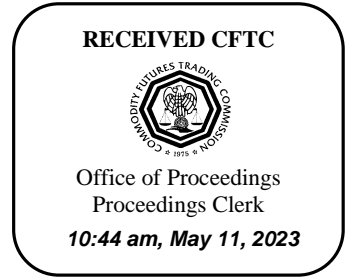




**U.S. COMMODITY FUTURES TRADING COMMISSION**

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Office of Proceedings

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AMBIT ME DMCC,	*	CFTC Dkt. No. 20-R016
	*	
Complainant,	*	Served electronically
	*	
v.	*	
	*	
Cunningham Commodities, LLC, and	*	
Patrick Pinkerton,	*	
	*	
Respondents.	*	
_____	*	

**NOTICE OF CORRECTIONS**

The following correction has been made to the Initial Decision dated May 5, 2023:

- (1) Page 15: On the 15th line of that page, change “2022” to “2020”. The corrected sentence should read:

Accordingly, Respondents are ordered to pay AMBIT ME DMCC \$500,000 plus pre-judgment interest beginning on February 20, 2020 (the date of the final unauthorized transfer) of 1.48%.

These corrections have no effect on the filing deadlines which are set out in the Proceeding Clerk’s cover letter accompanying the Initial Decision.

A copy of the corrected order is provided along with this Notice of Corrections.

Dated: May 11, 2023

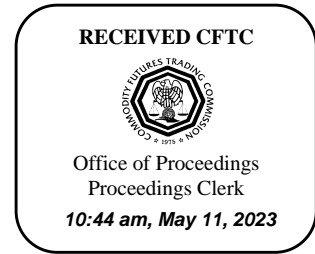
/s/ Kavita Kumar Puri  
Kavita Kumar Puri  
Administrative Judge



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AMBIT ME DMCC,	*	
	*	CFTC Dkt. No. 20-R016
	*	
Complainant,	*	<b>Served electronically</b>
	*	
v.	*	
	*	
Cunningham Commodities, LLC, and	*	
Patrick Pinkerton,	*	
	*	
Respondents.	*	

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**INITIAL DECISION**  
**[corrected version]**

This case arises out of a simple dispute. Complainant AMBIT ME DMCC (AMBIT) alleges that Respondents Cunningham Commodities, LLC (Cunningham Commodities) and Patrick Pinkerton wrongfully wired a total of \$500,000 from AMBIT’s futures account to bank accounts held at JP Morgan Chase Bank in Miami, Florida and HSBC in Birmingham, United Kingdom on three separate occasions in 2020: February 11, February 18, and February 20. Cunningham Commodities wired these funds to JP Morgan Chase Bank and HSBC in response to emails requesting the withdrawals. These emails were not sent by AMBIT, which contends that Cunningham Commodities should have known these emails were scams because: (1) AMBIT had never identified these banks as authorized

recipients of its funds; and (2) the emails contained numerous red flags making clear they were imposter emails.

AMBIT filed a motion for summary disposition, which I denied on May 20, 2022 in an Opinion & Order, appended here as Appendix A (May 20, 2022 Opinion & Order). In that Opinion & Order, I found “it highly plausible on the [then] current record that Cunningham Commodities acted with the requisite scienter in failing to verify the authority of the requesting individual purporting to represent AMBIT, [but that] more evidence by way of testimony (and perhaps the missing phone conversations) [was] necessary to decide whether there was sufficient intentionality—either recklessness or willful behavior—to amount to fraud under CEA.” We have since held a merits hearing by way of a virtual proceeding to collect that testimony on October 28, 2022 and received transcripts of various internal phone communications from Cunningham Commodities.

Having heard the testimony, and reviewed the parties’ documentary evidence and post-hearing briefs, I find Cunningham Commodities and Pinkerton violated the Commodity Exchange Act (CEA) and are liable for AMBIT’s out-of-pocket losses of \$500,000, including prejudgment interest from February 20, 2020 of 1.48%, and post-judgment interest of 4.72% until the date of payment.

## **I. Procedural History**

Because the only material events occurring after the issuance of the May 20, 2022 Opinion & Order are the merits hearing and the filing of pre- and post-hearing

briefs along with the hearing exhibits cited below, I need not detail the procedural history again. Familiarity with the May 20, 2022 Opinion & Order is assumed.

## **II. Findings of Fact**

I restate the findings of fact made in the May 20, 2022 Opinion & Order for ease of reference and coherence, as augmented by evidence provided at the merits hearing and in the pre-hearing briefs.

1. AMBIT is a foreign corporation with its principal place of business in Dubai, United Arab Emirates (UAE).

2. Respondent Cunningham Commodities is an Illinois limited liability corporation with its principal place of business in Chicago, Illinois. It has been registered with the National Futures Association (NFA) as a Futures Commission Merchant (FCM) since at least 1982, including during the time of the events discussed throughout this Opinion and Order.

