

UNITED STATES OF AMERICA
 Before The
 COMMODITY FUTURES TRADING COMMISSION

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 In the Matter of : CFTC Docket No. 09-04
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 Yehuda Belsky and Innovative Capital Management, LLC, :
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 Respondents. :
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**ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 6(c) AND 6(d)
 OF THE COMMODITY EXCHANGE ACT AND MAKING FINDINGS AND
 IMPOSING SANCTIONS**

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Yehuda Belsky (“Belsky”) and Innovative Capital Management, LLC (“Innovative”), (collectively, “Respondents”), have violated Sections 4b(a)(2)(i), (ii) and (iii), 4c(1)(A) and (B), and 9(a)(4) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. §§ 6b(a)(2)(i), (ii) and (iii), 6c(1)(A) and (B), and 13(a)(4) (2006). Therefore, the Commission deems it appropriate and in the public interest that a public administrative proceeding be, and hereby is, instituted to determine whether Respondents have engaged in the violations set forth in this order, and whether an order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of this administrative proceeding, Respondents have submitted Offers of Settlement (“Offers”) that the Commission has determined to accept. Without admitting or denying any of the findings in this Order, Respondents acknowledge service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, and Making Findings and Imposing Sanctions (the “Order”). The Respondents each consent to the entry of this Order and the use of the findings in this Order in this or any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ However, the Respondents do not consent to the use of the Offers, or the findings in this Order consented to in the Offers, as the sole basis for any other proceeding brought by the Commission, other than a proceeding in bankruptcy or to enforce the terms of this Order. Respondents also do not consent to the use of the Offers or this Order, or the findings consented to in the Offers or this Order, by any other party in any other proceeding

III.

The Commission finds the following:

A. SUMMARY

Respondents began operating a commodity pool in February 2006. From approximately September 2006 to February 2008 (the "Relevant Period"), Respondents fraudulently obtained funds totaling \$1,250,000 from five commodity pool participants. Instead of using the solicited funds to purchase commodity futures and/or options contracts, as represented in solicitation materials, Respondents misappropriated at least \$385,000 of those funds, created false commodity pool account statements misstating the net asset value ("NAV") and monthly rates of return of the pool and then delivered these fraudulent statements to pool participants.

In January 2008, the National Futures Association (the "NFA"), a registered futures association, conducted a routine audit of Respondents' commodity pool operation. During this audit, Respondents made and provided the NFA with fraudulent account statements for the pool that had purportedly been prepared by the futures commission merchant ("FCM") where the pool's account was maintained. Respondents in fact prepared these statements knowing that they represented fictitious trading activity and falsely reflected the month end balance of funds in the pool's account at the FCM. Respondents also made and provided the NFA with fraudulent bank statements knowing that these bank statements falsely inflated the amount of pool funds on deposit at the bank.

By this conduct, Respondents committed fraud in violation of Sections 4b(a)(i), (ii) and (iii), 4o(A) and (B), and 9(a)(4) of the Act.

B. RESPONDENTS

Yehuda Belsky resides in Brooklyn, New York. Belsky is the sole owner and principal of Respondent Innovative. Belsky has been registered as an associated person ("AP") and listed as the principal of Innovative since July 2005.

Innovative Capital Management, LLC is a New York limited liability company with its principal place of business in Brooklyn, New York. Innovative has been registered as a commodity trading advisor ("CTA") and as a commodity pool operator ("CPO") since July 2005.

C. **FACTS**

Innovative and Belsky, the sole owner, principal and AP of Innovative, began operating a commodity pool in or about February 2006. Respondents opened a commodity pool account entitled Innovative Capital Fund LLC account at a registered FCM.

From September 2006 to February 2008, Respondents fraudulently obtained funds totaling approximately \$1,250,000 from five pool participants. In Respondents' solicitation materials, they represented that any funds received from pool participants, less certain fees, would be used to purchase commodity futures and/or options contracts. Instead of using the solicited funds as represented, Respondents misappropriated at least \$385,000 of those funds. In order to conceal their misappropriation, Respondents created commodity pool account statements that misstated the NAV and monthly rates of return of the pool and then delivered these fraudulent statements to pool participants.

