



U.S. COMMODITY FUTURES TRADING COMMISSION

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JOYCE A. SCHWEICKART and
JAMES B. SCHWEICKART,
Complainants,

v.

OTTO GERDT FEDDERN,
Respondent.

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CFTC Docket No. 10-R018

INITIAL DECISION

Appearances:

Joyce Schweickart and James Schweickart, Louisville, Kentucky, *pro se*

Otto Gerdt Feddern, Jeffersonville, Indiana, *pro se*

Introduction

Joyce and James Schweickart's principal claim is that Otto Feddern convinced them to open a managed futures account traded by Victor Lyons by distorting the relative risks and rewards of Lyons' trading system. At the time, Lyons was the sole owner, principal and registered associated person with Aramis Capital Management, a registered commodity trading advisor. The Schweickarts assert that during a series of monthly public investor meetings culminating in a private meeting in his office, Feddern exaggerated the positive over the negative, for example, by claiming repeatedly that Lyons' customers had consistently made

money over the long term, and confidently assuring that in the unlikely event of a loss, losses would be capped at fifty percent. The Schweickarts also assert that Feddern delivered a defunct and deceptive Aramis commodity trading advisor disclosure document one week past its expiration date, and that Feddern downplayed the significance of that fact by telling the Schweickarts that it was “no big deal” and a minor “procedural issue” to backdate to the expiration date their signatures on the various agreements, acknowledgments, and risk disclosures in the account-opening package.¹ The Schweickarts initially had sought to recover \$2,000, based on one-half of Lyons’ annual managed account fee. More recently, after the conclusion of the hearing, the Schweickarts asked to amend their complaint and increase their damage claim to encompass their total out-of-pocket losses of \$34,420.

Feddern’s principal defense is that since he was not registered with the National Futures Association at the relevant time – *i.e.*, approximately July 2007 to August 2009 – he is not subject to the CFTC’s reparations jurisdiction. Feddern also asserts: one, that he made his representations about Lyons’ performance in good faith, based on Lyons’ representations to him; two, that he was had a “referral relationship,” not an agency relationship, with Lyons and Aramis; and three, that he did not owe the Schweickarts any fiduciary, disclosure or contractual obligations because they were not his clients. Finally, Feddern opposes the Schweickarts’ request to increase their damage claim.

¹ By order dated August 10, 2011, the parties were put on notice that the Schweickarts’ allegation that Feddern delivered the Aramis commodity trading advisor disclosure document after it had expired, and instructed them to backdate to the expiration date their signatures on the various account-opening documents, including the acknowledgment that they had received the Aramis CTA disclosure document, was being treated as an allegation that Feddern had violated Section 13(a) of the Commodities Exchange Act by aiding and abetting Lyons’ and Aramis’ disclosure violations. *See Hull v. Diversified*, Comm. Fut. L. Rep. (CCH) ¶26,131 (CFTC 1994) (The Commission noted that a complaint filed by *pro se* complainant need not specify the statutory or regulatory violations at issue, as long as it includes “an intelligible description of the conduct which the complainant alleges to be in violation of the Act.”); and *Ricci v. Commonwealth Financial Group, Inc.*, Comm. Fut. L. Rep. (CCH) ¶26,917, at 44,444 (CFTC 1996) (The Commission noted that in cases involving *pro se* litigants, it is appropriate for a presiding officer to take an active role in highlighting the relevant issues and fully developing the factual record.).

Lyons and Aramis were defaulted after they failed to file answers. The default against Lyons was vacated after he filed for Chapter 7 bankruptcy.

As explained below, after carefully reviewing the parties' written submissions² and oral testimony, it has been concluded: one, that, notwithstanding his status as a non-registrant at the time of the violations, Feddern is subject to the CFTC's reparations jurisdiction; two, that the Schweickarts' request to increase their damage claim be denied; three, that Feddern violated Section 13(a) of the Commodity Exchange Act by aiding and abetting Lyons' and Aramis' violations of Section 4o(1) of the Act and Aramis' violations of CFTC rules 4.31, 4.34, 4.35 and 4.36; and four, that the Schweickarts are entitled to an award of \$2,000, plus pre-judgment and post-judgment interest.

These conclusions reflect my determination that the testimony of the Schweickarts was generally more consistent and reliable than the testimony of Feddern. Although their recollection has faded somewhat due to the passage of time, the Schweickarts' recollection of pivotal events appeared sincere and convincing. Furthermore, their testimony was more plausible than Feddern's when viewed in light of the surrounding circumstances. For example, their recollection that Feddern, on July 11, 2008, had instructed them to backdate -- to July 3, 2008 -- their signatures on the various account-opening documents was buttressed by the fact

² The Schweickarts' principal evidentiary submissions include the factual description to their complaint, the addendum to their complaint, their joint affidavits dated March 25 and August 22, 2011, and a copy of the cancelled check for \$4,000 to Aramis, dated July 11, 2008. Feddern's principal evidentiary submissions include his answer, his August 2009 letter in response to the Schweickarts' initial complaint to the Better Business Bureau (attached to his answer), and his affidavits dated March 29, and August 29, 2011. In addition, Alaron Trading Corporation, the futures commission merchant that carried the Schweickarts' account for most of the relevant time, in response to a *sua sponte* subpoena, produced: the Alaron account-opening package, which Feddern had delivered to the Schweickarts in his office on July 11, 2008; the Aramis commodity trading advisor disclosure document dated October 3, 2007, which Feddern also had delivered to the Schweickarts on July 11, 2008; copies of the Schweickarts' cancelled check to Alaron for \$40,000, dated July 11, 2008; and a "Dear Prospective Client" letter on Aramis letterhead, dated July 19, 2008, in which Lyons glossed over the backdating of the account-opening documents.

that their two checks had been dated July 11, 2008 and cleared a few days later, and that July 3, 2008 happened to be the date that the Aramis CTA disclosure document had expired.