3. Respondent Pinkerton resides in Illinois, and during the relevant time period through the present, has been registered with NFA as an Associated Person (AP) of Cunningham Commodities. Pinkerton was an employee of Cunningham Commodities and acted as AMBIT's account manager.

4. Non-party Scott Cunningham has been registered with NFA as an AP and Principal of Cunningham Commodities during the relevant time.

5. Non-party Rita Tandaric is the Chief Compliance Officer (CCO) for Cunningham Commodities. Respondents Prehearing Memo at 6 (Oct. 18, 2022). As the CCO, Tandaric is responsible for the development, administration, and

enforcement of policies and procedures at Cunningham to promote compliance with relevant laws and rules. *Id.*

6. On August 8, 2018, AMBIT opened an account at Cunningham Commodities and executed the required Account Agreement to do so. Compl. Hearing Ex. 1 (Account Agreement).

7. The Account Agreement states, in bolded capitalized letters, that: “INFORMATION COLLECTED IN THIS APPLICATION WILL BE USED TO VERIFY YOUR IDENTITY, AS REQUIRED UNDER FEDERAL LAW.” Compl. Hearing Ex. 1 (Account Agreement).

8. As part of that Account Agreement, AMBIT provided its banking information as follows: RAKBANK, GOLD SOUQ, DEIRA, Dubai, UAE, Account # XXXXXXXXXXXXXXXXXXXXXXX02 (the RAK Bank Account).<sup>1</sup> Compl. at 2; and Compl. Hearing Ex. 1 at CC 4. AMBIT also provided its email address as [AMBITDMCC11@gmail.com](mailto:AMBITDMCC11@gmail.com). *Id.*

9. The Account Agreement provided for AMBIT’s use of fax or electronic signature to authorize, acknowledge or consent to transactions. Compl. Hearing Ex. 1 ¶¶ 27-28.

10. Pinkerton believed that AMBIT would be communicating solely through email from the onset of AMBIT and Cunningham Commodities’

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<sup>1</sup> The account number has been obscured in this Opinion & Order for privacy reasons.

relationship. Hearing Transcript at 52:12-53:19 (October 28, 2022) (hereinafter Tr.).

11. Pinkerton believed email to be the preferred mode of communication both because of the language barrier between Cunningham Commodities and AMBIT's representatives and the time difference between Chicago and Dubai. *Id.*

12. On July 18, 2019, AMBIT submitted the required form to change its email address on its account from [AMBITDMCC11@gmail.com](mailto:AMBITDMCC11@gmail.com) to [hbs8522@gmail.com](mailto:hbs8522@gmail.com). Compl. Hearing Ex. 3 (Change of Email Form (July 18, 2019)).

13. Cunningham Commodities never effectuated this email address change, despite receiving this communication and understanding the importance of email communication in this relationship. Cunningham Commodities continued to send emails, including daily statements, to the outdated "AMBITDMCC11" email address.<sup>2</sup>

14. From August 2018 through February 2020, AMBIT made forty-seven (47) transfers to and from its account at Cunningham Commodities. Compl. Ex. 2. Thirty-eight (38) of these transfers were to the RAK Bank Account, but the remaining nine (9) were to AMBIT's account at Noor Bank in the UAE. *Id.*

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<sup>2</sup> See Compl. Hearing Ex. 18 (Scott Cunningham admits in internal call that they had "AMBITDMCC11" email address on file, rather than the "hbs8522" email address.); Compl. Hearing Ex. 23 (Scott Cunningham states that he is unsure they "should be acknowledging [the hbs22] address because the address we sent statements to is not that address."); Tr. At 93:6-94:1 (testifying that though he sent the email form along, Pinkerton realized the change was never made).

15. Initially the transfer request to AMBIT's account at Noor Bank was refused. On November 5, 2019, Cunningham Commodities refused to wire funds to AMBIT's Account at Noor Bank because the funds did not "originate" there. Compl. Ex. 5 (Email from Cunningham Commodities to AMBIT (Nov. 5, 2019)). AMBIT cured this issue by providing additional documentation authorizing transfers to and from its Noor Bank Account to Cunningham Commodities on November 14, 2019. Compl. Hearing Ex. 4.

16. On February 11, 2020, Pinkerton received an email from someone purporting to be Harsh Soni, an employee of AMBIT. That email asked for \$100,000 to be wired to a bank account at the Bank of China HK Ltd. under an account held by Hong Kong Gar Trading Co Ltd—not AMBIT. Compl. Hearing Ex. 7.