In January 2008, NFA, a registered futures association, in furtherance of its official duties under the Act, began a routine audit of Innovative's commodity pool operation. During the course of that audit, Respondents made and provided NFA with fraudulent FCM account statements for the pool. Respondents knew that these statements falsely represented the amount of funds held in the pool account and that the statements misstated certain trading activity and certain deposits into, and withdrawals from, the pool account. Respondents also knowingly made and provided the NFA with fraudulent bank statements for the pool that falsely represented the amount of funds the pool maintained at a bank.

On February 22, 2008, the NFA issued a Membership Responsibility Action ("MRA") that suspended the NFA memberships of Respondents, prohibited them from further trading, except for the liquidation of existing positions, and prohibited them from disbursing or transferring customer and pool funds. At the time of the MRA, there was \$763,710.88 in the pool account.

IV.

LEGAL DISCUSSION

A. **Sections 4b(a)(2)(i) and (iii) of the Act:
Fraud by Misrepresentation and Misappropriation**

1. **Fraud by Misrepresentations**

Sections 4b(a)(2)(i) and (iii) of the Act provide that it shall be unlawful for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made or to be made, for or on behalf of any other person, to cheat or defraud, or attempt to cheat or defraud, such other person; or willfully to 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 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(a)(2)(i) and (iii) (2006).

To prove that a respondent has violated Sections 4b(a)(i) and (iii) of the Act, the Commission must show that: 1) the respondent misrepresented or deceptively omitted certain information regarding commodity futures trading; 2) that the misrepresentation or omission was "material"; and 3) the respondent knew the information was false and calculated to cause harm or recklessly disregarded the truth or falsity of the information (in other words, that he acted with "scienter"). *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,657 (CFTC Mar. 1, 1990); *In re JCC*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,568 (CFTC May 12, 1994), *aff'd sub nom.*, *JCC, Inc. v. CFTC*, 63 F.3d 1557 (11 Cir. 1995); *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002), *cert. denied*, 543 U.S. 1034 (2004).

The scienter requirement is met when "highly unreasonable omissions or misrepresentations [are made] ... that present a danger of misleading [customers] which is either known to the Defendant[s] or so obvious that Defendant[s] must have been aware of it." *R.J. Fitzgerald*, 310 F.3d at 1328. A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *Sudol v. Shearson Loeb Rhoades, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 at 31,119 (CFTC Sept. 30, 1985) (citing *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438,449 (1976)); *Hirk v. Agri-Research Counsel Inc.*, 561 F.2d 96, 103-04 (7th Cir. 1977) (defendants violated Section 4b of the Act by making misrepresentations about the profitability of their commodity trading when soliciting customers).

Respondents misrepresented material facts by issuing solicitation materials to pool participants that stated that pool participant funds, less certain fees, would be used to purchase commodity futures and/or options contracts when in fact Respondents failed to invest the funds as promised and instead misappropriated pool funds through unauthorized withdrawals. Respondents further misrepresented material facts by sending false account statements to pool participants regarding the NAV and rates of return of their investments. Respondents acted with scienter because they knew that these representations were false. Therefore, through their fraudulent representations of material facts, Respondents violated Sections 4b(a)(2)(i) and (iii) of the Act.

2. Fraud by Misappropriation of Pool Participants' Funds

Misappropriation of customer funds violates Sections 4b(a)(2)(i) and (iii) of the Act. *CFTC ex rel Kelley v. Skorupskas*, 605 F.Supp. 923, 932 (E.D. Mich. 1985) (defendant violated Section 4b(a) of the Act by misappropriating customer funds entrusted to her for trading commodity futures contracts); *CFTC v. Weinberg*, 287 F.Supp. 2d 1100, 1106 (C.D. Cal. 2003) (CTA violated Section 4b(a)(i) and (iii) of the Act by misappropriating investor funds); *CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F.Supp. 2d 676, 687 (D. Md. 2000) (misappropriation of funds constitutes "willful and blatant" fraudulent activity violative of Section 4b(a) of the Act), *aff'd in relevant part, vacated in part sub nom.*, *CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002).

