, unbeknownst to Complainants and Respondents, Mr. Ridao and Ultrader had a fee sharing agreement related to Ultrader's management of Complainants' Citigroup accounts. (Tr. 352-253, 370-371, 388, 408, 409).

Account Opening

6. Beginning in March 2003 and continuing through February 2005, Complainants, with the assistance of Mr. Ridao, opened trading accounts with Respondent Citigroup (Tr. 252, 291, 308, 341; RX's 1, 9, 10, 17, 18, 25, 26, 33, 34, 40, 42, 48, 50, 57, 59, 66, 68, 73, 75, 82, 84, 91, 93, 100, 102, 109, 110, 118, 120).

7. The Complainants granted discretionary trade authority over the Citigroup accounts to their foreign advisor Ultrader, and its principal Mr. Bruzon. Complainants' signed and executed several forms to this end, including: a Futures Account Agreement, a Discretionary Account Information Form, and a Commodity-Account Third Party Limited Discretionary Authorization Form. (Tr. 164, 169; RCLX's 1, 7, 13, 19, 25, 30, 36, 43, 50 55, 62, 69, 76, 83, 90; Tr. 165; RCLX's 2, 31, 37, 44, 51, 56, 63, 70, 77, 77, 84, 91; Tr. 165-166, RCLX's 3, 8, 14, 20, 26, 32, 28, 45, 52, 57, 64, 71, 78, 85, 92).

8. As Complainants were opening their accounts, Respondent Citigroup's branch Administrator, Liza Contreras, called 13 of the Complainants to confirm that they had authorized discretionary trade authority to Ultrader. (Tr. 37, 96, 105-107, 308, 401, 402, 418; CX 22; RCLX 40). Ms. Contreras did not call Complainants Maria Baclini and Hector Sandiano because their account opening forms had been publicly notarized (RCLX 52).

The 1,570 Gold Futures Contracts

December 12, 2005

9. On the morning of December 12, 2005, at approximately 9:30 a.m., Ultrader, at the direction of Mr. Bruzon, called in an order to Respondent Costa-Leroy for 1570 February 2006 Gold Futures contracts with a 540.20 buy-stop (Tr. 118, 124; RCLX 150).

10. At 10:16 a.m., Ultrader sent Ms. Costa-Leroy an email confirming the order. Attached to the email were two spreadsheets, labeled 'S' and 'SR', containing the initial allocation instructions for the Gold Contracts (RCLX 114; Tr. 118, 199). None of the 15 Complainants were included in these initial spreadsheets.

11. Upon receiving the email with the first set of allocation instructions, Respondent Costa-Leroy examined the spreadsheets to ensure that total number of contracts matched the order Ultrader placed. However, she did not examine the names of the customers listed (Tr. 125-126, 181).

12. At approximately 10:20 a.m., the price of gold hit 540.20 and the buy-stop order became a market order (Tr. 119; RCLX 141). During this time, Mr. Burzon repeatedly contacted Ms. Costa-Leroy for constant updates about the order's fill status (Tr. 119-120). At one point, Mr. Burzon attempted to place a sell-stop order for the 1,570 Gold Futures contracts, but cancelled it shortly thereafter (Tr. 120-121).

13. At approximately 10:52 a.m., the range of fills for the Gold Contracts order was reported to Ms. Costa-Leroy (Tr. 128). The majority of these contracts were filled at 543, significantly above the 540.20 buy-stop order (Tr. 131; CX's 7-b, 8-U; RCLX 150).

14. The trades were executed into Ultrader's bulk trade account, referenced as Ultrader Average Pricing Account ("APS") 428-90730, and remained there when the market closed on December 12, 2005 (CX's 8-C, 8-F; Tr. 70, 134, 283-284).

15. The Gold Contracts were never allocated into the accounts listed in the initial spreadsheets. Due to the day's unusually chaotic trade activity and Mr. Bruzon's frantic calls, Ms. Costa-Leroy inadvertently failed to forward the initial instructions to the Operations Department after the order was filled (Tr. 129).

16. Later that evening, Mr. Bruzon contacted Ms. Costa-Leroy as she was on her way home. (Tr.132). Mr. Bruzon wanted to sell the Gold Futures contracts that evening because he believed the market was going to open much lower the following morning (Tr. 133). Subsequently, Ms. Costa-Leroy contacted Citigroup's overnight trading desk to obtain a quote for Mr. Bruzon (Tr. 133-136).

