UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

DANNY K. MELTON and NELLIE H. MELTON	:	
v.	:	CFTC DOCKET NO. 99-R061
KEITH PASQUA, CARL ROBERT SAATHOFF, and UNIVERSAL COMMODITY CORPORATION	:	

DANNY K. MELTON	:	
v.	:	CFTC DOCKET NO. 99-062
KEITH PASQUA, CARL ROBERT SAATHOFF, and UNIVERSAL COMMODITY CORPORATION	:	OPINION AND ORDER

Respondents Keith Pasqua ("Pasqua"), Carl Robert Saathoff ("Saathoff"), and Universal Commodity Corporation ("UCC") appeal from the Initial Decision of an Administrative Law Judge ("ALJ"), which ordered them to pay complainants Danny K. Melton ("Melton") and Nellie H. Melton a reparations award of $40,715.32, plus interest and costs. The ALJ based the award on findings that Pasqua fraudulently induced Melton into opening a commodities account by misrepresenting the risk of loss and then churned Melton's account, along with a joint account that Melton later opened with his mother. He also found that Saathoff failed to supervise Pasqua adequately and that, as the employer of Pasqua and Saathoff, UCC was liable for their wrongdoing.

On appeal, respondents challenge the ALJ's credibility determinations and factual findings as unsupported by the record and argue that his liability analysis is at odds with Commission precedent. Their appeal brief, however, primarily emphasizes the ALJ's decision to award damages in the face of an executed stipulation of dismissal meeting the requirements of Commission Rule 12.21. Respondents contend that, in the circumstances presented, the ALJ lacked jurisdiction to issue a decision on the merits. In response, complainants urge us to affirm the ALJ's decision and his award of damages.

Our review of the record shows that the ALJ erred by disregarding the stipulation of dismissal submitted by the parties. In particular, we find no reliable basis for his conclusion that complainants did not intend to assent to the terms of a signed settlement agreement included in the record. Accordingly, we vacate the Initial Decision and dismiss the complaints in these two proceedings as settled.

BACKGROUND

I.

Danny K. Melton is a 56-year-old resident of North Carolina, who is retired on disability from the U.S. Postal Service. Acting *pro se*, Melton filed two substantially identical reparations complaints against Pasqua, Saathoff, and UCC in January 1999.[1] One complaint sought to recover losses in a commodities account that Melton opened in his own name in November 1996, while the other sought to recover losses in a joint account opened by Melton and his mother, Nellie, in January 1997.[2] In both complaints,

[1] According to NFA records, UCC is an independent Introducing Broker ("IB"), based in North Miami Beach, Florida. Pasqua and Saathoff are registered as associated persons ("APs") of UCC. Saathoff is also identified as one of the firm's principals.

[2] UCC introduced both of Melton's accounts to First American Discount Corporation, a registered futures commission merchant ("FCM"), which carried and cleared Melton's trades until June 3, 1997, when all of

the principal theories of liability alleged were "misrepresentation, nondisclosure, and churning."

Melton said that in 1996, after responding to a radio advertisement about the commodities market, he received promotional materials and telephone calls from two UCC account executives, Arnold Zager ("Zager") and Philip Verde ("Verde").[3] The two brokers told Melton that they "could double [his] money" with "strictly limited risk."[4] Although Zager and Verde each called Melton several times, he turned them both down.

Several months later, in October or November, Pasqua called. He told Melton that he "would double [Melton's] money in a very short time" and assured him that, by using stop orders, Melton "would lose very little money if the market started moving against [his] positions." In addition, Pasqua promised that if Melton wanted to get out of the market, Pasqua "would send [his] money back." About a month later, Melton told Pasqua that he would open an account for $5,000. When Pasqua argued he would need at least $20,000 to double Melton's investment, Melton "settled on $10,000." Although Pasqua had discussed the trading of both futures and options contracts, Melton told Pasqua that "[he] would do futures options only, never straight futures."[5]

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the funds remaining in Melton's joint account with his mother were transferred to another FCM, Linnco Futures Group ("Linnco"). Neither FCM was named as a respondent in either of Melton's complaints.

[3] The facts we describe are drawn from the submission that accompanied Melton's two complaints, along with attached exhibits (including trading records) and two handwritten addenda that Melton later submitted in response to concerns raised by the Office of Proceedings. Because, as mentioned below, respondents chose not to participate in the hearing held in these proceedings in November 1999, Melton's version of events is unrebutted.

