

FILED

**NATIONAL FUTURES ASSOCIATION
BEFORE THE
BUSINESS CONDUCT COMMITTEE**

NOV 14 2008

**NATIONAL FUTURES ASSOCIATION
LEGAL DOCKETING**

In the Matter of:)
)
LAST ATLANTIS CAPITAL)
MANAGEMENT LLC)
(NFA ID #360774),)
)
and)
)
IRWIN M. BERGER)
(NFA ID #91379),)
)
Respondents.)

NFA Case No. 08-BCC-028

COMPLAINT

Having reviewed the investigative report submitted by the Compliance Department of National Futures Association ("NFA"), and having reason to believe that NFA Requirements are being, have been, or are about to be violated and that the matter should be adjudicated, NFA's Business Conduct Committee issues this Complaint against Last Atlantis Capital Management LLC ("LACM") and Irwin M. Berger ("Berger").

ALLEGATIONS

JURISDICTION

1. LACM is a commodity trading advisor and commodity pool operator ("CPO") Member of NFA, organized as a limited liability company in the Virgin Islands, with offices in St. Charles, Illinois. As such, LACM was required to comply with all NFA Requirements and is subject to disciplinary proceedings for violations thereof.

2. Berger is a principal and associated person ("AP") of LACM and an NFA Associate. As such, Berger was required to comply with all NFA Requirements and is subject to disciplinary proceedings for violations thereof.

BACKGROUND

3. LACM operates Last Atlantis Partners LLC (the "Fund") pursuant to an exemption under Commodity Futures Trading Commission ("CFTC") Regulations 4.7. The Fund has numerous share classes, including LACM Proprietary Options, Share Class O ("Share Class O").
4. Petra Trading Group LLC ("Petra") is a registered broker/dealer ("BD") and introducing broker, which introduces the Fund's trading accounts, including Share Class O, to another BD that is also a futures commission merchant. Petra is located in St. Charles, Illinois, in the same building, on the same floor, and next door to LACM's offices. Martin Allamian ("Allamian") is a principal and an AP of Petra and runs Petra's day-to-day operations. Allamian is also an AP of LACM. Linda Allamian, Allamian's wife, is a listed owner and principal of Petra.
5. Share Class O's 2007 unaudited Pool Financial Statement ("PFS"), and other financial records, showed a net asset value ("NAV") of approximately \$4 million at the end of calendar year 2007, of which approximately 60% was comprised of a receivable listed in the amount of \$2.4 million (as of January 31, 2008, LACM listed this receivable as \$2.7 million). LACM represented to NFA that this receivable represented order flow rebate payments due to Share Class O from brokers through which Petra executed the Fund's trades. LACM represented that one BD, Interactive Brokers ("Interactive"), owed the vast majority of this

receivable. According to LACM, Interactive and other executing brokers would pay the order flow rebates to Petra, which in turn would pay them to LACM, which then would pay them to Share Class O.

6. Although LACM reflected the above receivable on its 2007 PFS and other financial records for Share Class O, Petra did not reflect any receivable from Interactive, or payable to LACM, on its own financial statements. In fact, Petra could not provide NFA with any support for the amounts it and LACM claimed Interactive owed them for order flow rebates.
7. Share Class O had a trading loss of approximately \$3.5 million in 2007, but its PFS showed a gain of \$526,385 for 2007 from securities trading. When NFA asked Berger and Allamian why Share Class O's 2007 PFS showed a trading gain, they indicated that, although Share Class O experienced a trading loss in 2007, the amount received from Petra for order flow rebates plus the unpaid receivable, exceeded Share Class O's trading loss and resulted in a gain of \$526,385.
8. In August 2007, Interactive filed a FINRA arbitration claim against LACM, Petra, and Allamian alleging that LACM and Petra had entered into wash trades for the sole purpose of generating order flow rebates. Interactive further alleged that it paid over \$9.7 million in rebates because of such wash trades and that it ceased executing trades for Petra in May 2007. Interactive is seeking, among other things, to recover the rebates that it paid to Petra.
9. Petra filed a counterclaim against Interactive in the FINRA arbitration claiming that Interactive still owes it approximately \$5.1 million for trades that Petra

directed to Interactive. Petra's counterclaim states that "much of Petra's order flow came from Last Atlantis, a hedge fund engaged in short term-trading."