17. That evening Mr. Burzon worked with Ms. Costa-Leroy and Citigroup's overnight desk to liquidate the 1570 Gold Futures positions in Ultrader's account (Tr. 133-138). The sell order was placed in a piecemeal fashion due to its size (Tr. 137). Since the market was closed, and in order to obtain the best pricing, the transactions were executed either though the ACCESS electronic trading system or through Exchanges for Physicals ("EFPs") (Tr. 136-139).

18. During the liquidation order, Mr. Bruzon informed Ms. Costa-Leroy that errors had been found on the buy-side of the transaction, and that Ultrader would be providing corrections shortly (Tr. 145, 177-178; RCLX 150; RX 131).

December 13, 2005

19. On December 13, 2005, at approximately 4:46 a.m., Ultrader emailed the "corrected" allocation instructions to Ms. Costa-Leroy, on spreadsheets labeled 'R', 'S', and 'SR'. (CX 8-D; Tr. 145-146). These "corrected" instructions directed trades to be allocated into the Complainants' accounts as well as other clients of Ultrader (*Id.*; Tr. 148). Ms. Costa-Leroy reviewed the total number of contracts to ensure that they matched the total number of contracts allocated, and then forwarded the instructions Citigroup's Operations Department (Tr. 149; RCLX 124).

20. Since it was not typically her responsibility, Ms. Costa-Leroy did not review the account names on the spreadsheets. She was unaware that Ultrader had not listed the Complainants in the initial instruction spreadsheets sent on December 12, 2005 (Tr. 147-149).

21. Later that day, Ms. Liza Contreras, Citigroup's Branch Administrator, reviewed the trade confirmations to ensure that the Gold Contracts in Ultrader's block account were properly allocated as per the "corrected" instructions Ultrader had emailed that morning (Tr. 67, 69, 70, 87, 108; RX 171). Ms. Contreras never saw the first set of allocation instructions sent on December 12, 2005, nor did anyone else but Ms. Costa-Leroy. *Id.* Consequently, Ms. Contreras was unaware that Ultrader had changed the customers on the allocation spreadsheets.

December 19, 2005

22. On December 19, Ultrader provided additional "corrected" instructions to Ms. Costa-Leroy because the instructions provided by Ultrader on December 13, 2005 failed to set forth the average price for the transactions (Tr. 151-152, 174; CX 8-D; CX 8-I through CX 8-N). The initial allocation from Ultrader's bulk trade account into the Complainants' did not reflect the

average price of the trade, which was corrected by December 21, 2005 (Tr. 110-111, 175; RX 172, 174).

23. As part of the instructions sent to Ms. Costa-Leroy on December 19, 2005, Ultrader directed an allocation for an additional 139 Gold Contracts to Complainants' accounts from Ultrader's bulk trade account (Tr. 111-112).

24. The Gold Contract trades resulted in a combined loss for the Complainants of $1,583,756.73 (Complainants' Post-Hr'g Br. 6, 55).

Aftermath

25. Mr. Ridao asserts that on November 4, 2005, and December 2, 2005, he emailed Mr. Bruzon with instructions limiting Ultrader's discretionary authority (Tr. 199; CX 25; RCLX 158). However, Mr. Ridao did not include Respondents in theses communications. Mr. Ridao did not contact Respondents until after the transaction took place, and even then he had no authority over the accounts (Tr. 202, 237-238; CX 8-H, 9).

26. On January 1, 2006, Ultrader's principal, Mr. Bruzon, sent a letter requesting an explanation of the December 12th and 13th trade executions (CX 8-U).

27. On January 11, 2009, nearly a month after the transactions at issue were performed, Complainants' provided written instructions to Citigroup revoking Ultrader's discretionary trade authority, and providing written Power of Attorney to Mr. Ridao (CX 9). In the same letter, Complainants again requested an inquiry into the December transactions.

28. On March 15, 1006, Citigroup sent a letter in response to the Complainants' inquires (CX 8-V). In the letter, Citigroup stated that it had reviewed the transactions and explained the transactions and how the losses incurred were a result of Ultrader's trading instructions. *Id.*

29. In an affidavit submitted to the court, Mr. Bruzon, Ultrader's principal, admitted to placing the orders and providing incorrect allocation instructions (CX 15, RCLX 150).