17. That Harsh Soni was an impostor.

18. The impostor email was sent from [hbs85221@gmail.com](mailto:hbs85221@gmail.com), not [hbs8522@gmail.com](mailto:hbs8522@gmail.com). In other words, the numerical ID has an additional digit—the "1" at the end.

19. Not realizing the email address was not a precise match for the address Patrick Pinkerton had on file, Pinkerton followed up, asking whether AMBIT owns Hong Kong Gar or vice versa. The impostor replied that AMBIT owns Hong Kong Gar. *Id.*

20. Pinkerton replied that same morning: “After review we are afraid we cannot and will not send funds to any bank account not held in the name of AMBIT ME DMCC.” *Id.*

21. About 10 minutes later, the impostor emailer replied: “Okay i would send you Ambit other bank account where we would be able to make a quick turnaround of the money and send it to the subsidiary account our self. i will be sending the bank information along with the statement. [T]hanks.” *Id.*

22. Roughly an hour later, the same day—February 11, 2020—Pinkerton received an email from the same impostor address requesting that Cunningham Commodities wire \$100,000 from AMBIT’s Cunningham Commodities account to an account at JP Morgan Chase Bank in Miami, Florida. Compl. Hearing Ex. 5. It had a bank statement attached, as promised. *Id.*; Compl. Hearing Ex. 7.

23. This impostor email was sent as a follow up from the emailer to cure the deficiency in the previous emails regarding the transfer to the Bank of China HK.

24. Pinkerton testified that he reviewed the impostor email and the attached bank statement. Tr. at 61:1-61:25 (Pinkerton Cross Examination). However, there were several curious things about this request that Pinkerton did not notice.

a. AMBIT had never identified either JP Morgan Chase Bank or any other U.S. bank as either an authorized originating or depositing account. In



fact, to date the only bank accounts associated with AMBIT were located in the UAE, where AMBIT was located. *See supra* ¶ 14.

b. Pinkerton testified that he had never deposited any funds into accounts other than those at RAK Bank or Noor Bank until that date. Tr. 63:19-25.

c. The routing number listed for the JP Morgan Chase Bank account, which Harsh Soni identified as being in Miami, Florida was in fact tied to a bank account listed in Tampa, Florida. Compl. ¶ 15.

d. Although the email request had a JP Morgan Chase bank statement attached, that statement had various contents and columns misaligned. Compl. Hearing Ex. 6 (JP Morgan Bank Statement).

e. The February 11, 2020 email was sent from [hbs85221@gmail.com](mailto:hbs85221@gmail.com), not [hbs8522@gmail.com](mailto:hbs8522@gmail.com). In other words, the numerical ID has an additional digit—the “1” at the end.

25. Despite the anomalies associated with the February 11, 2020 impostor email request, Respondents Cunningham Commodities and Pinkerton transferred \$100,000 from AMBIT’s Cunningham Commodities account to the JP Morgan Chase account. Compl. Ex. 8 (Feb. 2020 Statement).

26. One week later, on February 18, 2020, Respondents received, at Pinkerton’s email address, another request from the impostor email address for transfer of \$100,000 from AMBIT’s Cunningham Commodities account to the same JP Morgan Chase account in Florida as in the February 11, 2020 email. Compl. Hearing Ex. 7 (Feb. 18, 2020 Email).

27. This February 18, 2020 impostor email contained the same anomalies as did the February 11, 2020.

28. Respondents nonetheless transferred \$100,000 from AMBIT's Cunningham Commodities account to the JP Morgan Chase Bank account on February 18, 2020. Compl. Ex. 8 (February 2020 Statement).

29. Two days later, on February 20, 2020, Respondents received a third transfer request from the impostor email address at Pinkerton's email account, requesting that Cunningham Commodities wire \$300,000 from AMBIT's Cunningham Commodities account to HSBC, a financial institution in Birmingham, United Kingdom. Compl. Ex. 11 (February 20, 2020 Email).

30. As with the February 11 and February 18 emails, this email was sent from the impostor email address: [hsb85221@gmail.com](mailto:hsb85221@gmail.com).

31. AMBIT had never authorized HSBC or any bank located in the UK as an originating or depositing bank account. Tr. at 64:1-64:6.

32. And the Swift Code provided in the request for transfer in the February 20 email was for a bank with a completely different address; not HSBC at the address provided in the request for transfer. Compl. ¶ 8.

33. Respondents nonetheless transferred \$300,000 from AMBIT's Cunningham Commodities account to the HSBC account on February 20, 2020. Compl. Hearing Ex. 14.