In contrast, Feddern had little or no recollection of significant events. Although he could recall the Schweickarts' drawn-out efforts, starting in early 2009, to get their account balance returned, Feddern could recall few convincing details about his earlier and more significant dealings with them.³ Moreover, Feddern undermined his credibility by producing internally inconsistent descriptions about various relevant matters. For example, Feddern represented at different points in the proceeding first that he did deliver, next that he did not deliver, and finally that he may have delivered, the Alaron and Aramis account-opening documents to the Schweickarts in his office on July 11, 2008.⁴

Findings of Fact

The Parties

1. Joyce Schweickart and James Schweickart, wife and husband residing in Louisville, Kentucky, were 68 and 69 years old, respectively, when they opened their joint, discretionary account. James Schweickart works as a self-employed musician and music teacher. Joyce Schweickart works as a housewife.

³ See ¶¶ 5-9 of Feddern's March 29, 2011 affidavit.

⁴ At first, just a year after the events in question, in his August 31, 2009 reply to the Schweickarts' complaint to the Better Business Bureau, Feddern acknowledged conversations with Mr. Schweickart "on several occasions." Significantly, he also did not dispute the Schweickarts' assertion that they had met in his office on July 11, 2008 to sign the account-opening documents. Similarly, in his answer to the Schweickarts' reparations complaint, Feddern did not dispute the Schweickarts' assertion that they had met in his office that day and did not dispute their assertion that he had instructed them to back date their signatures on the account-opening documents. However, at the hearing Feddern zigzagged. He first testified, "I had nothing to do with anything involved with any of the accounts, as far as paperwork and as far as having an account with Victor Lyons," but later testified that "[the Schweickarts] sat there [i.e., in his office] and filled out the paperwork, but it was not as a client of mine." [Compare pages 33 and 48 of hearing transcript.] Finally, in his post-hearing affidavit, Feddern equivocated: "I have no records of dates of the Schweickarts in my office for any reason since they were not clients. Lyons kept those records. They certainly may have signed the Alaron/Aramis paperwork there." [Underlining added for emphasis.]

James “Bernie” Schweickart was principally responsible for investment communications and decisions. However, he regularly consulted Joyce Schweickart, who a couple of times would join James at the monthly public investor meetings conducted by Otto Feddern before they decided to open their joint account at Feddern’s office. Also, Joyce and James Schweickart together would meet three times with Feddern at his office: the first time in July 2008 to receive and sign the various account-opening documents; the second time in October 2008 to meet Victor Lyons in person to discuss a change in strategy to recoup their early losses; and the third time in January 2009 for a conference call to ask Lyons to refund half of the \$4,000 annual fee, since he had lost over half of their investment in less than half a year.

When the Schweickarts opened their joint account, James Schweickart had about ten years experience trading stocks and bonds, but no experience with commodity futures or options or other derivatives. James Schweickart had independently gained a basic understanding that futures trading involved a general risk of loss that was commensurate with the possibility of great profits. [See account application (produced by Alaron); and James Schweickart testimony pages 6-7, 11, and 20-21, of hearing transcript.]

2. Alaron Trading Group, a registered futures commission merchant at the relevant time, carried the Schweickarts’ joint account from July to December 2008. Subsequently, the account would be transferred to Penson Futures, and then to Peregrine Financial Group, Inc.

3. Respondent Otto Gerdt Feddern, a resident of Jeffersonville, Indiana, across the Ohio River from Louisville, is the president of Feddern Consulting Group, a registered investment advisor. Feddern was first registered with the National Futures Association in 1988. From 1988 to 2006, he was a registered associated person with a series of firms, including JC Bradford & Company, LLC, Lehman Brothers, Inc., Citigroup Global Markets, Inc., UBS Financial

Services, Inc., Prudential equity Group, LLC, and Wells Fargo Advisors, Inc.⁵ Feddern was not registered with the NFA from August 29, 2006, to September 16, 2009. Thus, during the relevant time -- from about July 2007, when James Schweickart first met Feddern, to August 2009, when the account balance was refunded to the Schweickarts -- Feddern was not registered with the NFA. Subsequently, on September 17, 2009, Feddern became a registered associated person and branch manager with Zaner Group, Incorporated. [NFA records; *see* Feddern's testimony at pages 28-31.]

4. According to Feddern, he had a verbal agreement with Victor Lyons, under which Lyons would pay Feddern two percent of the funds committed by any customer referred by Feddern to Lyons. Feddern estimated that between May 22, 2007 and March 31, 2008 he referred 26 new accounts to Lyons, 8 of them after March 31, 2008, when the National Futures Association had instructed Lyons to cease soliciting new accounts. Feddern asserted that Lyons never informed him of the NFA's ban on Lyons soliciting new customers. [See ¶¶ 1-3, and 12 of Feddern's March 29, 2011 affidavit; ¶ 2 of Feddern's August 29, 2011 affidavit; and Feddern's testimony at pages 31-39 of hearing transcript.]