[4] Among other exhibits attached to Melton's complaints were two identical letters mailed to Melton by Zager (on May 23, 1996) and Verde (on June 12, 1996). The letters advised Melton that the purchase of exchange-traded commodity options "offer[s] the unique advantage of powerful leverage, strictly limited risk, and unlimited profit potential." They also noted that, besides advising customers to buy options, UCC "often recommend[s] other options strategies that maintain the valuable limited risk benefit, and have the potential to return sizeable profits."

[5] During the solicitation process, Melton told Pasqua he was retired on disability, with an annual income of just $12,000. He also described his disabilities, including an orthopedic condition that prevents him from

On November 27, 1996, Melton deposited $10,000 into his newly opened account. Some of those funds were used to establish a spread position in NYMEX gasoline options by buying and selling five options at different strike prices. On December 4, 1996, Melton asked Pasqua to sell the options. Pasqua persuaded Melton to keep his position open, by saying that "he would double [Melton's] money." However, Melton was sent a check for $3,835, which represented the amount of excess liquidity in Melton's account on December 4. Notwithstanding the withdrawal of these funds, five more NYMEX gasoline call options were bought for Melton's account on December 16, 1996. To eliminate the resulting margin deficit, Melton deposited a check for $5,870 two days later. By the end of December, the market value of Melton's account had fallen to $11,367.90.

In January 1997, Melton began trading CME currency options. On January 8, he bought ten Swiss franc puts. This caused a margin deficit of $11,363.80, which Melton covered the next day by depositing a check for $11,500. On January 17, he liquidated his position in Swiss franc options by selling ten puts for a substantial gain. His account then purchased additional Swiss franc put options (on January 17 and 21), Japanese yen put options (on January 21, 22, and 28), and German mark put options (on January 21 and 28). All of these positions were offset by February 24, 1997, when the account ceased trading. Largely as a result of these currency option transactions, Melton's account made $35,299.42 in realized profits in January and February of 1997.

By the end of January, the market value of Melton's account had risen to $39,956. At that time, Melton began trading through a joint account he had opened for his mother,

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lifting more than 20 pounds, skin and bone diseases possibly caused by exposure to Agent Orange, and Post Traumatic Stress Syndrome, for which Melton receives treatment from the U.S. Veterans Administration.

Nellie, and himself. According to Melton, Pasqua suggested that he open the joint account when Melton asked how he could leave his mother the assets in his individual account "if something happened to [him]." Pasqua told Melton that he already had made $30,000 to $35,000 in profits in his individual account and suggested that he deposit an additional $30,000 into the joint account. Pasqua assured Melton that, once the deposit was made, he would return all of the funds remaining in the individual account to Melton.

On January 30, 1997, Melton withdrew $10,000.01 from his individual account. The following day, he deposited a $30,000 check into the joint account. Some of these funds were immediately used to buy NYMEX gasoline call options and CME Japanese yen call options. According to Melton, Pasqua persuaded him to buy the gasoline calls on the basis of purported troop movements in Iraq. When, on February 3, Melton found out that the joint account had suffered substantial losses,[6] he asked Pasqua to sell the gasoline calls. Pasqua, however, "refused to sell [Melton] out of [his] losing positions."

Over the next three months, the joint account bought a variety of exchange-traded commodity options, including all of those traded in Melton's individual account.[7] To finance this activity, Pasqua persuaded Melton to transfer $27,280.77 from his individual account into the joint account on February 11, 1997, and the remaining $19,544.91 on February 25, 1997.[8] In spite of these additional funds, the joint account failed to prosper.

[6] Melton's trading records show that, at the close of trading on January 31, 1997, the market value of the joint account stood at $15,094.10, which represented about half of the $30,000 that had been deposited into the account earlier that day.

[7] According to Melton, when Pasqua called to recommend the purchase of additional options for either of his accounts, Melton often complained that he "was on [his] medicine . . . and did not understand what [Pasqua] was talking about." Ignoring Melton's complaint, Pasqua "insisted [on making a decision] right then and would not take no for an answer."