34. There was no activity in AMBIT's account for a few days.

35. Then on or about March 2, 2020, Pinkerton contacted Soni about a margin call to cover open positions through a Skype call. Soni Written Testimony ¶ 18. This came as a “shock” to Soni, who believed AMBIT had sufficient funds in their account to cover any open positions. *Id.*

36. At this time, Soni learned about the unauthorized transfers made on February 11, 18, and 20. Soni Written Testimony ¶ 19.

37. Soni would not have easily uncovered those unauthorized transfers through the usual means for the following reasons.

a. AMBIT’s daily statements, which would have reflected the unauthorized wire transfers, were being sent to the old email address:

AMBITDMCC@gmail.com; not the requested or corrected email address:

[hbs8522@gmail.com](mailto:hbs8522@gmail.com).<sup>3</sup>

b. There was no evidence demonstrating that AMBIT would have seen the wire transfers on the online trading platform it used to access its account. Pinkerton testified that customers “can see their account balance and their positions, and their P and L, profit and loss.” Tr. at 67:15-68:5. Tandaric testified that she could not be sure customers could see their wire transfers on the trading platform interface because it was “strictly a trading platform.” Tr. at 107:14-108:11. Soni accessed Cunningham Commodities’ trading platforms several times during

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<sup>3</sup> Not only did Scott Cunningham admit this and Pinkerton testify in this regard, Tandaric testified that the daily statements would have gone to the email address on file. Tr. at 106:3-106:13. But in a case that is all about email addresses and their accuracy, the very same Chief Compliance Officer could not recall which email address was on file. *Id.*

the February 11, 2020 through March 2, 2020 time frame, but he did so “to check on the status of open positions.” Soni Written Testimony ¶ 21. He did not access any view that would display the unauthorized transfers. *Id.*

38. On March 2, 2020—just 10 days after the last unauthorized transfer—AMBIT emailed Cunningham Commodities demanding that its account be credited the \$500,000 that was transferred out of its account. Compl. Ex. 13 (March 12, 2020 Email).

39. Respondents refused to credit AMBIT’s account.

40. There were a series of internal calls held at Cunningham Commodities to investigate these wire transfers that occurred between March 2, 2020 and March 9, 2020. Those calls (as supplemented by the testimony at hearing), make the following facts clear:

a. Scott Cunningham believed Pinkerton’s conduct was wrongful. He states he is holding something (presumably compensation) back from Pinkerton because “you instructed us to do this stuff.” Compl. Hearing Ex. 23 (Call on March 3, 2020 at 10:37 am). He further states, “you sent the wrong . . . without talking to anybody to verify anything, you sent it.” *Id.* On that same call Pinkerton states he was never told by Cunningham Commodities that he had to verify identify on a phone call. *Id.*

b. On that same phone call, Scott Cunningham warned, “I mean we can’t send money to places that we haven’t got confirmed. It can happen just

like it happened, somebody sent you a bogus email and ---.” Compl. Hearing Ex. 23 (Call on March 3, 2020 at 10:37 am).

c. Pinkerton admitted that he believes a third party is scamming them and that he does not believe it is AMBIT. Compl. Hearing. Ex. 18. *See also* Compl. Hearing Ex. 23 (Call on March 3, 2020 at 10:37 am).

d. Pinkerton stated that he could not have done more to confirm the authenticity of the wire transfer requests, Compl. Hearing Ex. 18 (Call on March 3, 2020 at 8:30 am), though he admits at hearing he never thought to pick up the phone to call AMBIT at the number Cunningham Commodities had on file despite having the ability to do so. Tr. at 77:8-81:6.

e. The investigations uncovered that Scott Cunningham had approved all three wire transfers, even though two of the wire transfers were not independently approved by the customer. Compl. Hearing Ex. 20 (Call on March 3, 2020 at 5:50 pm). The remaining third wire transfer authorization contained a note stating it was independently verified “from Pat,” which is presumably a reference to Pinkerton. *Id.* *See also* Tr. at 85:10-86:13. Scott Cunningham would have approved the wire transfers some time after the request for transfer was made by someone on the staff other than Pinkerton. Tr. at 118:25-119:14.

f. Scott Cunningham’s email account had “automated forwarding rules” that were taking “certain emails and forwarding them.” Compl. Hearing Ex. 24 (Call on March 9, 2020 at 1:40 pm); Tr. at 111:24-112. But although an internal investigation prompted by these fraudulent transfers uncovered Scott

Cunningham’s email forwarding rules, Tandaric could remember nothing about whether these rules were connected to the misconduct at hand. For example, Tandaric testified she did not know to whom the emails were forwarded because she “[did not] remember.” Tr. 112:1-112:16. And in a case about fraudulent wire transfers, she further testified that she could not be sure whether the rules governing Scott Cunningham’s email address had anything to do with the fraudulent wire transfers because she did not “recall specifically.” Tr. 115:18-115:23.