10. Despite Interactive's arbitration claim (which seeks to recover order flow rebates already paid to Petra and LACM and which denies liability for any additional rebates) and the fact that Petra, by May 2007, had ceased using Interactive as an executing broker, LACM continued to accrue amounts for the above receivable. Consequently, the receivable increased significantly throughout 2007 and January 2008. According to LACM's calculations, LACM accrued \$1.1 million for the receivable from May 2007 through January 2008, after Petra had stopped using Interactive to execute trades.
11. Further, LACM included this receivable in calculating the value of each participant's investment in both the monthly participant statements and the 2007 PFS sent to participants, thus misleading participants as to the actual value of their investment in the Fund. LACM also charged performance fees totaling approximately \$230,000 based on an NAV that included this receivable.
12. The amount of the order flow rebates that LACM accrued on its internal records is suspiciously similar to the trading losses experienced by Share Class O. For example, in 2007, based on the trading statements of the BD through which Share Class O traded, Share Class O suffered approximately \$3.5 million in trading losses. For this same period, LACM accrued, on the books of Share Class O, a little over \$3.5 million as order flow rebate payments, of which only approximately \$1.8 million was actually paid. Thus, by showing this receivable,

LACM was able to masquerade the significant trading losses suffered by Share Class O's investors.

13. NFA repeatedly requested that LACM provide documentation to support the \$2.7 million receivable. However, all that Berger provided to NFA as support was a one-page sheet that included the purported number of trades that had been executed in the account of Share Class O for each month from January 2007 through January 2008 and the corresponding amount of money LACM expected to recover for these trades as payment for order flow rebates. When NFA asked how LACM calculated the amount of money it would receive for these payments, Berger represented that Petra and Petra's former chief executive officer, Mark Ramos ("Ramos"), provided this information to LACM. (Ramos is also named as a respondent in the FINRA arbitration claim).
14. NFA reminded Allamian and Berger that they had previously told NFA that LACM and Petra had ceased executing trades through Interactive in approximately April 2007. NFA asked Allamian why then LACM continued to accrue for order flow rebates on trades placed after April 2007 and add these accruals to the above receivable. The only answer Allamian could give was that this was what Ramos had told him to do.
15. In September 2007, LACM made a subordinated loan of \$300,000 on behalf of Share Class O to Petra. However, LACM's unaudited 2007 PFS listed the \$300,000, in the schedule of assets, as "Cash and Cash equivalents at broker" and only in the footnotes did it disclose that this was actually a subordinated loan to Petra. LACM made no other disclosure to Share Class O participants

concerning the subordinated loan to Petra, until April 2008, when NFA required LACM to provide such disclosure to Share Class O participants.

16. Petra represented to NFA that it needed the subordinated loan – which came from Share Class O's funds – to meet the minimum net capital requirements of FINRA and NFA. Yet, shortly after the loan was made, Petra funneled a large portion of the loan proceeds back to LACM and the remainder to its owner, Linda Allamian. (Petra received the \$300,000 subordinated loan proceeds from Share Class O on September 1, 2007. On September 11, 2007, Petra transferred \$250,000 back to LACM. On that same day, Linda Allamian withdrew \$60,000 from Petra.)
17. On April 24, 2008, NFA issued a Member Responsibility Action ("MRA") against LACM. After the issuance of the MRA, LACM, Berger, Allamian, and an individual named Michael Elizondo ("Elizondo"), came to NFA's offices with their attorneys and asked that the MRA be lifted. At that meeting, Elizondo, although purportedly only a consultant for LACM, answered most of the questions put to LACM by NFA. (Elizondo is also a respondent in the FINRA arbitration claim).
18. At this meeting, NFA told LACM that it must satisfy two conditions before NFA would consider lifting the MRA. First, LACM had to liquidate Share Class O and provide NFA with a plan to distribute its remaining assets to participants. Second, LACM had to provide support for the receivable that LACM claims is owed to Share Class O as payment for order flow rebates. However, to date, LACM has failed to propose a reasonable plan of distribution for Share Class O or provide NFA with adequate support for the receivable.

19. In a subsequent letter to LACM, NFA requested that LACM give Share Class O participants an opportunity to review and comment on any distribution plan that LACM develops. NFA further advised LACM that, before NFA would approve any distribution plan, LACM must obtain the consent of all Share Class O participants to the distribution plan or court approval of the plan. It is NFA's understanding that LACM has not yet attempted to obtain the consent of the participants in Share Class O to a distribution plan, nor sought court approval of the plan.

APPLICABLE RULES

20. NFA Compliance Rule 2-2(a) provides, in pertinent part, that no Member shall cheat, defraud or deceive, or attempt to cheat, defraud or deceive, any commodity futures customer.
21. NFA Compliance Rule 2-2(f) provides, in pertinent part, that no Member shall willfully submit materially false or misleading information to NFA or its agents.
22. NFA Compliance Rule 2-13(a) provides, in pertinent part, that any Member who violates CFTC Regulations 4.7 shall be deemed to have violated an NFA requirement.
23. NFA Compliance Rule 2-9(a) provides that each Member shall diligently supervise its employees and agents in the conduct of their commodity futures activities for or on behalf of the Member. Each Associate who has supervisory duties shall diligently exercise such duties in the conduct of that Associate's commodity futures activities on behalf of the Member.