Respondents used at least \$385,000 of pool participants' funds, to which they were not entitled, for their own purposes. Accordingly, Respondents misappropriated pool participant funds in violation of Sections 4b(a)(2)(i) and (iii) of the Act.

**B. Section 4b(a)(2)(ii) of the Act:
Fraud by Delivery of False Account Statements to Pool Participants**

Delivering, or causing the delivery of, false account statements to commodity pool participants constitutes a violation of Section 4b(a)(2)(ii) of the Act. *Skorupskas*, 605 F.Supp at 932-33 (defendant violated section 4b(a) of the Act by delivering false monthly account statements to commodity pool participants); *Weinberg*, 287 F.Supp. at 1107 (false and misleading statements as to the amount and location of investors' money violated Section 4b(a) of the Act.); *Noble Wealth*, 90 F.Supp. 2d. at 685-87 (defendants violated Section 4b(a) of the Act through the delivery of false account statements).

Respondents violated Section 4b(a)(2)(ii) of the Act by delivering monthly account statements to Respondents' pool participants knowing that material information on those account statements, including NAV and rates of return of the pool, was false.

**C. Section 4o(1) of the Act: CPO Fraud by Misrepresentations, Misappropriation
and Delivery of False Account Statements to Pool Participants**

Section 4o(1) of the Act makes it unlawful for a CPO or an AP of a CPO by using the mails or any means or instrumentality of interstate commerce, directly or indirectly (A) to employ a device, scheme or artifice to defraud pool participants, or (B) to engage in a transaction or course of business that operated as a fraud or deceit upon pool participants. 7 U.S.C. § 6o(1) (2006). This section of the Act applies to all CTAs, CPOs and their APs whether registered, required to be registered, or exempt from registration. *Skorupskas*, 605 F.Supp. at 932. Although scienter must be proved to establish violations of Sections 4b and 4o(1)(A) of the Act, it is not necessary to prove scienter to establish a violation of Section 4o(1)(B) of the Act. See *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cr. 1988). Accord *In re Kolter*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,262 (CFTC Nov. 8, 1994 (Commission cited *Messer* for this proposition with approval)).

By operating a business in the nature of an investment trust, syndicate or similar form of enterprise and by soliciting, accepting or receiving funds for the purpose of trading commodity futures or options, Innovative was acting as a CPO and Belsky was acting as an AP of Innovative. Section 1(a)(5) of the Act, 7 U.S.C. § 1(a)(5) (2006). See, e.g., *Slusser*, ¶ 27, 701 at 48,310 (respondent acted as a CPO when it accepted investment funds from individual investors who deposited funds in respondent's bank account for the purpose of trading in a commodity pool); *SEC v. Princeton Econ. Int'l*, 73 F. Supp. 2d 420, 424 (S.D.N.Y. 1999) (defendant acted as a CPO by commingling proceeds derived from sale of notes to customers in a commodity pool).

The same intentional fraudulent conduct that violates Section 4b(a), the fraudulent solicitations and misappropriation of funds as well as the delivery of false monthly account statements to the pool participants set forth above, also violates Sections 4o(1)(A) and (B). *Skorupskas*, 605 F. Supp. at 932-33. Accordingly, Respondents violated Sections 4o(1)(A) and (B) of the Act.

**D. Section 9(a)(4) of the Act:
Making and Providing False Documents to NFA**

Section 9(a)(4) of the Act, in relevant part, makes it a violation of the Act for any person willfully to “make any false, fictitious, or fraudulent statements ... to a registered ... futures association ... acting in furtherance of its official duties under [the] Act.” 7 U.S.C. § 13(a)(4) (2006).

During the course of a routine audit conducted by the NFA, a registered futures association acting in furtherance of its official duties under the Act, Respondents made false trading account and bank statements and then provided those false statements to the NFA. Further, Respondents knew that these trading and bank statements were false in that they contained fictitious trading activity and false information regarding the value of the pool’s account. By this conduct, Respondents violated Section 9(a)(4) of the Act.