### **I. Analysis and Legal Discussion of AMBIT’s Claims**

In the May 20, 2022 Opinion & Order, I ruled that failure to verify the customer’s identity and scope of their authority could constitute fraud under CEA § 4b, 7 U.S.C. § 6b. *See* May 20, 2022 Order at 9-11 (containing discussion of statutes and precedent). I further ruled that under applicable case law, in order to find fraud and liability under CEA § 4b, some finding of intentionality needed to be made. *Id.* I also clarified that intentionality, under the applicable case law, could be shown through either willful or reckless misconduct—that is conduct constituting an extreme departure from ordinary care. So the only question that remained in this case is was there evidence of such intentionality. That question has been answered in the affirmative, not by a preponderance of the evidence here, but by an overwhelming amount of evidence.

First, AMBIT admitted as discussed above that there were several failures in its internal protocols. Cunningham Commodities never changed the email address

on file from AMBITDMCC@gmail.com to hbs8522@gmail.com as requested. Although Cunningham Commodities made AMBIT go through additional steps to add Noor Bank to its list of authorized banks on November 5, 2019 since it only had RAK bank on file, it never did so for the JP Morgan Chase or HSBC banks associated with the unauthorized transfers of February 2020. Cunningham Commodities failed to pick up any suspicious cues in the emails of February 2020, such as the incorrect email address, the anomalies in the bank statements and routing numbers, and the fact that these banks were located all over the world—as opposed to in the UAE where AMBIT was located and where the other two verified banks were located. For at least two of the transfers, the authorizations to effectuate the transfers included a note that the transfers had not been independently verified by the customer. And Cunningham Commodities **admitted** fault in its internal conversations.

Second, I find the entirety of Rita Tandarić's testimony non-credible. Everything she stated was carefully hedged to dance around the questions asked and provide as little information as possible. I find it particularly non-credible that she could not (a) identify the email address on file for Harsh Soni because she could not recall it (in a case that is all about email addresses); (b) verify whether a customer could see wire transfers on their electronic trading platform interface; or (c) provide information regarding the anomalies in Scott Cunningham's email account rules because she could not recall them.

Finally, AMBIT repackages its affirmative defense of ratification of these unauthorized transfers, which I discussed at length in the May 20 Opinion & Order at 12-14, as a duty to mitigate damages. This is an audacious argument when the record plainly illustrates that the daily statements reflecting the damages (or wire transfers) were being sent to a non-operative email address. Nothing AMBIT could have or should have done excuses Respondents from the gross recklessness with which they conducted business here.

### CONCLUSION

After carefully reviewing the evidentiary record, I find that Respondents Cunningham Commodities and Patrick Pinkerton violated CEA § 4b, 7 U.S.C. § 6b, by failing to verify the identity and scope of authority behind the imposter emailer before transferring \$500,000 out of its customer's accounts. This violation proximately caused Complainant AMBIT ME DMCC \$500,000 in damages. Accordingly, Respondents are ordered to pay AMBIT ME DMCC \$500,000 plus pre-judgment interest beginning on February 20, 2020 (the date of the final unauthorized transfer) of 1.48%. Respondents are also ordered to pay post-judgment interest on that entire reparations amount at 4.72% compounded annually from the date of this Order to the date of complete payment, plus \$250 in costs for the filing fee.

Dated: May 5, 2023

/s/ Kavita Kumar Puri  
Kavita Kumar Puri  
Administrative Judge

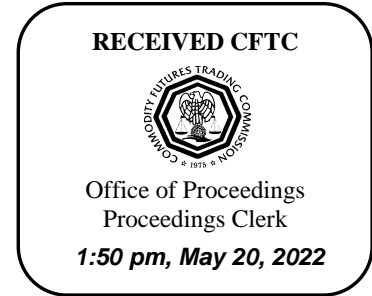


# **APPENDIX A**



**U.S. COMMODITY FUTURES TRADING COMMISSION**

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Office of Proceedings

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AMBIT ME DMCC,

Complainant,

v.

Cunningham Commodities, LLC, and  
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CFTC Dkt. No. 20-R016

**Served electronically**

**OPINION AND ORDER**  
**DENYING MOTION FOR SUMMARY DISPOSITION,**  
**CLARIFYING ISSUES &**  
**SETTING FOR HEARING**

This case arises out of a simple dispute. Complainant AMBIT ME DMCC (AMBIT) alleges that Respondents Cunningham Commodities, LLC (Cunningham Commodities) and Patrick Pinkerton wrongfully wired a total of \$500,000 from AMBIT's account to accounts held at JP Morgan Chase Bank in Miami, Fl and HSBC in Birmingham, United Kingdom on three separate occasions: February 11, 2020, February 18, 2020, and February 20, 2020. Cunningham Commodities transferred these funds to JP Morgan Chase Bank and HSBC in response to emails, sent by someone claiming to be an authorized designee of AMBIT, requesting the withdrawals. However, AMBIT contends that Cunningham Commodities should

have known these emails were scams because AMBIT had never identified these banks as authorized institutions to receive withdrawals from its account, and the emails contained numerous red flags making clear they were imposter emails.