Feddern made inconsistent assertions about the extent to which Lyons had paid and had not paid Feddern for the referrals. At the hearing, Feddern first stated that Lyons had not rebated any fees, but later stated that initially Lyons had been rebating the fees but stopped when he became embroiled in a divorce. [*Compare* Feddern's testimony at pages 34-35, and 44-46, of hearing transcript.] Similarly, Feddern initially had asserted that Lyons had owed, but not paid, an \$800 fee rebate for referring the Schweickarts' \$40,000 account. However, subsequently he

⁵ At the hearing, Feddern appeared reluctant to confirm his registration with the NFA from 1988 to 2006. In response to a routine query to state when he had "first been registered with the NFA," Feddern initially answered: "January of 2009." Subsequently, he only reluctantly confirmed that he had been registered as an associated person with these firms from 1988 to 2006. *See* pages 28-31 of hearing transcript.

testified that Lyons had not owed him anything in connection with the Schweickarts' account because they were not Feddern's clients. [*Compare* last paragraph on second page of Feddern's March 29, 2011 affidavit, and Feddern's testimony at page 46 of hearing transcript.] In any event, Feddern has not produced any reliable documentary evidence to support his assertion that Lyons failed to compensate him for referring the Schweickarts. Furthermore, the fact that Feddern recently produced a copy of an updated version of the Aramis CTA disclosure document suggests an ongoing mutually beneficial relationship between Feddern and Lyons at least half a year after Feddern had referred the Schweickarts to Lyons.⁶ In these circumstances, little weight can be accorded Feddern's assertion that Lyons failed to compensate him for referring the Schweickarts' \$40,000 account.

5. Feddern would conduct monthly open meetings of the American Association of Individual Investors at the local library, country clubs, and restaurants. These meetings covered a variety of topics, including stock trading software and Lyons' trading system. Sometimes, Lyons would participate via a video connection and show a power point presentation. Other times, Feddern would show Lyons' power point presentation. At these meetings which James Schweickart would begin occasionally attending in July of 2007 Feddern and other participants whom Feddern had referred to Victor Lyons would regularly discuss Lyons' trading system. As noted above, Joyce would join James Schweickart for some of these meetings, and after several months, on July 11, 2008, Joyce and James Schweickart would jointly appear at Feddern's office to sign the various account-opening documents and to deliver two checks totaling \$44,000.

⁶ Feddern produced a copy of the Aramis CTA disclosure document with his post-hearing affidavit. Although Feddern did not include the cover page with the date of the disclosure document, the performance tables in this version reported results in more recent months than did the October 3, 2007 disclosure document. According to the NFA, Lyons would eventually replace the October 3, 2007 disclosure document, which had expired on July 3, 2008, with a revised disclosure document dated January 9, 2009. See finding 8, below.

Throughout the relevant time, Otto Feddern acted as the Schweickarts' principal point of contact for dealing with Victor Lyons and Aramis Capital Management. In this connection, the Schweickarts spoke directly to Lyons just two times. The first time, in October 2008, was a face-to-face meeting in Feddern's office to discuss a new trading strategy to recoup early losses. The second time, in January 2009, was over a conference call originating in Feddern's office to discuss Lyons' poor performance and to demand a refund of half of Lyons' \$4,000 annual fee. [See second and fourth paragraphs on first page of factual description of the Schweickarts' complaint; addendum to the Schweickarts' complaint; ¶¶ 1-5 of the Schweickarts' joint affidavit dated March 25, 2011; James Schweickart's testimony at pages 1-15 and 47-48 of hearing transcript; Joyce Schweickart's testimony at pages 24-27 of hearing transcript; third paragraph of Feddern's letter to Schweickart dated August 31, 2009; ¶¶ 4-9 of Feddern's March 30, 2011 affidavit; ¶ 3 of Feddern's August 29, 2011 statement; and Feddern's testimony at pages 47-48 of hearing transcript.]

6. Respondent Aramis Capital Management LLC, located in Kirkland, Washington, became registered as an introducing broker and commodity trading advisor in September 7, 2007. On January 10, 2010, Aramis' registration was terminated. [NFA records.] As noted above, Aramis was defaulted after it failed to file an answer to the Schweickarts' complaint.

7. Respondent Victor Lyons was the sole owner, sole listed principal and sole registered associated person of Aramis Capital Management from September 2007 to January 2010, and thus presumably controlled operations of the firm. Lyons first became registered with the National Futures Association in June 2000. Lyons was registered associated person with a series of firms from June 2000 to March 2003. From October 2003 to March 2007, Lyons was the sole owner, listed principal and registered associated person of Financial Alliance, Inc., a

registered introducing broker, commodity trading advisor and commodity pool operator. [See NFA records.]

Lyons would forward to Feddern the Aramis CTA disclosure document dated October 3, 2007, as well as the updated version of that CTA disclosure document. As noted above, according to Feddern: Lyons and Feddern had a verbal agreement under which Lyons would pay Feddern two percent of the funds committed by any individual referred by Feddern to Lyons; and Feddern would refer about 26 accounts to Lyons.