DISCUSSION

A. Complainants' Foreign Advisor, Ultrader, Possessed Exclusive Discretionary Trade Authority over Complainants' accounts.

The transactions at issue and related losses were the direct result of the trading decisions and allocation instructions provided by Complainants' designated foreign advisor, Ultrader. Ultrader was the agent of each Complainant and legally authorized to place trades and give instructions with respect to each Complainant's account. See *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082 (2d Cir. 1997); *Morel v. Commonwealth Financial Group, Inc.*, 1997 WL 21660 (CFTC 1997). The record clearly establishes Ultrader's discretionary authority. The Complainants signed several forms granting Ultrader discretionary trade authority over their accounts, including a Futures Account Agreement, a Discretionary Account Information Form, and a Commodity-Account Third Party Limited Discretionary Authorization Form.[5] Citigroup went a step further and called nearly every one of the Complainants to confirm this grant of authority.[6] Ultrader traded on behalf of the Complainants for years without protest before the transactions at issue occurred. It was not until January 11, 2006, that Complainants formally revoked Ultrader's discretionary trade authority. [7]

B. Complainants' fail to establish that Respondents' Committed Fraud or Acted in Bad Faith.

Complainants allege that Citigroup and Ms. Costa-Leroy violated Section 4b of the Commodity Exchange Act and Regulation §1.35 by fraudulently "reallocating" losing trades into

[5] Tr. 164, 169; RCLX's 1, 7, 13, 19, 25, 30, 36, 43, 50 55, 62, 69, 76, 83, 90; Tr. 165; RCLX's 2, 31, 37, 44, 51, 56, 63, 70, 77, 77, 84, 91; Tr. 165-166, RCLX's 3, 8, 14, 20, 26, 32, 28, 45, 52, 57, 64, 71, 78, 85, and 92
[6] Tr. 37, 96, 105-107, 308, 401, and 418
[7] (Tr. 352-35, 370-371, 388, 408, and 409

their accounts, and then further violated Section 4b by intentionally failing to disclose the details of the transactions in an alleged "cover-up."[9] 7 U.S.C. § 6b (2009); 17 C.F.R. §1.35(a-1)(5)(iii)(A) (2009).[10]

To establish a Section 4b violation it must be proved by a preponderance of the evidence: (1) that the respondent made a misrepresentation or omission of material fact; (2) that the respondent did so with the requisite scienter; (3) that the complainant reasonably relied on that misrepresentation or omission, and (4) that this reliance was the proximate cause of the damages suffered. See *Hammond v. Smith Barney, et. al.*, 1990 WL 282810 (CFTC Mar. 1, 1990); *CFTC v. Rosenberg*, 85 F.Supp.2d 424, 447 (D.N.J. Mar. 1, 2001); *Anderson v. Beach*, 2008 WL 5030208 (CFTC Nov. 25, 2008), *aff'd in part,* 2009 WL 4818149 (CFTC Dec. 3, 2009); *Horn v. Ray E. Friedman and Company*, 776 F.2d 777 (CA8 Ark. 1985); *In re Slusser* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 27,417 (CFTC July 19, 1999). The evidence fails to establish any elements of a Section 4b violation.

Complainants failed to prove the first element of a 4b violation - that Respondents made a misrepresentation or omission of material fact. A fact is material if "there is a substantial likelihood that a reasonable investor would consider the information important in making a decision to invest." *R & W Technical Services Ltd. v CFTC*, 205 F3d 165, 169 (5th Cir. 2005) *citing TSC Indus, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *CFTC v. Weinberg*, 287 F.Supp.2d 1100, 1105 (C.D. Cal. 2003). Nondisclosure of a material fact will trigger liability under Section 4b when "disclosure is necessary to make other representations not materially

[9] Comp. Post-Hearing Memorandum, 3, ¶ 1-2, June 23, 2009

[10] The pertinent part of Section 4b states that it shall be unlawful for any person connected to the sale of a commodity contract to "willfully deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person." 7 U.S.C. § 6b (2006).

mislead, or where it is affirmatively required by regulation." *Precision Ratios v. Man Financial* [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,813 (CFTC July 23, 2004).