Respondents Cunningham Commodities and Pinkerton counter that they acted in a reasonable manner in fulfilling what they believed were AMBIT's withdrawal requests, and that AMBIT was checking its account daily and never questioned those transactions. Respondents further contend that there is still a question of where the money went and whether it was in fact requested by a designee of AMBIT. Respondents finally contend that AMBIT's claims are precluded by law.

AMBIT filed for summary disposition, which it mistakenly filed as a Motion for Summary Judgment, on January 12, 2021. Respondents filed their Opposition to the Motion for Summary Disposition on February 1, 2021. After reviewing the parties' motions, I ordered, among other things, further briefing on the issue of whether the affirmative defenses of ratification or estoppel preclude recovery of the damages stemming from the second and third transfers. *See* Briefing Order (Oct. 12, 2021). The parties filed their timely responses and briefing was complete by December 7, 2021.

In reviewing the record, our Office learned it could not access certain recordings of telephone conversation on which AMBIT relied in making its motion. On May 10, I ordered AMBIT to produce those .wav files. On May 11, Counsel for AMBIT emailed our Office stating that the link to those files "is no longer active due

to the time which has passed.” *See* Email from Nelis to OP (May 11, 2022). No additional productions have yet been made to our Office since that time, though AMBIT is attempting to procure the missing conversations. *See* Email from Nelis to OP (May 20, 2022). Because of these missing telephone conversations, the non-testimonial record—though voluminous—is not yet complete.

However, even assuming these missing recordings contain evidence helpful to AMBIT, testimony is needed to evaluate the issue of Respondents’ scienter and AMBIT’s Motion for Summary Disposition is denied.

### **I. Factual Findings**

The following facts have been established by the current record.

1. AMBIT is a foreign corporation with its principal place of business in Dubai, United Arab Emirates (UAE).

2. Respondent Cunningham Commodities is an Illinois limited liability corporation, with its principal place of business in Chicago, Illinois. It has been registered with the National Futures Association (NFA) as a Futures Commission Merchant (FCM) since at least 1982, including during the time of the events discussed throughout this Opinion and Order.

3. Respondent Pinkerton resides in Illinois, and during the relevant time period through the present has been registered with the NFA as an Associated Person (AP) of Cunningham Commodities. During the relevant period, Pinkerton was an employee of Cunningham Commodities and acted as AMBIT’s account manager.

4. On August 8, 2018, AMBIT opened an account at Cunningham Commodities, and executed the required Account Agreement to do so. Compl. Ex. 1 (Account Agreement).

5. The Account Agreement states, in bolded capitalized letters, that: “INFORMATION COLLECTED IN THIS APPLICATION WILL BE USED TO VERIFY YOUR IDENTITY, AS REQUIRED UNDER FEDERAL LAW.” Compl. Ex. 1 (Account Agreement).

6. As part of that Account Agreement, AMBIT provided its banking information as follows: RAKBANK, GOLD SOUQ, DEIRA, Dubai, UAE, Account # XXXXXXXXXXXXXXXXXXXXXXX02 (the RAK Bank Account).<sup>1</sup> Compl. at 2; and Compl. Ex. 1 at CC 4. AMBIT also provided its email address as [AMBITDMCC11@gmail.com](mailto:AMBITDMCC11@gmail.com). *Id.*

7. The Account Agreement provided for AMBIT’s use of fax or electronic signature to authorize, acknowledge or consent to transactions. Compl. Ex. 1 ¶¶ 27-28.

8. On July 18, 2019, AMBIT changed the email address on its account from [AMBITDMCC11@gmail.com](mailto:AMBITDMCC11@gmail.com) to [hbs8522@gmail.com](mailto:hbs8522@gmail.com). Compl. Ex. 7 (Change of Email Form (July 18, 2019)).

9. From August 2018 through February 2020, AMBIT made forty-seven (47) transfers to and from its account at Cunningham Commodities. Compl. Ex. 2.

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<sup>1</sup> The account number has been obscured in this Opinion & Order for privacy reasons.