COUNT I

VIOLATION OF NFA COMPLIANCE RULE 2-2(a): PROVIDING FALSE AND DECEPTIVE REPORTS TO PARTICIPANTS.

24. The allegations contained in paragraphs 1 through 20 are realleged as paragraph 24.
25. Under generally accepted accounting principles ("GAAP"), it was impermissible for LACM to include the receivable for anticipated order flow rebates as an asset of Share Class O because the payment of the receivable was and is wholly contingent on the outcome of the pending arbitration case. Moreover, even if this receivable were not contingent on the outcome of the arbitration, under GAAP, it still should not have been counted as an asset by LACM as there is no underlying documentation to show that the receivable is actually owed to Share Class O or that LACM's calculation of the amount of the receivable is accurate.
26. Therefore, LACM included a fictitious receivable in its calculation of Share Class O's NAV, and provided false and misleading information to participants by sending them monthly statements and the 2007 PFS, which included this receivable in the value of each participant's investment.
27. By reason of the foregoing acts and omissions, LACM is charged with violations of NFA Compliance Rule 2-2(a).

COUNT II

VIOLATION OF NFA COMPLIANCE RULE 2-2(f): PROVIDING FALSE AND MISLEADING INFORMATION TO NFA.

28. The allegations contained in paragraphs 1 through 19, 21, 25 and 26 are realleged as paragraph 28.

29. LACM willfully submitted false and misleading information to NFA when, on April 15, 2008, it filed with NFA the 2007 PFS that included the fictitious receivable.
30. By reason of the foregoing acts and omissions, LACM is charged with violations of NFA Compliance Rule 2-2(f).

COUNT III

VIOLATION OF NFA COMPLIANCE RULE 2-13(a): FAILING TO PROPERLY COMPUTE AND PRESENT FINANCIAL STATEMENTS AND REPORTS.

31. The allegations contained in paragraphs 1 through 19 and 22 are realleged as paragraph 31.
32. CFTC Regulations 4.7(b)(2) and 4.7(b)(3)(ii) provide that a pool's account statements and annual report, respectively, must be presented and computed in accordance with GAAP.
33. As alleged in paragraphs 25 and 26, LACM failed to compute the assets of Share Class O in accordance with GAAP in that it included in such assets the fictitious receivable.
34. Additionally, as alleged in paragraphs 15 and 16, LACM listed the subordinated loan that it made to Petra on behalf of Share Class O as "Cash and Cash equivalents at broker." However, pursuant to GAAP, the subordinated loan should have been listed as a loan receivable instead of cash at a broker.
35. By reason of the foregoing acts and omissions, LACM is charged with violations of NFA Compliance Rule 2-13(a).

COUNT IV

VIOLATION OF NFA COMPLIANCE RULE 2-13(a): FAILING TO PROVIDE COMPLETE AND ACCURATE DISCLOSURES.

36. The allegations contained in paragraphs 1 through 19 and 22 are realleged as paragraph 36.
37. CFTC Regulation 4.7 exempts CPOs from providing disclosure documents to prospective participants for pools operated pursuant to 4.7. CFTC Regulation 4.7(b)(2) provides, however, that if, despite the exemption, an offering memorandum is used to solicit participants it must include all disclosures necessary to make the information, in the context in which it is furnished, not misleading.
38. LACM sent to prospective participants a private placement memorandum ("PPM") for the Fund dated December 2007. The PPM failed to disclose numerous material facts that made the document misleading.
39. Among other things, LACM failed to include in the PPM the FINRA arbitration action Interactive filed against LACM and others. In light of the fact that Share Class O lost money trading and could only be profitable if the purported receivable from Interactive – constituting 60% of Share Class O's NAV – was realized, this arbitration action was a material fact that should have been disclosed.
40. Further, although the PPM noted that one of the risk factors associated with the Fund was the risk of litigation involving LACM, it did not disclose the fact that there was pending litigation involving LACM that would directly impact the Fund,

even though the PPM was dated four months after the arbitration was commenced.

41. The PPM discussed the trading strategies for Share Class O, but did not include the material fact that part of the trading strategy for Share Class O, as represented to NFA by Berger, Allamian, and Elizondo, was to receive rebate payments for order flow; thus, the PPM's description of the trading strategy for Share Class O was misleading.
42. The PPM also failed to disclose that LACM made a subordinated loan on behalf of Share Class O to Petra in September 2007 and that if Petra were to become insolvent, then Share Class O would stand behind all other creditors of Petra before it would receive payment of the subordinated loan.
43. Additionally, although the December 2007 PPM discussed the fact that "an affiliated broker/dealer" earns commissions and fees from the Fund, it did not disclose that the Fund had made a significant loan to Petra or that the pending arbitration in which Petra was also named might affect the ability of Petra to repay the subordinated loan.
44. The failure of the PPM to include these material facts regarding the arbitration and the subordinated loan to Petra made the PPM misleading.
45. By reason of the foregoing acts and omissions, LACM is charged with violations of NFA Compliance Rule 2-13(a).