[8] In addition to his original deposit of $30,000 and the funds transferred from his individual account, Melton deposited an additional $4,000 into the joint account on April 10, 1997. These funds were used to

Only two of the 17 open positions established in the account were liquidated profitably. The rest either expired worthless or were offset at a loss. When the final open position was liquidated by offset on June 2, 1997, the joint account's balance had fallen to $5,617.40. At Melton's request, these funds were transferred the following day to a commodities account he had opened at another FCM, Linnco.

In his written submission, Melton claimed that, as his losses mounted, Pasqua repeatedly frustrated Melton's attempts to liquidate his open positions and close the joint account.[9] On February 11, 1997, Melton withdrew $5,000 from the joint account. He said, "Everything was a contest from then on. I'd ask to sell everything and he'd ask for more money. I had no control over him or my account even though we taped every [telephone call]." In refusing to do what Melton wanted, Pasqua insisted that he "knew what was best for [Melton]." After Melton finally was able to close the joint account and transfer his remaining funds to Linnco, Pasqua told him that "[he] was stingy and to have a nice day."

All told, Melton lost $64,208.44 as a result of the options trading in his and his mother's joint account. Offsetting those losses against the $23,493.12 in profits made by the individual account, Melton's out-of-pocket losses from his dealings with respondents amounted to $40,715.32.

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cover a margin deficit of $3,805.57, which had resulted from the purchase of four German mark call options the previous day.

[9] Melton said that he contacted First American Discount Corporation on a daily basis to monitor the value of the open positions in his two accounts. When a position dropped more than $500 in value, Melton would start asking Pasqua to sell the options. According to Melton, it took an average of five to seven requests before Pasqua would agree to make the requested sale, "if he did it at all." Melton said that before agreeing to sell, Pasqua often would put him on hold and confer with Saathoff, one of the owners of UCC. Since, in Melton's view, Saathoff "had a lot of influence what was bought, what and when anything was sold, and when anything was sent back to [Melton]," he named Saathoff as one of the respondents in these proceedings.

II.

In May 1999, the Office of Proceedings forwarded Melton's two complaints to respondents. The following month, respondents timely filed a single answer to both complaints.[10] The answer denied that respondents were liable for Melton's claimed losses. It noted that Melton had signed a Rule 1.55 risk disclosure document and confirmed that he understood the speculative and volatile nature of options trading. According to the answer, Pasqua was in "constant communication" with Melton and never pressured him into buying or selling a single option. On the contrary, Melton "often selected the trades which ultimately proved unprofitable" and also "frequently rejected [Pasqua's] recommendation to liquidate positions, only to later sustain large losses or watch positions expire worthless."

Respondents' answer further argued that, based on losing trades that had been made in his individual account, Melton was aware of the risks associated with options trading by the time he opened the joint account with his mother in January 1997. In respondents' view, the losses subsequently suffered by the joint account "were sustained purely and simply as the result of adverse market movement." In that regard, the answer asked why, if the joint account had been mishandled and abused to the extent alleged, did Melton decide later to open additional accounts with other FCMs. Finally, the answer raised several affirmative defenses, including the statutory requirement that a reparations complaint has to be filed within two years after the cause of action accrued.

[10] Melton chose the formal decisional procedure in Docket No. 99-061 and the voluntary decisional procedure in Docket No. 99-062. Respondents elected to pay the filing fee necessary to convert Docket No. 99-062 to a formal decisional proceeding, which allowed it to be assigned to an ALJ for a formal hearing.

After respondents filed their answer, the two proceedings were assigned to an ALJ. Once prehearing discovery was completed and the parties filed their respective prehearing memoranda, the ALJ scheduled a hearing, which was to begin on October 25, 1999, in Winston-Salem, North Carolina. On October 20, however, counsel for respondents wrote to Melton, confirming that his clients "agreed to accept [Melton's] settlement offer in connection with [both pending] cases." The letter acknowledged that, in return for a release of claims, respondents would "pay $10,000 and provide a written apology from Keith Pasqua." A copy of the letter was filed with the Office of Proceedings.

The following day, October 21, respondents' counsel mailed a copy of the proposed settlement agreement, along with a stipulation of dismissal, to Melton by overnight delivery. On Friday, October 22, counsel moved to postpone the hearing, citing a scheduling conflict and the parties' ongoing efforts to reach a settlement. The motion advised the ALJ that Melton had told respondents "for the very first time that he would not agree to the [proposed] settlement unless the settlement agreement contained an admission of guilt by Keith Pasqua." It also noted that "a short postponement may facilitate, through the assistance of the [ALJ], a finalization of the settlement agreement."