Lyons had discretionary authority to trade the Schweickarts' Alaron account, pursuant to a managed account authorization backdated by the Schweickarts to July 3, 2008. As mentioned above, Lyons would speak to the Schweickarts just twice: first in October 2008, in person at Feddern's office, and again in January 2009 in conference call with the Schweickarts and Feddern in Feddern's office, and Lyons on the West Coast.

Lyons failed to file an answer to the Schweickarts' reparations complaint, and by order dated March 16, 2011, was found in default. Subsequently, Feddern produced a copy of Lyons' petition under Chapter 7 of the Bankruptcy Code, filed March 3, 2011, in the Western District of Washington of the U.S Bankruptcy Court. As a result, on April 26, 2011, pursuant to CFTC rule 12.24, the default order as to Lyons was vacated and the complaint against Lyons was dismissed without prejudice.

Lyons' and Aramis' Deceptive CTA Disclosure Document

8. On October 26, 2007, the National Futures Association informed Lyons that it had reviewed the Aramis CTA disclosure document dated October 3, 2007, without verifying any of the representations therein, and confirmed that he could now use it to solicit customers for the

next nine months, *i.e.*, up to July 3, 2008. This is the version of the Aramis CTA disclosure document that Feddern would deliver to the Schweickarts on July 11, 2008.

The front page of the October 26, 2007 disclosure document prominently stated that it could not be utilized after July 3, 2008. In this connection, the Schweickarts credibly asserted that, when they would meet Feddern at his office on July 11, 2008 to sign the account-opening documents, Feddern would ask them – as a minor “procedural issue” – to back date to July 3, 2008 all of the account-opening documents, including the acknowledgment that they had received the Aramis CTA disclosure document.

This disclosure document included a performance history which showed trading results for March through July 2007, ranging from -9.10% to 1.69%, for a year-to-date return of -15.03%. Thus, by July 11, 2008, when Feddern would deliver this version of the disclosure document to the Schweickarts, the performance information in the disclosure document was particularly stale, because it did not report any performance information for the preceding year. This one-year reporting gap would coincide with the time that Feddern and Lyons’ clients at his monthly public meetings had been enthusiastically discussing Lyons’ purportedly profitable performance.

In March of 2008, the NFA discovered multiple deficiencies in the Aramis October 3, 2007 CTA disclosure document: one, Lyons had failed to disclose an adverse 2006 arbitration award;⁷ and two, the performance information in the disclosure document was skewed due to the

⁷ On September 26, 2006, an NFA arbitration panel directed Lyons, Financial Alliance and a third member to pay the claimants \$340,000 in compensatory damages, \$100,000 in punitive damages, \$60,000 in interest, \$6,650 in costs, and \$65,000 in attorneys’ fees pursuant to the State of California’s financial elder abuse statute, Welfare and Institutions Codes sections 16510.27 *et. seq.*, and 15657 *et. seq.* *Papazian, et. al. v. Barraza, et. al.*, NFA case no. 05ARB0007606.

way that Lyons collected management fees.⁸ As a result, on April 9, 2008 – three months before the Schweickarts would open their account – the NFA informed Lyons that he was not permitted to solicit new clients until he had corrected the Aramis disclosure document. Notwithstanding the NFA’s instructions, Lyons did not correct the Aramis disclosure document and continued to open at least twenty one new accounts. [Pages 3-5, NFA complaint dated August 25, 2000, *In re, Aramis Capital Management LLC, and Victor Lyons*, NFA Case No. 09-BCC-030, NFA records.] As previously noted, several of these post-ban accounts, including the Schweickart account, were opened after referrals by Otto Feddern.

Not until January 9, 2009, after trading in the Schweickart account had ceased, would Lyons submit a revised disclosure document that NFA conditionally approved. However, during a subsequent examination of Aramis in February 2009, the NFA determined that the performance information in the disclosure document still did not accurately reflect the performance of Aramis’ trading program. The NFA noted, among other things, that the Main Performance Capsule represented the performance for December 2007 as -3.98% when it was actually -24.85%, and presented the yearly rates of return for 2007 and 2008 as -16.07% and 2.96%, respectively, when in reality the rates of return for those years were -47.29% and 4.28%, respectively. [*Id.*]

On August 25, 2009, the NFA Business Conduct Committee brought a disciplinary complaint against Lyons and Aramis alleging violations of CFTC and NFA rules governing CTA disclosure, reporting and supervision requirements. The NFA’s principal complaint was that Lyons and Aramis had delivered to clients and to prospective clients a deceptive disclosure document that contained material misrepresentations and omissions, and that Lyons had ignored

⁸ Pursuant to a delegation of authority, NFA staff review CTA disclosure documents during the course of on-site audits as well as through a desk review program. 62 Fed. Reg. 52088 (October 6, 1997).

the NFA's directive that he must stop soliciting new clients until he cured the defects in the disclosure document. The NFA asserted that: "Lyons also has a nonchalant and entirely inappropriate attitude about regulatory requirements as evidenced by his comment to NFA when NFA directed him to a certain NFA Compliance Rule. Lyons responded that he was 'not going to read every NFA rule.'" [Page 6, *id.*]

In his answer to the NFA complaint, Lyons did not dispute the NFA's assertions that he had continued to solicit new clients after the NFA had instructed him not to do so. Lyons also did not dispute the NFA's assertions about the inaccurate performance representations in his power point presentation and the Aramis disclosure document, which he claimed "were solely the result of spreadsheet formula errors." By decision dated February 3, 2010, the NFA accepted Lyons' and Aramis' offer of settlement not to seek re-registration for two years and found that Lyons and Aramis had violated various NFA compliance rules. [NFA records.]