COUNT V

VIOLATION OF NFA COMPLIANCE RULE 2-9(a): FAILING TO SUPERVISE.

46. The allegations contained in paragraphs 1 through 19, 23, 25, 26, 29, 32 through 34 and 37 through 44 are realleged as paragraph 46.
47. LACM entered into a scheme to deceive Fund participants, provided them with false and deceptive statements, and failed to provide them with material disclosures. These violations evidence a failure on LACM's part to supervise its employees.
48. Berger is a managing member, listed principal, and AP of LACM. Throughout NFA's examination of LACM and subsequent to the issuance of the MRA, Berger was the main point of contact at LACM and was routinely the one to contact NFA and respond to inquiries from NFA. Accordingly, Berger is responsible for supervising the activities of LACM and ensuring its compliance with all applicable CFTC and NFA rules. The above examples of violations at LACM evidence a failure on the part of Berger to adequately supervise LACM's activities.
49. By reason of the foregoing acts and omissions, LACM and Berger are charged with violations of NFA Compliance Rule 2-9(a).

PROCEDURAL REQUIREMENTS

ANSWER

You must file a written Answer to the Complaint with NFA within thirty (30) days of the date of the Complaint. The Answer shall respond to each allegation in the Complaint by admitting, denying or averring that you lack sufficient knowledge or information to admit or deny the allegation. An averment of insufficient knowledge or infor-

mation may only be made after a diligent effort has been made to ascertain the relevant facts and shall be deemed to be a denial of the pertinent allegation.

NFA staff is authorized to grant such reasonable extensions of time in which an Answer may be filed as it deems appropriate.

The place for filing an Answer shall be:

National Futures Association
300 South Riverside Plaza
Suite 1800
Chicago, Illinois 60606
Attn: Legal Department-Docketing

E-Mail: Docketing@nfa.futures.org
Facsimile: 312-781-1672

Failure to file an Answer as provided above shall be deemed an admission of the facts and legal conclusions contained in the Complaint. Failure to respond to any allegation shall be deemed an admission of that allegation. Failure to file an Answer as provided above shall be deemed a waiver of hearing.

POTENTIAL PENALTIES, DISQUALIFICATION AND INELIGIBILITY

At the conclusion of the proceedings conducted as a result of or in connection with the issuance of this Complaint, NFA may impose one or more of the following penalties:

- (a) expulsion or suspension for a specified period from NFA membership;
- (b) bar or suspension for a specified period from association with an NFA Member;
- (c) censure or reprimand;
- (d) a monetary fine not to exceed \$250,000 for each violation found; and
- (e) order to cease and desist or any other fitting penalty or remedial action not inconsistent with these penalties.

The allegations in this Complaint may constitute a statutory disqualification from registration under Section 8a(3)(M) of the Commodity Exchange Act.

Respondents in this matter who apply for registration in any new capacity, including as an AP with a new sponsor, may be denied registration based on the pendency of this proceeding.

Pursuant to the provisions of CFTC Regulation 1.63, penalties imposed in connection with this Complaint may temporarily or permanently render Respondents who are individuals ineligible to serve on disciplinary committees, arbitration panels and governing boards of a self-regulatory organization, as that term is defined in CFTC Regulation 1.63.

**NATIONAL FUTURES ASSOCIATION
BUSINESS CONDUCT COMMITTEE**

Dated: 11-14-2008

By: _____

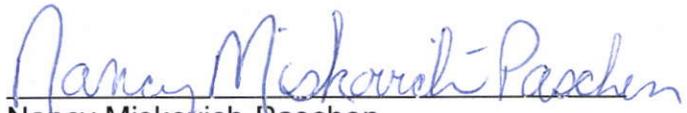
Chairperson

AFFIDAVIT OF SERVICE

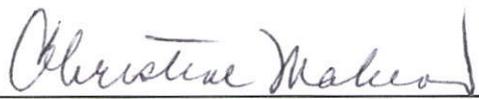
I, Nancy Miskovich-Paschen, on oath state that on November 14, 2008, I served copies of the attached Complaint, by sending such copies in the United States mail, first-class delivery, and by overnight mail, in envelopes addressed as follows:

Last Atlantis Capital Management LLC
525 Dunham Road
Suite 50
St. Charles, IL 60174
Attn: Irwin Berger

Irwin M. Berger
5N206 Glen Sharon Lane
St. Charles, IL 60174


Nancy Miskovich-Paschen

Subscribed and sworn to before me
on this 14th day of November 2008.


Notary Public