On Sunday, October 24, Melton and his mother, Nellie, signed a "Stipulation of Dismissal With Prejudice," which respondents' counsel executed on behalf of his clients and faxed to the Office of Proceedings. On Tuesday, October 26, the ALJ issued an order dismissing both of these proceedings with prejudice. Two days later, however, he issued another order, which vacated the dismissal and re-scheduled the hearing for November 3 and 4, 1999. As a basis for his action, the ALJ stated that, on Wednesday,

October 27, Melton telephoned him to complain that respondents had failed to comply with the terms of the settlement. After convening a telephone conference with all parties, the ALJ concluded that they "have not reached a settlement." The order, however, did not cite any of the facts that supported the ALJ's conclusion.

On October 29, the Office of Proceedings received a letter from respondents' counsel, enclosing a "Settlement and Agreement" signed by all of the parties. In pertinent part, the agreement stated that complainants were releasing all claims that they had against respondents in return for the payment of $10,000. Of this amount, $5,000 had to be delivered to Melton in the form of a check or wire transfer. The other $5,000 was to be deposited in a "commodity futures trading account" that would be opened in complainants' names and managed by an independent IB selected by Melton. In signing the agreement, complainants acknowledged that trading in futures or options "carries with it a high degree of risk, substantially higher than investments such as certificates of deposit." The agreement contained no apology from, or admission of guilt by, Pasqua or the other respondents.

The letter from respondents' counsel noted that Melton had not yet opened an account or selected an IB and asked the ALJ to convene a telephone conference to "finalize the completion of the settlement." It also advised the ALJ that, in respondents' view, the ALJ's order of dismissal with prejudice necessarily terminated his jurisdiction in these proceedings. Respondents' objections notwithstanding, the ALJ issued an order, dated October 29, which formally re-scheduled the hearing and clarified the reasons for the ALJ's conclusion that the parties had not reached a settlement. According to the ALJ's order, during the telephone conference on October 27, Melton "flatly rejected the

so-called settlement on grounds that he had received in hand no money, and that half the settlement amount had to be invested in a commodity account."

Respondents promptly applied for interlocutory review of the ALJ's order vacating his previous order of dismissal. Relying on the decision in *Murphy v. Madsen*, CFTC Docket No. 89-R023, 1992 WL 88340 (CFTC Apr. 22, 1992), respondents argued that the ALJ had no authority to take such action.[11] Finding that respondents had not established the type of extraordinary circumstances that are required for interlocutory review, the Commission denied the application. *Melton v. Pasqua*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,913 (CFTC Nov. 3, 1999) (Order Pursuant to Delegated Authority).

III.

The re-scheduled hearing took place on November 3, 1999. The only witness was Melton himself. Although they had been given written notice of the time and place of the hearing, neither respondents nor their counsel attended.[12]

Generally speaking, Melton's testimony was consistent with the version of events given in the written submissions that accompanied his complaints. According to Melton, Pasqua persuaded him to open an account with UCC "by calling [him] day and night. It

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[11] In *Murphy v. Madsen*, the Commission, citing the requirements of Rule 12.21, held that a complainant's claim under the Act was extinguished when he accepted an offer of settlement and the ALJ issued an order of voluntary dismissal. The Commission found that, in those circumstances, the ALJ lacked jurisdiction to re-open the matter, and the complainant was free to seek enforcement of the settlement in an appropriate forum.

[12] By failing to appear at a scheduled hearing, respondents subjected themselves to considerable risk. "Absent compelling circumstances, the Commission's regulations make it clear that a party's failure to appear at the hearing constitutes a waiver of the right to an oral hearing in the proceeding." *Sukup Manufacturing Co. v. Meridian Equities Corp.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,621 at 30,654 (CFTC May 30, 1985) (citing Commission Rule 12.312(b)(2)). Moreover, if one party appears at the hearing and no party appears for the opposing side, the party present may present evidence, in whole or in part, in the form of affidavits or oral testimony. *See* Rule 12.312(b)(2). Finally, in response to a motion by the party present at the hearing or upon his own motion, the presiding officer may treat a party's failure to appear as a default under Rule 12.35 and, in appropriate circumstances, draw adverse inferences against the non-appearing party. *Id*.

was just like he [knew] the money was in the account." Tr. at 37. He told Melton he could double Melton's investment in "just a short time" and "send back [the] initial investment within weeks." Tr. at 12. By liquidating losing positions "immediately," Pasqua explained, Melton "could get out with 60%, 70% . . . of his initial investment." *Id*.