The monthly AAIL meeting

9. In the fall of 2007, James Schweickart began occasionally attending monthly public meetings of the American Association of Individual Investors at the Jeffersonville library. Joyce Schweickart joined him for a few of these meetings. Feddern essentially guided these meetings, which covered a variety of topics, including Victor Lyons' trading system. According to Feddern, Lyons participated twice via a video connection and showed a power point presentation, and other times Feddern working alone showed Lyons' power point presentation. The Schweickarts were not at either of the meetings where Lyons participated. In this connection, when asked to describe the disclosures by Feddern and/or Lyons about the risks associated with Lyons' trading system, Feddern replied that "Lyons was always 'upfront' about the downside risks of trading." [Underlining added for emphasis; ¶ 2 of Feddern's March 29,

2011 affidavit.] As previously noted, James Schweickart conceded that he knew as a general proposition that the high risk of loss associated with futures trading was commensurate with the possibility of great profits. However, the Schweickarts credibly recalled that the principal message enthusiastically conveyed by Lyons' clients was that Lyons' system had been making money month after month and that after a few months Lyons had returned their initial investment and thus only put their profits at risk. The Schweickarts also credibly recalled that Feddern repeatedly reinforced this message with confident confirmations that Lyons system had been consistently profitable and that in the unlikely event of losses such losses would be limited to fifty percent. [See James Schweickart's testimony at pages 7-13, and 22, and Joyce Schweickart's testimony at pages 24-25, of hearing transcript.]

The account opening

10. On July 11, 2008, the Schweickarts met with Feddern at his office for about an hour. Feddern spent most of this time talking about Lyons' trading system. The Schweickarts credibly recalled that Feddern reinforced the message in the monthly meetings that Lyons had been consistently generating profits and that any losses would be limited to fifty percent, and so convinced the Schweickarts to open a managed account. As a result, while James Schweickart expected to make money, he psychologically steeled himself for the possibility, however remote, of losing up to \$20,000.

Near the end of the meeting, Feddern delivered to the Schweickarts the 24-page Alaron account-opening package which included: the managed account authorization; the customer agreement; and multiple risk disclosure statements. Feddern also delivered the 19-page Aramis disclosure document which included an acknowledgement of receipt of the disclosure document. The Schweickarts spent little time reviewing these documents, partly because Feddern suggested

that the documents were inconsequential and spent little time reviewing or explaining any of the documents. Feddern also instructed the Schweickarts to backdate to July 3, 2008 the various Aramis and Alaron account-opening documents, explaining that the back-dating was “no big deal” and a minor “procedural issue.” The Schweickarts also handed Feddern two checks, one made out to Alaron for \$40,000, and another made out to Aramis for \$4,000. [See James Schweickart’s testimony at pages 13-15 and 20-21, and Joyce Schweickart’s testimony at pages 25-26, of hearing transcript.]

11. Alaron produced a copy of a letter on Aramis letterhead dated July 19, 2008.

Alaron (the clearing firm) is requiring you to acknowledge the following with your signature before they will assign you an account number.

This letter clarifies you are aware the disclosure document you have signed expired on the 3rd of July 2008. The expiration of the disclosure document means that it may not be used to solicit new accounts beyond the 3rd of July 2008. By signing this letter you are acknowledging you were not solicited with the use of this document after the 3rd of July 2008.

As can be seen, the letter was less than forthcoming or completely accurate. For example, it did not mention that three months before the Schweickarts opened their account the NFA had informed Lyons that he must immediately cease soliciting new clients until he had corrected various material deficiencies in the Aramis disclosure document, or mention that by July 11, 2008 he had failed to cure the defects. The letter also did not identify the material deficiencies in the disclosure document. For example, the letter did not mention that Lyons was required to provide the Schweickarts new performance tables updated from July 2007 to March 2008, and the letter did not mention that Lyons was required to correct the disclosure document to disclose that an NFA arbitration panel in September 2006 had found that Lyons and his previous firm had violated California’s financial elder abuse statute, and ordered Lyons and his firm to pay a \$571,650 award.

The fuzzy appearance of the letter indicates that it had been faxed at least once, possibly multiple times. However, on the copy produced by Alaron, the fax numbers, dates and times are not legible. Therefore, it cannot be reliably determined when Lyons faxed it to Alaron, and it cannot be reliably determined whether he actually faxed it to the Schweickarts.

Trading activity

12. Lyons began trading for the Schweickarts' account in late August. In early October he stopped trading when losses exceeded 50%. Around this time, Lyons held separate meetings in Feddern's office with the various clients whom Feddern had referred to Lyons, including James and Joyce Schweickart. Lyons told them that he had revamped his trading system and hoped to recoup gradually their losses with a more conservative options trading strategy. The Schweickarts gave him the go-ahead. Lyons was not successful, and in early January 2009 stopped the second round of trading, which left an account balance of about \$9,580. Thus, the Schweickarts' out-of-pocket losses totaled \$34,420, based on the sum of the \$30,420 in trading losses and Alaron commissions, and Lyons' \$4,000 annual fee. [See James Schweickart's testimony at pages 15-23, and Joyce Schweickart's testimony at pages 26-28, of hearing transcript.]