The rules, regulations, and procedures of an FCM are clearly material information a reasonable investor would consider important. *TSC Inc. v. Norway Inc.*, 426 U.S. 428, 96 S. Ct. 2126 (1976); *R & W Technical Services Ltd., v CFTC*, 205 F3d 165, at169 (5th Cir. 2005). According to Complainants, Respondents misrepresented the rules, regulations, and procedures in place to protect the Complainants' accounts. They also claim that Respondents did not inform them of all the necessary information regarding the December 12, 2005 transactions.[11] However, Respondents did not misrepresent these rules and regulations, nor did Respondents misrepresent their adherence to them. The Third-Party Limited Discretionary Authorization form, signed by Complainants, states, "in all such purchases, sales, or trades you [Respondents] are authorized to follow the instructions of the above-named person [Ultrader] in every respect concerning the undersigned account."[12] Complainants knew that Ultrader had discretionary authority over their accounts, and that they were a risk for the losses suffered as result of Ultrader's instructions. Respondents did not violate any rules in following Ultrader's instructions and acted in accordance with their disclosed procedures. *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082 (2d Cir. 1997); *Index Futures Group, Inc. v. Ross*, 199 Ill. App. 3d 468 (App. Court 1990).

Additionally, Complainants failed to present sufficient evidence to establish that Respondents omitted material information regarding the transactions in question. *Precision Ratios v. Man Financial* [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,813 (CFTC July 23, 2004). The Complainants allege that Respondents attempted to "cover-up" their

[11] Compl. Post-Hr'g Br. 45-48
[12] CX 10, 18, 26, 34, 42, 50, 59, 68, 75, 84, 93, 102, 111, 120

wrongful acts by not answering their inquiries into the transactions.[13] However, this argument is unsupported by the evidence. On January 1, 2006, Ultrader sent a letter to Citigroup on behalf of Complainants inquiring about the executed December transactions. Citigroup promptly conducted a review and responded to the inquiry two months later.[14] And, while Mr. Ridao did make inquiries into the trades, he had no authority to do so until January 11, 2006, when Complainants provided Citigroup with a signed Power of Attorney authorizing Mr. Ridao to represent their interest.[15]

Additionally, Complainants failed to establish the second element of a 4b violation, scienter. *Hammond v. Smith Barney, Harris Upham & Co. Inc.* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. CCH ¶ 24,617 (CFTC Mar. 1, 1990). In a 4b violation, scienter is established by showing that a Respondent's wrongful acts were committed "intentionally or with reckless disregard for their duties under the Act." *In re Slusser* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. CCH ¶ 27,701 (CFTC July 19, 1999); *See also Hammond v. Smith Barney, Harris Upham & Co. Inc.* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. CCH ¶ 24,617 (CFTC Mar. 1, 1990); *CFTC v. Weiberg*, 287 F.Supp.2d 1100, 1105 (C.D. Cal. 2003).

To prove scienter, Complainants vaguely assert that Respondents "told untruths and failed to inform the 15 Individual Argentine Investors of information necessary for them to understand all aspects of the December 12, 2005 transaction."[17] However, Complainants' assertion is not only vague but contrary to the facts on the record. First, Respondents acted reasonably in relying on Ultrader's instructions because Ultrader had written authorization

[13] Compl. Post-Hearing Memorandum, at 3, ¶ 3; 30 at 61.
[14] CX 8-U; 8-V
[15] CX 8-H, 8-T, and 9; Moreover, there is evidence that Complainants "investment advisor," Mr. Ridao, was aware of what transpired in the Complainants' accounts just days after December 12, 2005. This is because Mr. Ridao was convicted by an Argentine Criminal Court of holding a knife to Mr. Bruzon's neck on December 15, 2005, and coercing him to sign a false statement stating that Mr. Bruzon had not placed the order for the Gold Contracts in question. (RCLX 153, 154 pp. 411, 417).
[17] Complainants' Post-Hr'g Br. 61

required under Regulation §166.2 to execute discretionary transactions in Complainants' accounts. 17 C.F.R. §166.2 (2009); *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082, 1087 (2nd Cir. 1997) (A FCM may effect a transaction instructed by a person who had been provided written authorization to such transactions for the account of the customer); *Investors Network Group v. Lind-Waldock & Co.*, 1987 WL 103521 at 2 (CFTC Apr. 22, 1987). Second, there was little reason for Respondents to be suspicious of Ultrader's instructions. Ultrader had an unblemished record of trading on behalf the Complainants that extended for years. With regard to the December 2005 transactions, on the night of December 12, 2005, Mr. Bruzon told Ms. Costa-Leroy the buy-side allocations needed to be corrected even before all the trades had been liquidated.[18] The December 19, 2005, allocation correction was warranted because trades had not been averaged, and had to be adjusted to reflect the average price per trade.[19] Thus, the Respondents were reasonable and acting in good faith in following the instructions of the Complainants authorized agent, Ultrader. See *In re Salvatore Squadrito*, 1992 WL 65499 at 5 (CFTC Mar. 27, 1992).