Melton testified that Pasqua asked him to lie about his income, net worth, and disabilities when filling out account-opening documents and speaking with compliance officials. Tr. at 38. Pasqua told Melton "do and say what I tell you to do and say. I'll make you money, you've just got to trust me." *Id*. In November 1996, however, after depositing $10,000 into his newly opened account, Melton decided that he "did not need to be in the market" and told Pasqua to "get [him] out." Tr. at 13. Although Pasqua agreed to send him a check for more than $3,000, he talked Melton into leaving his open positions intact. Tr. at 14.

When the account became profitable in January 1997, Melton again "asked [Pasqua] several times . . . to send [Melton's] money back." Tr. at 15. Like before, after talking with Pasqua, Melton "settled on [a withdrawal of] $10,000." *Id*. According to Melton, a check for the agreed-upon amount was mailed to him on January 29, 1997. *Id*. Pasqua then talked Melton into transferring the remaining funds to his newly opened joint account by promising to "send it all back at one time." Tr. at 47. Once the account suffered losses, Melton began "asking, begging Keith Pasqua to send [Melton's] money back to [him]." Tr. at 23. In response, Pasqua succeeded in "talking [Melton] into . . .

sending him more." Eventually, Pasqua "had it all, and [Melton] didn't have nothing." Tr. at 25.[13]

Turning to the settlement with respondents, Melton testified that he rejected the proposed offer respondents' counsel mailed him on October 21. In Melton's words, "I did not sign it, and I did not send it back." Tr. at 26. On October 22, Patrick King ("King"), an attorney working with respondents' counsel, called to discuss "what [Melton] would settle for." Tr. at 29. Melton told King that he wanted respondents to "open an account in their name and send [him] back $5,000 every 90 days" until all of his claimed losses were repaid. *Id*. King replied that it would violate Commission rules for respondents to open an account for Melton in their name. Tr. at 30.

On the following day, Saturday, October 23, King called Melton and proposed that respondents "would send [Melton] five thousand [dollars] and put the other five in a managed account." Tr. at 31. According to Melton's testimony, King said he "knew this guy [who] had made $10 million in a managed account with five thousand." *Id*. King explained that "[this] other person . . . would be in charge of the account" and that Melton "would get [his] money back any time that he asked for it." Tr. at 33.

On Sunday, October 24, Melton spoke again with King, who was joined by Andrew Stern, the principal owner of UCC. According to Melton's testimony, during

[13] Melton's testimony provided additional information not found in the written materials that accompanied his complaint forms. At the hearing, Melton recalled that the radio advertisement he answered in 1996 claimed "you could double your money in the commodities market, depending on which way the market went, up or down." Tr. at 6. The first call that he received after responding to the advertisement was from Robert Connahan, a salesman for Ceres Trading Group ("Ceres"), a registered IB located in Jupiter, Florida. Initially, Melton told Connahan that he "didn't feel [he] needed to be in the market, [since he] was on disability." Tr. at 7. Nevertheless, he sent Ceres a $5,000 check after Connahan explained that, by using stop orders, he could limit Melton's risk of loss. Tr. at 8. Connahan promised Melton that "any time anything started falling, he would sell it immediately" and also that "whenever [Melton] asked him, he would get [Melton] out." *Id*. Despite these assurances, Melton lost his entire $5,000 investment with Ceres before he opened his account with UCC. *Id*.

their conversation, King urged Melton not to open a commodities account, but to invest his $5,000 instead in certificates of deposit. Tr. at 34. Ignoring King's advice, Melton admitted that he nevertheless signed the settlement agreement as written and executed a voluntary stipulation of dismissal, which the Office of Proceedings received from respondents' counsel on Monday, October 25, 1999. Tr. at 28-29.