Conclusions

Feddern's Jurisdiction Defense

Feddern's principal defense is that he is not subject to the CFTC's reparations jurisdiction because he was not registered with the NFA at the time of the alleged violations. This defense is without merit. The Commission long ago held that, consistent with Congressional intent: "we will normally exercise our jurisdiction and adjudicate claims against individuals who were

registered at the time of the violation as well as those who become registered during the two year limitations period.” *Nelson Incorporated Retirement Trust v. Diversified Investment Group, Incorporated*, Comm. Fut. L. Rep. ¶ 22,627 (CFTC 1985). In *Nelson*, the Commission further noted that, similarly consistent with Congressional intent: “We also retain jurisdiction in reparations over non-registrants who willfully aid or abet a registrant in violations of the Act resulting in damages to the complainant.” *Id.*, fn. 4, at 30,679. Thus, two independent grounds support the conclusion that Feddern is subject to the Commission’s reparations jurisdiction despite the fact that he was not registered at the relevant time: one, he re-registered within the two-year limitations period, and two, as explained below, he has been found to have aided and abetted violations by registrants Lyons and Aramis.

The Schweickarts’ Motion to Amend Complaint and Increase Damage Claim

In their initial complaint, the Schweickarts alleged that Otto Feddern had fraudulently induced them to open the managed account. They alleged, among other things, that Feddern had misled them about Victor Lyons’ experience and expertise, and had deceptively downplayed the specific risks and exaggerated the past performance of Lyons’ trading system. The Schweickarts also indicated that they were aware of the NFA’s disciplinary action against Lyons and Aramis, and that they were aware that their out-of-pocket losses had totaled \$34,420, based on an upfront \$4,000 payment for Lyons’ annual fee, plus \$30,420 in trading losses and Alaron commissions. Nonetheless, the Schweickarts indicated that they sought to recover only \$2,000, based on half of the annual fee. In this connection, the Schweickarts asserted that the fees were “excessive and unwarranted” in view of Feddern’s and Lyons’ “extreme negligence.” The Schweickarts explained that they were not seeking to recover their trading losses, because, notwithstanding

Feddern's alleged misrepresentations about the specific risks associated with Lyons' trading system, they had been aware of the general risks associated with trading futures.

In a follow-up letter, the CFTC informed the Schweickarts that the normal measure of damages for the deceptions, misrepresentations, omissions, and reckless breaches of the sort alleged in the complaint would be their out-of-pocket losses, based on the theory that if they prevailed they should be returned to their financial status before the fraud had occurred. Therefore, the CFTC asked the Schweickarts to confirm whether or not they wanted to increase their damage claim to include their total out-of-pocket losses. In response, the Schweickarts indicated that they had decided not to increase their damage claim: "Although it is a hard lesson to learn we will accept our trading losses, but still think we are due at least ½ of the \$4,000 annual fee due to the inaction of both Mr. Lyons and Mr. Feddern." In this reply, the Schweickarts also mentioned for the first time that they recalled that the Aramis disclosure document had a July 3, 2008 expiration date and that, on July 11, 2008, Feddern had asked them to back date their signatures on the account-opening documents to July 3, 2008. In a second follow-up letter, the CFTC confirmed that the Schweickarts had capped their damage claim at \$2,000.

After the hearing had been held, I issued an order placing the parties on notice that I was treating the Schweickarts' principal claim against Feddern as a claim that he had aided and abetted the disclosure violations by Lyons and Aramis by delivering a defunct and deceptive CTA disclosure document and by disingenuously instructing them -- as a minor "procedural issue" -- to back date their signatures to a date that happened to be the expiration date for the disclosure document. In that order I also gave both sides an opportunity to produce supplemental affidavits that addressed factual matters that related to the aiding and abetting claim. I also

provided additional background information concerning Lyons and Aramis, including a detailed description of the NFA disciplinary action against Lyons and Aramis, which the Schweickarts had referenced in their initial complaint. In reply, the Schweickarts attached to their affidavit a request to increase their damage claim to encompass their full out-of-pocket losses. Feddern opposed the request.

At the time that they decided to limit their damage claim to \$2,000, the Schweickarts: one, had indicated that they were aware that Lyons had been the subject of an NFA disciplinary action; two, had articulated their claim that Feddern had failed to provide an accurate and fair disclosure of the risks and rewards associated with Lyons' trading system, and that he had instructed them to backdate their signatures to the expiration date of the Aramis disclosure document; and three, had received clear, explicit notice that based on this sort of claim they could seek to recover their entire out of pocket losses of over \$34,000 in damages. None of the facts which subsequently have emerged, or have been supplemented or highlighted, fundamentally altered the factual circumstances known to the Schweickarts' when they filed their claim. Moreover, none of these facts were hidden by Feddern, who presumably relied on the dollar amount of the Schweickarts' damage claim when he made significant litigation decisions during the course of this case, including the decision to represent himself without counsel. In these circumstances, the Schweickarts' request to amend their damage claim at this late point in the proceeding must be denied.