Third, while true that Ms. Costa-Leroy failed to forward the initial allocation instructions to the Operations Department after the order had been filled, there is no evidence to indicate that this was anything more than a mistake or that Ms. Costa-Leroy was aware of Ultrader's customer allocation changes.[20] Generally, "[m]ere negligence, mistake, or inadvertence fails to meet section 4b's scienter requirement." *Wasnick v. Refco, Inc.*, 911 F.2d 345, 348 (9th Cir. 1990); see also *Do v. Lind-Waldock*, 1995 WL 581223 (CFTC 1995) (finding that an employee's decision

[18] Tr. 145, 177-178

[19] Tr. 71, 151-152, 174; CX 8-D, 8-I through 8-N

[20] Ms. Costa-Leroy testified that she did not remember forwarding the initial allocation instructions she received on the morning of December 12th, and her testimony is consistent with the evidence on record (Tr. 129). There are no records, email or otherwise, of her forwarding the instructions to the Operations Department. Nor is there any record of an allocation of that conforms to the initial instructions. Evidence also indicates that the allocation of trades into the Complainants accounts originated with Ultrader's bulk trade account, and not other customer accounts.

to intentionally ignore a customer's instructions was sufficient to establish scienter) citing *In Re Scheck* [1992-1994] Comm. Fut. L. Rep. (CCH) 25,834 (CFTC Aug. 13, 1993) (a showing of intentional misconduct is sufficient to establish scienter without proof of evil motive or intent to injure). When Ms. Costa-Leroy received the subsequent sets of "corrected" allocation instructions, on December 13th and 19th respectively, she reviewed them to ensure the total number of contracts matched and in good faith forwarded the instructions onto the Operations Department. *In re Salvatore Squadrito*, 1992 WL 65499 at 5 (CFTC Mar. 27, 1992).

Respondent Citigroup's actions were equally innocent. There is no evidence that Citigroup either intentionally or recklessly ignored the initial allocation instructions or was even aware of them. *Anderson v. Beach*, 2008 WL 5030208 (CFTC Nov. 25, 2008), *aff'd in part,* 2009 WL 4818149 (CFTC Dec. 3, 2009) ("A reckless action is one that departs so far from the standards of ordinary care that it is hard to believe that Respondent was not aware of what he was doing") citing *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742 (D.C. App. Ct. 1988); *First Commodity Corp v. CFTC*, 676 F.2d 1 (1st Cir. 1982). Citigroup was unaware of Ultrader's customer allocation changes because Ms. Costa-Leroy had not forwarded the initial allocation instructions. When Citigroup's Branch Administrator, Ms. Liza Contreras, reviewed the "corrected" allocation instructions sent on the morning of December 13th, the instructions provided matched the order tickets to the only allocation instructions she received.[21]

The Complainants also claim that Respondents alleged failure to disclose information regarding the December 12th transactions is a "cover-up" and evidence of Respondents wrongful intent.[22] However, as stated above, there is insufficient evidence to find that Respondents

[21] Tr. 87, 108-109, 113; RCLX 121
[22] Compl. Post-Hearing Memorandum, at 3, ¶ 3; 30 at 61.

actually omitted material information regarding the transactions at issue or intentionally or recklessly disregarded Complainants' request for information.

Lastly, the Complainants fail to prove the third and fourth elements of a 4b violation – reliance and proximate causation. There is simply insufficient evidence to find a misrepresentation or omission of material fact that Complainants could reasonably claim to have relied upon and, based on the foregoing discussion, it is clear that Respondents were not the proximate cause of Complainants' damages. Ultrader's trades and allocation instructions lead to their losses and Ultrader had clear authority to make these decisions.

Based on the evidence and facts above, Complainants did not establish that Respondents violated Section 4b. *Hammond v. Smith Barney, et. al.*, 1990 WL 282810 (CFTC Mar. 1, 1990); *In re Slusser* [1998 1999 Transfer Binder] Comm. Fut. L. Rep. CCH ¶ 27,701 (CFTC July 19, 1999).