Melton testified that, after the stipulation of dismissal was submitted to the Commission, he called the ALJ (1) to complain that respondents had violated the settlement agreement and (2) to advise the ALJ that he had decided to reject it outright. Tr. at 35. At the hearing, Melton stated that he had two concerns about the agreement. First, Melton said he had "want[ed] an admission of guilt and an apology to [himself]. There was no talk about that in this final settlement." Tr. at 38. According to Melton's testimony, he "would have settled for $10,000 if . . . Keith Pasqua had [given him] an apology." Tr. at 51. Second, focusing on the $5,000 that was to supposed to be deposited into a managed account, Melton testified that he "got to thinking . . . I will be going right back [to] throwing it back in there again." Tr. at 38. As Melton saw it, he "did not need to be talking on the phone with [any] of those people." *Id*.

At the close of the hearing, Melton asked the ALJ what he should do with a check for $5,000 received from respondents the previous day. Tr. at 48. The ALJ told him that, if he cashed the check, there would be no case. Tr. at 49. After admitting Melton's medical and trading records into evidence, the ALJ advised Melton he could submit a posthearing brief, as well as a reply to respondents' answering brief, if they chose to file one. Tr. at 55.

IV.

After the filing of posthearing submissions by Melton and the respondents, the ALJ issued his Initial Decision, awarding Melton $40,715.32 in reparations. *Melton v. Pasqua*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,109 (ALJ Apr. 12, 2000) ("I.D.") As an initial matter, the ALJ held that Melton had testified "in good faith" and noted that his factual findings and legal conclusions were based, in large part, on that testimony. I.D. at 49,766. The ALJ found it clear from speaking with Melton that his "well documented" disabilities "affect his reasoning and decision-making capacity." I.D. at 49,768. In the ALJ's view, respondents "knew of Melton's disabilities and used that knowledge to manipulate and exploit him." *Id*.

On specific issues of liability, the ALJ found that, in soliciting Melton to open an account, Pasqua falsely represented that Melton could double his money within a short period of time while risking the loss of only 30 to 40 percent of his investment. I.D. at 49,769. According to the ALJ, Pasqua then fraudulently lulled Melton into keeping his accounts open by failing to accurately disclose their true status and ignoring Melton's numerous requests to get out of the market and have his remaining funds returned to him. *Id*.

In addition, the ALJ found that Pasqua churned Melton's individual account in January 1997 and the joint account in February and April. I.D. at 49,770. He based this finding on figures showing that, during each of those months, the commission-to-equity ratio in Melton's individual or joint account was above 18.8%. Citing Commission case law, the ALJ opined that these ratios, by themselves, "are sufficient to substantiate a charge of churning." I.D. at 49,771. As indicia of Pasqua's control over Melton's

accounts, both of which were nondiscretionary, the ALJ cited the fact that Melton "is severely disabled" and that Pasqua repeatedly disregarded Melton's instructions to close his accounts. *Id*.

In light of his findings that Pasqua fraudulently solicited Melton and churned his accounts, the ALJ concluded that Pasqua and UCC violated the antifraud provisions of Section 4b of the Act and Commission Rule 33.10. He further concluded that Saathoff and UCC failed to comply with the supervision requirements of Rule 166.3, but he did not analyze the issue or make factual findings in support of his conclusion. I.D. at 49,771.

Respondents filed a timely appeal brief, arguing that the Initial Decision is replete with factual and legal errors that warrant its reversal. The primary emphasis of the appeal brief, however, is the ALJ's decision to re-open these proceedings after dismissing them with prejudice pursuant to the parties' voluntary stipulation of dismissal. Respondents contend that the ALJ had no authority to vacate his own order of dismissal, especially in disregard of a valid settlement agreement signed by all of the parties. In respondents' view, moreover, by summarily vacating his dismissal order on his own motion, the ALJ improperly denied them both fair notice and an opportunity to be heard on disputed issues. Accordingly, they ask us on appeal to dismiss both of Melton's complaints with prejudice.[14]

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[14] On February 5, 2002, Thomas J. Muth, Esq., filed a motion asking that he be allowed to withdraw as counsel for the respondents in these proceedings. Mr. Muth's motion stated that he recently left the law firm representing respondents and that other attorneys at the firm will continue to provide respondents with competent legal representation. Mr. Muth's request, which complainants do not oppose, is granted.

DISCUSSION

On appeal, respondents raise a number of objections to the ALJ's liability analysis that, in our view, are well taken.[15] There is no need for us to resolve those issues, however, because the evidentiary record—including Melton's sworn testimony at the hearing—establishes that the voluntary stipulation of dismissal that Melton and the other parties executed on October 24, 1999, was based on a valid agreement of settlement. In those circumstances, our rules dictate that these proceedings be dismissed, as settled.