Thirty-eight (38) of these transfers were to the RAK Bank Account, but the remaining nine (9) were to AMBIT's account at Noor Bank in the UAE. *Id.*

10. Originally, on November 5, 2019, Cunningham Commodities refused to wire funds to AMBIT's Account at Noor Bank because the funds did not "originate" there. Compl. Ex. 5 (Email from Cunningham Commodities to AMBIT (Nov. 5, 2019)). AMBIT cured this issue by providing additional documentation authorizing transfers to and from its Noor Bank Account to Cunningham Commodities on November 14, 2019. Compl. Ex. 3.

11. Then, on February 11, 2020, Pinkerton received an email from a Harsh Soni, purporting to be an employee of AMBIT, requesting that Cunningham Commodities wire \$100,000 from AMBIT's Cunningham Commodities account to an account at JP Morgan Chase Bank in Miami, Florida. Compl. Ex. 4.

12. There were several curious things about this request.

a. AMBIT had never identified either JP Morgan Chase Bank or any other U.S. bank as either an authorized originating or depositing account.

b. The routing number listed for the JP Morgan Chase Bank account, which Harsh Soni identified as being in Miami, Florida was in fact tied to a bank account listed in Tampa, Florida. Compl. ¶ 15.

c. Although the email request had a JP Morgan Chase bank statement attached, that statement had various contents and columns misaligned. Compl. Ex. 6 (JP Morgan Bank Statement).

d. The February 11, 2020 email was sent from [hbs85221@gmail.com](mailto:hbs85221@gmail.com), not [hbs8522@gmail.com](mailto:hbs8522@gmail.com). In other words, the numerical ID has an additional digit—the “1” at the end.

13. Despite the anomalies associated with the February 11, 2020 email request, Respondents Cunningham and Pinkerton transferred \$100,000 from AMBIT’s Cunningham Commodities account to the JP Morgan Chase account. Compl. Ex. 8 (Feb. 2020 Statement).

14. One week later, on February 18, 2020, Respondents received, at Pinkerton’s email address, another request for transfer of \$100,000 from AMBIT’s Cunningham Commodities account to the same JP Morgan Chase account in Florida as in the February 11, 2020 email. Compl. Ex. 9 (Feb. 18, 2020 Email) & 10 (JP Morgan Chase Bank Statement).

15. This February 18, 2020 email contained the same anomalies that the February 11, 2020 email did.

16. Respondents nonetheless transferred \$100,000 from AMBIT’s Cunningham Commodities account to the JP Morgan Chase Bank account on February 18, 2020. Compl. Ex. 8 (February 2020 Statement).

17. Two days later, on February 20, 2020, Respondents received a third transfer request at Pinkerton’s email account, requesting that they wire \$300,000 from AMBIT’s Cunningham Commodities account to HSBC, a financial institution in Birmingham, United Kingdom. Compl. Ex. 11 (February 20, 2020 Email).

18. As with the February 11 and February 20 emails, this email was sent from a Harsh Soni at [hsb85221@gmail.com](mailto:hsb85221@gmail.com).

19. AMBIT had never authorized HSBC or any bank located in the UK as an originating or depositing bank account.

20. And the Swift Code provided in the request for transfer in the February 20 email was for a bank with a completely different address; not HSBC at the address provided in the request for transfer. Compl. ¶ 8.

21. Respondents transferred \$300,000 from AMBIT's Cunningham Commodities account to the HSBC account on February 20, 2020. Compl. Ex. 8 (February 2020 Statement).

22. On March 2, 2020—just 10 days after the last unauthorized transfer—AMBIT emailed Cunningham Commodities demanding that its account be credited the \$500,000 that was transferred out of its account. Compl. Ex. 13 (March 12, 2020 Email).

23. Respondents refused to credit AMBIT's account.

## **II. Analysis and Legal Discussion of AMBIT's Claims**

AMBIT brings three claims for relief in its Complaint under the Commodity Exchange Act, as well as claims for breach of fiduciary duty, negligence and conversion. This Office has jurisdiction over claims arising under the CEA or any rules promulgated thereunder, 7 U.S.C. § 18(a)(1), but only has jurisdiction over breaches of fiduciary duty if there is an underlying violation of the CEA or its rules. *See, Emily v. Gleichmann*, CFTC No. 14-R007, 2020 WL 3248253, at \*2-3 &n.1.



(CFTC June 9, 2020). It does not have jurisdiction over the claims for negligence or conversion.<sup>2</sup> Thus the questions here are simple: (1) Whether there is any provision requiring an FCM to safeguard its customers' funds against unauthorized transfers; (2) If such a duty exists, whether Respondents violated that duty by transferring AMBIT's funds to unauthorized bank accounts; and (3) If so, whether AMBIT nonetheless ratified these transfers?