Complainants failed to establish that Respondents violated Regulation 1.35

Complainants claim that Respondents perpetrated this alleged fraud by violating Regulation §1.35 when Respondents allocated trades into the Complainants' accounts, rather then the accounts listed in the initial allocation instructions.

The applicable parts of Regulation §1.35 require that when placing a bunched ordered, an account manager must provide the FCM with allocation information the day an order is executed to ensure that clearing records identify the ultimate customer for each trade. 17 C.F.R. §1.35(a-1)(5)(iii)(A). The account manager does not have to provide specific customer account allocation instructions when the order is placed, nor when it is executed.[23] §1.35(a-1)(5)(iv)(D). Once the order is filled, the FCM must allocate the order "as soon as practical" after the

[23] "(5) *Post-execution allocation of bunched orders.* Specific customer account identifies for accounts included in bunched orders need not be recorded at time of order placement or upon report of execution if the requirements of paragraphs (a-1)(5)(i)-(iv) of this section are met." 17 C.F.R. 1.35(a-1)(5)(2009).

transaction is executed. §1.35(a-1)(5)(iii)(A). Regulation §1.35 also requires that, "Allocations must be fair and equitable. No account or group of accounts may receive *consistently* favorable or unfavorable treatment." §1.35(a-1)(5) (iii)(B) (emphasis added).

The facts demonstrate that Respondents did not violate Regulation §1.35. Ultrader, as the foreign adviser that exercised sole discretionary trading authority over the accounts of non-U.S. persons, was the "eligible account manager" under Regulation §1.35. 17 C.F.R. §1.35(a-1)(5)(iii)(A). The Respondents prepared and kept a record of when the orders were received, when they were executed, when they were filled, and the allocation instructions and subsequent corrections submitted by Complainants' account manager.[24] 17 C.F.R. §1.35(a-1)(5)(iv)(C); *Knight v. First Commercial Financial Group Inc.*, 1995 WL 590136 (1995 CFTC) (Finding a FCM violated Regulation §1.35 in failing to prepare and keep written records of an order); *Ping He v. NonFerrous Metals Inc.*, 22 F.Supp.2d 94 (S.D.N.Y. 1998). There is also no evidence that Respondents had a "preferential system of allocation" or treated the Complainants in any consistently unfavorable manner. *Index Futures Group, Inc. v. Ross*, 199 Ill.App.3d. 468, 474 (Ill. App. Ct. 1990) (Finding Complainant failed to prove a violation of Regulation §1.35 because there was no preferential system of block trade allocations demonstrated); 17 C.F.R. §1.35(a-1)(5)(iii)(B).

Based upon the reasoning stated above, Respondents did not violate Regulation §1.35.

Respondents use of EFP's is not Evidence of Fraud

Complainants also alleged that Respondents use of EFP's in liquidating the position violated COMEX Regulation 104.36 and is further evidence of fraud.[25] On the night of December 12, 2005, Ultrader sought to liquidate the Gold Futures contracts after the markets had

[24] RCLX 114, 124; RX 131; CX 8-B, 8-D, 8-N

[25] Compl. Response, at 21 (Complainants also alleged that Respondents use of the ACCESS platform was prohibited, but recanted the claim).

closed for fear that the price of gold would open even lower the next morning. To fulfill Ultrader's liquidation instructions overnight, there were only two venues available: EFP and through ACCESS.[26] There is insufficient evidence Respondents use of EFPs was a violation of the Commodity Exchange Act nor is it clear how Respondents use of EFPs is evidence of fraud. The contracts were liquidated through the use of EFPs to *limit* the customer's losses and done so at the direction of Ultrader, Complainants' authorized foreign advisor and account manager.

C. Respondent Citigroup Diligently Supervised Complainants Accounts

Complainants also allege that Respondents violated Regulation 166.3 in failing to diligently supervise their accounts. 17 C.F.R. §166.3 (2009). Regulation 166.3 requires Commission registrants to diligently supervise the handling by its partners, officers, employees, and agents of all commodity interest accounts the registrant carries. *Id.*[27] Regulation 166.3 excludes Associated Persons who have no supervisory duties from this requirement. Therefore, Respondent Costa-Leroy is excluded from Regulation 166.3's requirement. 17 C.F.R. §166.3 (2009). Thus, it only needs to be determined whether Respondent Citigroup violated Regulation 166.3 in its management of the Complainants' accounts.