Lyons' and Aramis' Disclosure Violations

The preponderance of the evidence supports the conclusion that Lyons and Aramis defrauded the Schweickarts, Aramis and Lyons in violation of Section 4o(1) of the Commodity

Exchange Act,⁹ and Aramis in violation of CFTC rules 4.31,¹⁰ 4.34,¹¹ 4.35¹² and 4.36,¹³ The purpose of the Commission's Part 4 rules governing the conduct of commodity trading advisors is to assure that CTAs furnish customers meaningful information, to assure that CTAs are dealing fairly with customers and maintaining adequate records of those dealings, and to facilitate inspections of the operations and activities of CTA's. *See* Revisions of CPO and CTA Regulations, 46 Fed. Reg. 26,004 (May 8, 1981). The requirement in rule 4.31 that a customer sign and date an acknowledgment of receipt of the CTA disclosure document, before entering into a managed account agreement with the CTA, memorializes the delivery of the disclosure document and creates a record that facilitates inspections of the operations and activities of a CTA, and thus plays a critical role in assuring the CTA's compliance with substantive customer-protection rules. The requirement in rule 4.35 that performance information must be "up-to-date," the requirement in rule 4.36(a) that the performance information must be current as of a

⁹ Section 4o(1) of the Act provides, in pertinent part: "It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor . . . by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly — (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant."

¹⁰ CFTC rule 4.31(a) requires a commodity trading advisor ("CTA") to provide a prospective client with a disclosure document ("DD") that contains all the information required under CFTC rules 4.34 and 4.35, no later than the date that the CTA delivers to the prospective client an advisory agreement. CFTC rule 4.31(b) requires a CTA to obtain from a new client the client's signed and dated acknowledgment of receipt of the DD.

¹¹ CFTC rule 4.34 requires that the DD contain, among other things, any material administrative or civil action pending or concluded within the previous five years against any principal of the CTA.

¹² CFTC rule 4.35 provides that a DD must include the actual, up-to-date, performance of all accounts directed by the CTA and each of its trading principals.

¹³ CFTC rule 4.36 (a) provides that the information in the DD must be current as of the date of the DD, and that the "performance information must be current as of a date no more than three months preceding the date of the [DD]." CFTC rule 4.36 (b) provides that a CTA may not use a DD "dated more than nine months prior to the date of use." CFTC rule 4.36 (c) provides that if a CTA knows or should know that its DD is materially incomplete or inaccurate, it must correct the defect and distribute the correction to all clients within 21 calendar days of the date upon which the CTA first knows or has reason to know of the defect, and may not use the DD until the correction is made. Rule 4.36 (c) further requires the CTA to provide such corrections to any previously solicited prospective client prior to entering into an agreement to direct the client's account.

date no more than three months before the date of the disclosure document, and the requirement in rule 4.36(b) that a CTA may not deliver a disclosure document more than nine months past its date, together assure that a CTA will provide performance data in the disclosure document that is materially current, complete and accurate. The requirement in rule 4.36(c) that the CTA must not otherwise deliver a disclosure document that it knows to be “materially incomplete and deficient,” and must promptly correct any known defects and provide customers with notice of the correction, assures that that prospective customers receive meaningful disclosure of performance and other material information. *Id.*, at 26,013 . In other words, compliance with the Commission’s Part 4 requirements assures that performance data set out in the disclosure document is not stale and not misleading. Similarly, the requirement in rule 4.34 that the CTA must disclose any material civil action assures the disclosure of information that “an average prospective customer” would consider material. *Id.*, at 26,008.

Here, when Lyons accepted the Schweickarts’ managed account agreement and acknowledgment of receipt of the uncorrected Aramis disclosure document, he blatantly disregarded an NFA warning to cure the material deficiencies in the Aramis disclosure document and to stop soliciting new customers until he had corrected the deficiencies. Thus, Lyons and Aramis violated Section 4o(1) of the Commodity Exchange Act, and Aramis violated CFTC rule 4.36(c), by delivering a disclosure document that the NFA had explicitly warned Lyons was materially deficient. Also, Lyons and Aramis, through Feddern, delivered the October 3, 2007 disclosure document to the Schweickarts past the July 3, 2008 expiration date for the disclosure document. Because the disclosure document had expired and had not been updated since July 2007, the performance data in the disclosure document was materially stale, with a one-year gap between the last month reported in the performance capsule and the date of delivery. As a result,

Lyons and Aramis failed to provide meaningful performance disclosure: Lyons and Aramis in violation of Section 4o(1) of the Act, and Aramis in violation of CFTC rules 4.31(a), 4.35 and 4.36. Finally, Lyons and Aramis deprived the Schweickarts of material information by failing to disclose the adverse arbitration award: Lyons and Aramis in violation of Section 4o(1) of the Act, and Aramis in violation of CFTC rule 4.34.

Fedders' Aiding and Abetting Lyons' and Aramis' Violations

The aiding and abetting provision of the Act, Section 13(a), provides: “Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations or orders issued pursuant to this Act, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this Act or any of such rules, regulations, or orders may be held responsible for such violation as a principal.”¹⁴ The Commission has adopted Judge Learned Hand’s standard articulated in *U.S. v. Peoni*:¹⁵ To violate Section 13(a) of the Act, one must (1) knowingly associate himself with the unlawful venture, (2) participate in it as something that he wishes to bring about, and (3) seek by his actions to make it succeed.¹⁶ Thus, aiding and abetting liability depends on proof that an alleged aider and abettor knew that the person who committed the primary violation was acting in a “wrongful” manner.¹⁷ Ignorance of the law is no more an excuse for the aider and abettor than it is for the primary wrongdoer, particularly when the person charged with aiding and

¹⁴ 7 U.S.C. §13c(a).