V.

OFFER OF SETTLEMENT

The Respondents have submitted Offers in which they, without admitting or denying the findings herein:

- A. Admit the jurisdiction of the Commission with respect to the matters set forth in this Order;
- B. Acknowledge service of this Order;
- C. Waive: (1) the filing and service of a complaint and notice of hearing; (2) a hearing; (3) all post-hearing procedures; (4) judicial review by any court; (5) any and all objections to the participation by any member of the Commission's staff in consideration of the Offer; (6) any and all claims that they may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. §§ 148.1-30 (2008), relating to or arising from this proceeding; (7) any and all claims that they may possess under the Small Business Regulatory Enforcement Act, 1996 HR 3136, Pub. L. 104-121, §§ 231-232, 110 Stat. 862-63 (Mar. 29, 1996), as amended by Pub. L. No. 110-28, 121 Stat. 112 (2007), relating to or arising from this proceeding; and (8) any claim

of Double Jeopardy based upon institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;

- D. Stipulate that the record basis upon which this Order is entered shall consist solely of the findings contained in this Order, to which Respondents have consented;
- E. Consent to the NFA being appointed as Monitor and further consent to payment of funds in the amount of \$763,710.88 (seven hundred sixty three thousand seven hundred ten dollars and eighty eight cents) from the Innovative Capital Fund LLC account at MF Global LLC to an account in the name of Innovative Capital Settlement Fund maintained by the Monitor. Respondents further consent that said funds will be used to partially satisfy their restitution obligation.
- F. Consent solely on the basis of the Offer, to the entry of this Order that:
 - 1. makes findings by the Commission that Respondents violated Sections 4b(a)(2)(i), (ii) and (iii); 4c(1)(A) and (B); and 9(a)(4) of the Act;
 - 2. orders Respondents to cease and desist from violating Sections 4b(a), 4c(1)(A) and (B), and 9(a)(4) of the Act;
 - 3. permanently prohibits Respondents from directly or indirectly:
 - (a) trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29) (2006); b) entering into any commodity futures transactions and/or options on commodity futures transactions for their own accounts, for any account in which they have a direct or indirect interest and/or having any commodity futures and/or options on commodity futures traded on their behalf; (c) engaging in, controlling or directing the trading for any commodity futures account and/or options on commodity futures account for or on behalf of any other person or entity, whether by power of attorney or otherwise; and/or (d) soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures contracts and/or options on commodity futures contracts;
 - 4. orders Respondents, jointly and severally, to pay restitution to pool participants, in accordance with Schedule A attached to the Offers, in the amount of one million, two hundred fifty thousand dollars (\$1,250,000) plus post-judgment interest within ten (10) days of the date of entry of this Order;
 - 5. orders Respondents, jointly and severally, to pay a civil monetary penalty in the amount of one hundred thousand dollars (\$100,000) plus post-judgment interest within ten (10) days of the date of entry of this Order;

6. appoints the NFA as Monitor in this matter; and
7. orders Respondents to comply with the undertakings consented to in the Offer and set forth in this Order.

Upon consideration, the Commission has determined to accept Respondents' Offers.

VI.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondents each violated Sections 4b(a)(2)(i), (ii) and (iii); 4o(1)(A) and (B); and 9(a)(4) of the Act, 7 U.S.C. §§ 6b(a)(2)(i), (ii) and (iii), 6o and 13(a)(4) (2006).