As mentioned, the stipulation of dismissal was filed in accordance with the requirements of Rule 12.21. *See* 17 C.F.R. 12.21. Under this rule, parties may obtain

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[15] Our review of the ALJ's liability analysis suggests that, at best, it is incomplete. As noted in respondents' appeal brief, although the ALJ found that Melton testified "in good faith," he failed to address whether the testimony was reliable. Thus, the ALJ credited Melton's testimony that he was misled into opening an account with UCC by Pasqua's false claims about the likelihood of profit and risk of loss, but failed to consider Melton's testimony (1) that, based on the same claims, he had previously invested and lost $5,000 in an account at another IB, Ceres, and (2) that, after having suffered $40,715.32 in out-of-pocket losses at UCC, he chose to transfer his remaining funds into a new account at another commodities firm, Linnco, rather than simply withdraw them. Although we will generally defer to an ALJ's credibility determinations, we expect him to independently evaluate the reliability of a witness's version of events "in light of the record as a whole." *McDaniel v. Amervest Brokerage Services* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,264 at 51,589 (CFTC Sept. 26, 2000). By failing to address, or even acknowledge, the inconsistencies in Melton's own testimony, the ALJ's evaluation of Melton's reliability as a witness was inadequate. Moreover, the ALJ's failure to analyze whether Melton actually relied on Pasqua's misrepresentations in deciding to open his account, or would have been justified in doing so, casts doubt on his finding that respondents should be held liable for fraudulent solicitation. *Jakobsen v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1984-1986 Transfer Binder] Comm. fut. L. Rep. (CCH) ¶ 22,812 at 31,392-93 (CFTC Nov. 21, 1985) (to recover losses caused by broker's misrepresentations, complainant must show that he relied on the false statements, *i.e.*, that he would have acted differently had he been told the truth).

As respondents' appeal brief further argues, the ALJ's churning analysis also was incomplete. In finding that both of Melton's accounts had been traded excessively, the ALJ relied solely on the fact that, during each indicated month, the account's commission-to-equity ratio was 18.8 percent or higher. This analytic approach is at odds with our precedent, which holds that "excessive trading is a question of fact that cannot be determined by any precise formula or rule." *Hinch v. Commonwealth Financial Group, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,056 at 45,021 (CFTC May 13, 1997). Thus, we have rejected the proposition that a particular commission-to-equity ratio can be used as a bright line test in establishing whether an account has been traded excessively. *Levine v. Refco, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,488 at 36,116 n.10 (monthly commission-to-equity ratio in excess of 18 percent "is not, standing alone, a sufficient basis for finding churning"). Finally, the ALJ held Saathoff liable for failing to comply with the supervision requirements of Commission Rule 166.3 without any analysis whatever. If we were not to dismiss these proceedings on other grounds, these shortcomings in the ALJ's liability analysis would require us to remand these matters to him for further consideration.

dismissal of a proceeding by filing a stipulation of dismissal executed by all of the complainants and each respondent against whom the complaint has been forwarded. Rule 12.21 "presupposes a prior agreement between the parties to settle or to dismiss for other reasons." *Burkhart v. Zeff*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,637 at 33,660 n.1 (CFTC May 28, 1987) (noting, in Order of Summary Affirmance, that the ALJ misinterpreted Rule 12.21 by requiring a written settlement agreement as a prerequisite for dismissal).[16] The parties are not required, however, to disclose the substance of the negotiations that preceded the agreement or the terms of any settlement that they may have reached. In this way, Rule 12.21 eliminates the need for the presiding officer to make factual determinations before issuing an order of voluntary dismissal and places the onus on the parties to evaluate and protect their interests. *Shenkle v. Chillmark Commodities Corp*., CFTC Docket No. 88-R10, 1989 WL 242150 (CFTC Sept. 14, 1989) (denying respondents' post-appeal motion to dismiss complaint as settled).[17]

The facts presented here, however, fall outside the confines of Rule 12.21. After voluntarily executing a stipulation of dismissal, Melton telephoned the ALJ and said that he had rejected the underlying settlement agreement. Based on Melton's call and a follow-up telephonic conference with all parties later in the day, the ALJ concluded that

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[16] The Order of Summary Affirmance in *Burkhart v. Zeff* further explained that whether a settlement agreement is written or oral, its validity is not affected by the procedures set forth in Rule 12.21, but instead is governed by substantive law. *Id*.