¹⁵ 100 F.2d 401, 402 (2d Cir. 1938).

¹⁶ *In re Richardson Securities, Inc.*, Comm. Fut. L. Rep. ¶ 21,145, fn. 2 at 24,646 (CFTC 1981).

¹⁷ See, e.g., *In re Mayer*, Comm. Fut. L. Rep. ¶ 27,259 (CFTC 1998); *In re Bear Sterns & Co.*, Comm. Fut. L. Rep. ¶ 24,994 (CFTC 1991); and *In re Lincolnwood Commodities*, Comm. Fut. L. Rep. ¶ 21,986 (CFTC 1984).

abetting is an industry professional that operates in a regulated field that imposes duties that normally do not attach to the general public.¹⁸

Direct proof of knowledge is not necessary to establish aiding and abetting. In other words, knowing assistance can be inferred from the surrounding facts and circumstances.¹⁹ For example, in *Sanchez v. Crown*, Comm. Fut. L. Rep. ¶ 30,183 (CFTC 2006), the Commission imposed aiding and abetting liability on a broker who had failed to deliver a proper CFTC Rule 33.7 risk disclosure statement before an account had been opened.²⁰

Here, Feddern knowingly committed a series of overt acts on July 11, 2008 that advanced Lyons' and Aramis' fraud on the Schweickarts. First, despite the fact that the performance data in the Aramis disclosure document was patently stale and despite the fact that the cover page of the Aramis disclosure document stated that it was not to be used after July 3, 2008, Feddern delivered the Aramis disclosure document to the Schweickarts. Second, Feddern instructed the Schweickarts to back date their signatures -- to the date that happened to be the expiration date for the Aramis disclosure document -- on all of the account opening documents, including the acknowledgment of receipt of the Aramis disclosure document. Third, Feddern obscured and downplayed the significance of the backdating instruction by inaccurately characterizing it as "no big deal" and a minor "procedural issue."

Feddern's ignorance of the NFA's ban on Lyons soliciting new customers and Feddern's lack of familiarity with the CFTC's Part 4 rules governing CTA disclosure documents do not preclude a conclusion that he knew that Lyons was acting in a wrongful manner by authorizing

¹⁸ *Lincolnwood*, at 28,254.

¹⁹ *Lincolnwood*, at 28,255. See also *In re Buckwalter*, Comm. Fut. L. Rep. ¶ 24,995, at 37,686 (CFTC 1991), and *Korn v. Great American Commodities, Inc.*, Comm. Fut. L. Rep. ¶ 25,397 (CFTC 1992).

²⁰ See *In re Nikkha*, Comm. Fut. L. Rep. ¶ 28,129 (CFTC 2000) (CFTC rule 33.7 requires a futures commission merchant or an introducing broker, but not an associated person working for the FCM or IB, to provide a risk disclosure document to a customer. However, such liability may be imposed on the AP through a finding of aiding and abetting.)

Feddern to continue distributing an expired disclosure document, particularly since Feddern had formerly been registered with the NFA, and was currently registered as an investment advisor. Feddern's lack of familiarity with the CFTC's Part 4 rules underscores the fact that he had no reasonable basis to represent to the Schweickarts that back dating the acknowledgment of receipt of the expired disclosure document was a minor technicality. Finally, the fact that the performance data in the Aramis disclosure document was patently stale, coupled with the fact that the cover page of the Aramis disclosure document stated that it was not to be used after July 3, 2008, gave Feddern good reason to know that the Aramis disclosure document failed to provide meaningful performance disclosure to the Schweickarts and thus that Lyons was acting in a wrongful manner by authorizing and compensating Feddern to continue distributing the expired disclosure document. In these circumstances, the evidence supports the conclusion that Feddern violated Section 13(a) of the Act, by aiding and abetting Lyons' and Aramis' violations of Section 4o(1) of the Act and Aramis' violations of CFTC rule 4.31, 4.34, 4.35 and 4.36.

The Schweickarts' presumed reliance on Lyons' and Aramis' multiple material omissions aided and abetted by Feddern has not been rebutted by Feddern. Thus, the proper measure of damages for Feddern's violation is the Schweickarts' out-of-pocket losses, capped by the amount of their damage claim: \$2,000.

ORDER

James and Joyce Schweickart have established that Otto Feddern violated Section 13(a) of the Commodity Exchange Act by aiding and abetting violations of Section 4o(1) of the Act by Victor Lyons and Aramis Capital Management and violations of CFTC rules 4.31, 4.34, 4.35 and 4.36 by Aramis Capital Management, and that Feddern's violation proximately caused \$34,420

in damages. However, the damage award shall be limited to the \$2,000 award sought by the Schweickarts. Accordingly, Otto Gerdt Feddern is ordered to pay to Joyce Schweickart and James Schweickart reparations of \$2,000, plus interest on that amount at 0.10% compounded annually from July 16, 2008, to the date of payment, plus \$125 in costs for the filing fee.

Dated October 5, 2011.


Philip V. McGuire,
Judgment Officer