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Respondents shall cease and desist from violations of Section 4b(a) of the Act, as amended by The Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 13102, 122 Stat. 1651 (to be codified at 7 U.S.C. § 6b(a)).
2. Respondents shall cease and desist from violations of Sections 4o(1)(A) and (B); and 9(a)(4) of the Act, 7 U.S.C. §§ 6o and 13(a)(4) (2006).
3. Respondents are permanently prohibited from directly or indirectly (a) trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29) (2006); (b) entering into any commodity futures transactions and/or options on commodity futures transactions for their own personal accounts, for any account in which they have a direct or indirect interest and/or having any commodity futures and/or options on commodity futures traded on their behalf; (c) engaging in, controlling or directing the trading for any commodity futures account and/or options on commodity futures account for or on behalf of any other person or entity, whether by power of attorney or otherwise; and (d) soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures contracts and/or options on commodity futures contracts.
4. Respondents are jointly and severally liable for and shall pay restitution in the amount of one million, two hundred fifty thousand dollars (\$1,250,000) plus post-judgment interest (the "Restitution Obligation") within ten (10) days of the date of entry of this Order. Post judgment interest shall accrue beginning eleven days after the date of entry of this Order

and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

5. Respondents shall direct their restitution payments to the NFA, which has been appointed to act as Monitor in this matter. All restitution payments shall be made payable to the Innovative Capital Settlement Fund, c/o Suzanne Cech, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606 by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. Along with any restitution payment, the paying Respondent shall provide to the Monitor a cover letter that identifies the paying Respondent and the name and number of this proceeding. The paying Respondent shall simultaneously transmit copies of the cover letter and the form of payment to (a) Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581, (b) Chief, Office of Cooperative Enforcement, Division of Enforcement, at the same address, and (c) Regional Counsel, Commodity Futures Trading Commission, Eastern Regional Office, 140 Broadway, 19th Floor, New York, NY 10005.

6. Restitution shall be distributed by the Monitor to the pool participants in accordance with Schedule A attached to their Offers.

7. Respondents shall pay, jointly and severally, a civil monetary penalty in the amount of one hundred thousand dollars (\$100,000) plus post-judgment interest (the "CMP Obligation") within ten (10) days of the date of entry of this Order. Post judgment interest shall accrue beginning eleven days after the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961. The Respondents shall pay this civil monetary penalty by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, the Respondent shall make the payment payable to the Commodity Futures Trading Commission, and send to the following address:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Marie Bateman - AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: 405-954-6569

If the payment of the CMP Obligation is to be made by electronic funds transfer, the paying Respondent shall contact Marie Bateman, or her successor, at the above address to receive payment instructions and shall fully comply with those instructions. The paying Respondent shall accompany the payment of the penalty with the cover of a letter that identifies the paying Respondent and the name and docket number of this proceeding. The paying Respondent shall simultaneously transmit copies of the cover letter and the form of payment to (1) Regional Counsel, Commodity Futures Trading Commission, Eastern Regional Office, 140 Broadway,

19th Floor, New York, NY 10005; (2) Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, D.C. 20581; and (3) Chief, Office of Cooperative Enforcement, Division of Enforcement at the same address.

8. All payments by Respondents pursuant to this Order shall first be applied to satisfy the Restitution Obligation. After satisfaction of the Restitution Obligation, payments by Respondents pursuant to this Order shall be applied to satisfy the CMP Obligation.

9. Any acceptance by the Commission or the NFA of partial payment of Respondents' Restitution Obligation and/or CMP Obligation shall not be deemed a waiver of the Respondents' respective requirements to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.

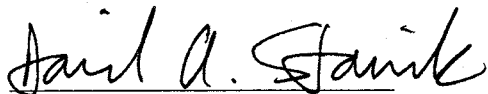
10. Respondents acknowledge that failure to comply with this Order shall constitute a violation of the Order and may subject them to administrative or injunctive proceedings, pursuant to the Act.

11. Respondents are directed to comply with the following undertakings set forth in their Offers:

- a. Neither the Respondents nor any of their agents, employees or representatives shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order, or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision affects the Respondents': (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. The Respondents shall take all steps necessary to ensure that all of their agents, employees and representatives, if any, understand and comply with this agreement; and
- b. Respondents shall never apply for registration or seek exemption from registration with the Commission in any capacity, shall never engage in activity requiring registration or exemption from registration with the Commission, except as provided for in Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9), and shall not act as a principal, agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9).

The provisions of this Order shall be effective on this date.

By the Commission

A handwritten signature in black ink, appearing to read "David A. Stawick". The signature is written in a cursive style with a horizontal line underneath the name.

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: December 18, 2008