[17] The denial of respondents' motion to dismiss in *Shenkle v. Chillmark Commodities Corp*. was included in an Order of Summary Affirmance, which concluded that the result reached in the ALJ's Initial Decision was substantially correct. Relevant here, after the respondents in that case had filed their appeal brief, they notified the Commission that the complainant accepted a $5,000 payment from them. On that basis, they asked that the complaint be dismissed as settled. Opposing the motion, complainant admitted cashing the $5,000 check, but argued that he did not intend to settle the case. Stating that it would be "inappropriate to intervene in settlement negotiations to compel an unwilling party to forego a decision on the merits," the Commission's Order of Summary Affirmance denied respondents' motion to dismiss and deducted $5,000 from the award of damages. *Id*.

the parties had not reached a settlement. In a subsequent order, he explained that, during the conference call on October 27, Melton "flatly rejected the so-called settlement on grounds that he had received in hand no money, and that half the settlement amount had to be invested in a commodity account." On that basis, he vacated his prior order of dismissal and scheduled a hearing to begin the following week.

If in dispute, the question of whether the parties to a reparations proceeding have reached a valid pre-trial settlement "depends as a factual matter upon an assessment of written evidence and/or of witness testimony." *Burkhart v. Zeff*, ¶ 23,637 at 33,660, n.1. Generally speaking, in making that assessment we will defer to the ALJ who heard the witnesses. *Id*. In these proceedings, however, the ALJ's finding that the parties never reached a settlement was based solely on statements made by Melton in an unrecorded telephone conference, without reference to the written evidence in the record or to the sworn testimony that Melton gave at the hearing.

On its face, the written evidence—which is to say, the stipulation of dismissal and the settlement agreement, both of which bear Melton's and his mother's signatures—strongly supports an inference that they intended to assent to the terms of settlement as written. Our independent review of the record shows that Melton's testimony does not detract from that inference, but instead supports it.

More specifically, at the hearing Melton testified he had two concerns about the "final settlement" with respondents. First, he was upset that the settlement did not call for an apology from Pasqua. Second, he had misgivings about placing half of the settlement funds into a managed account, which was to be opened in complainants' names and traded by an independent advisor whom Melton would select.

In our view, neither of these concerns supports a finding that Melton and his mother did not reach a settlement with the respondents. By his own admission, it was Melton's idea to place his settlement funds in a commodities account. Acting on respondents' behalf, Patrick King made a counter-offer to settle these two proceedings for $10,000, with half of the funds to be paid to complainants by wire transfer or check and the other half to be deposited into a managed account opened in complainants' names. On October 24, in a follow-up conversation that included Andrew Stern, one of the owners of UCC, King advised Melton not to open a new commodities account, but instead to use his remaining $5,000 to buy certificates of deposit. Melton rejected this advice and signed the settlement agreement as written.

Melton also testified that he would have settled these proceedings for $10,000 if Pasqua had apologized to him. As reflected in respondents' October 29, 1999 motion to adjourn the hearing, Melton clearly raised the issue of an apology from Pasqua during the parties' ongoing settlement negotiations. Thus, he may genuinely have hoped that, in connection with the settlement, Pasqua would apologize. At the hearing, however, Melton produced no evidence showing that respondents agreed to provide an apology as a term of settlement. On the contrary, when presented with a written offer that neither contained an apology nor offered to provide one, Melton and his mother accepted the agreement by signing.

In these circumstances, we cannot reliably find that complainants' signed assent to the settlement agreement in the record was not valid. As a consequence, there is no basis for ignoring the voluntary stipulation of dismissal executed by all of the parties on

October 24, 1999. Accordingly, we dismiss these proceedings as settled.

IT IS SO ORDERED.[18]

By the Commission (Chairman NEWSOME and Commissioners HOLUM, ERICKSON, LUKKEN, and BROWN-HRUSKA)

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Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 9, 2002

[18] Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 18(e) (1994)), a party may appeal a reparation order of the Commission to the United States Court of Appeal for only the circuit in which a hearing was held; if no hearing is held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the Commission order, and that any appeal is not effective unless, within 30 days of the date of the order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.