Under Regulation 166.3, Registrants have an affirmative duty to supervise their employees by establishing, implementing, and executing an adequate supervision structure and compliance programs. *In re MF Global Inc.*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,730 (Dec. 26, 2007), 2007 WL 4564104, (CFTC). In order to prove a violation of Regulation 166.3, the Complainant must demonstrate that either: (1) the registrant's supervisory

[26] Tr. 275:1-8

[27] "Each Commission registrant, except an associated person who has no supervisory duties, must diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other actives of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant." 17 C.F.R. §166.3 (2009).

system was generally inadequate; or (2) the registrant failed to perform its supervisory duties diligently. *In re Walsh Trading Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 31,325 (CFTC March 11, 2009), 2009 WL 649577 (CFTC); *In re Murlas Commodities*, (1994-1996 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 26,485 at 43,161 (CFTC Sept. 1 1995); *In re Paragon Futures Assoc.*, (1990-1992 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,850 (CFTC Apr. 1, 1992). The existence of undetected violations is independent proof of a failure to supervise if the violations should have been detected due to their nature or repeated occurrences. *Id.* citing *In re Paragon Futures Ass'n* [1990 -1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38, 850 (CFTC Apr. 1, 1992). Furthermore, the Commission has held that a Regulation 166.3 violation is "an independent and primary violation for which no underlying violation is necessary." *In re Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194 (CFTC Dec. 10, 1997) (Order of remand reversing ALJ decision in *In re Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,981 (CFTC Mar. 5, 1997)).

In this case, Complainants failed to prove either (1) that Citigroup's supervisory system was generally inadequate, or (2) that Citigroup failed to perform its supervisory duties diligently. *In re Walsh Trading Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 31,325 (CFTC March 11, 2009), 2009 WL 649577 (CFTC).[28] First, the record indicates that Citigroup did indeed have an adequate supervisory system in place, including Citigroup's compliance manuals, references guides, and the testimony of Citigroup's associates.[29] Second, there is insufficient evidence to find that Citigroup failed to perform their supervisory duties diligently. There was no independent violation of the CEA by Respondents and, even if a there was a violation, it be would such an isolated incident that it could not give rise to an inference of supervisory failure. *In re Paragon*

[28] Compl. Response, at 6
[29] CX 18-20;

Assoc., at 38,851; *In re GNP,* at 25,360 (the existence of undetected violations is independent proof of a failure to supervise if the violations should have been detected). Third, Ultrader had been trading the Complainants' accounts for years without incident. There is no evidence of any previous customer allocation issues or any other questionable activities regarding Ultrader and Respondents. See generally *In re MF Global Inc.*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,730 (CFTC Dec. 26, 2007) citing *In re Thomas W. Collins*, ¶ 27,194; *In re GNP*, [1990-1992] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,219 (Aug. 11, 1992), *aff'd sub nom., Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993). Lastly, the fact that Citigroup complied with Ultrader's information request and promptly reviewed the transactions after the incident is further evidence of diligent supervision.[30] *See In re MF Global Inc.*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,730 (Dec. 26, 2007); *In re Thomas W. Collins*, ¶ 27,194; *In re GNP*, [1990-1992] Comm. Fut. L. Rep. (CCH) 25,360 (CFTC 1992).

Therefore, based upon the reasoning set forth above, this court finds Respondents did not violate Regulation 166.3 in their supervision of Complainants' accounts.

D. Complainants Are Not Entitled To Punitive Damages

Complainants have failed to establish a violation on the part of Respondents which entitles them to either compensatory or punitive damages pursuant to 7 U.S.C. §18(a)(1)(B).

CONCLUSIONS OF LAW

The Complainants have failed to establish that Respondents: (1) violated Section 4b of the Commodity Exchange Act, 7 U.S.C. §6b (2009), (2) made a beneficial change of ownership in assigned trades in violation of Regulation 17 C.F.R. §135(a-1)(5)(iii)(a), or (3) failed to diligently supervise Complainants' accounts in violation of Regulation 17 C.F.R. §166.3.

ORDER

[30] (CX 8-25)

Based upon the findings fact and conclusions of law set forth above, Complainants did not establish by a preponderance of the evidence that they sustained monetary damages resulting from a violation of the Commodity Exchange Act on the part of the Respondents. Therefore, Complainants' claims are hereby **DISMISSED** with prejudice.

So Ordered.

Issued February 26, 2010

George H. Painter, ALJ