A. Standards of Analysis for Motions for Summary Disposition

Under Commission Rule 12.310(e), summary disposition is appropriate when each of three conditions has been met: (1) there is no genuine issue of material fact; (2) there is no need for further factual development; and (3) the moving party is entitled to a decision as a matter of law. *Elliot v. Jay De Bradley et al.*, CFTC No. 11-R004, 2012 WL 6087468 at \*6 (CFTC Dec. 5, 2012); *Levi-Zeligman v. Merrill Lynch Futures, Inc.*, CFTC No. 92-R125, 1994 WL 506234 at \*6 (CFTC Sept. 15, 1994). The purpose of summary disposition "is to avoid the empty ritual of an oral hearing," *Elliot*, 2012 WL 6087468 at \*6 (internal citation omitted), and at this stage:

[T]he judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. All reasonable doubts about the facts should be resolved in favor of the non-moving party. If reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied.

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<sup>2</sup> For this reason, Respondent's arguments that this case is governed by Illinois law is irrelevant. Respondents are registered under the CEA, and are therefore subject to the CEA and its rules. Those are the laws that govern disposition of these claims.

*Id.* Because I find there are genuine issues of material fact with respect to Respondents' scienter, this motion for summary disposition is denied.

B. Questions of Fact Remain as to Whether Respondents Cunningham Commodities and Pinkerton Violated the Commodity Exchange Act and its Rules Intentionally or Recklessly When They Transferred AMBIT's Funds to a Person Other Than AMBIT in Response to Fraudulent Email Requests

Complainants cite a variety of rules and regulations for the proposition that an FCM is required to treat a customer's money as if it belongs to the customer. *See* Compl. citing "7 U.S.C. § 6(d)(b)"; and CFTC Regulations §§1.73 and 1.74.<sup>3</sup> This is true. The Commission has stated that there is a "statutory mandate to segregate customer funds—to treat them as belonging to the customer. . ." Final Rule: *Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations*, 78 Fed. Reg. 68505, at 68509 (codified at 17 C.F.R. §§ 1, 3, 22, 30, and 140) (November 14, 2013). This mandate is reiterated in a variety of statutes and regulations. *See e.g.*, CEA § 4d(a)(2), 7 U.S.C. § 6d(a)(2) (FCMs must deal with "treat and deal with all money securities, and property [of the customer] . . . as belonging to such customer."); 17 C.F.R. § 1.20(a) ("A futures commission merchant must separately account for all futures customer funds and segregate such funds as belonging to its futures customers."); 17 C.F.R. § 1.22(a) ("No futures commission merchant shall use, or permit the use of, the futures customer funds of one futures customer to purchase,

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<sup>3</sup> The statute AMBIT cites, 7 U.S.C. § 6(d), does not exist. Presumably AMBIT intended to cite 7 U.S.C. 6d, which is discussed throughout this Opinion & Order.

margin, or settle the trades, contracts, or commodity options of, or to secure or extend the credit of, any person other than such futures customer.”).

But this does not mean that these statutes can be violated by negligent or mistaken conduct. The requisite conduct must have scienter.

In a case presenting similar facts to this one, both the Commission and the D.C. Circuit found that Respondents had committed fraud under the CEA’s anti-fraud provision, CEA § 4b, 7 U.S.C. § 6b, by failing to verify the scope of the customer’s identity. *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 746 (D.C. Cir. 1988) (citing *Sansom Refining Co. v. Drexel Burnham Lambert, Inc.*, CFTC No. 82-R448, 1987 WL 106873 (July 20, 1987) (Commission Op.)). In *Drexel*, an employee at Sansom Refining Company made a series of speculative trades on behalf of Sansom through a Drexel agent, even though that employee was not authorized to trade the Sansom account. At no time did the agent at Drexel ask whether this employee was authorized to place trades on behalf of Sansom. That failure of care amounted to fraud.

But the Commission went one step further to hold that Drexel and its agent also violated then-CEA § 4d(2), 7 U.S.C. § 6d(2) (1987), or the CEA’s segregation provisions that require FCMs to treat customer funds as belonging to the customer. The D.C. Circuit reversed this reading of the statute. 850 F.2d at 752-753. The D.C. Circuit held CEA Section 4d(2) could not apply for two reasons—because (1) that statute was intended “to prevent an unscrupulous broker from commingling

clients' funds," and (2) the Commission's reading of Section 4d(2), 7 U.S.C. § 6d(2), would nullify the scienter requirement of CEA Section 4b, 7 U.S.C. § 6b. *Id.*

In other words, some intentionality finding must be made in order to hold the Respondents' conduct actionable under the Commission's statute governing fraudulent transactions—CEA Section 4b, 7 U.S.C. § 6b. The statute makes it illegal for any person in connection with regulated transactions “(A) to cheat or defraud or attempt to cheat or defraud the other person; (B) willfully to make or cause to be made to the other person any false report . . . [or] false record; (C) willfully to deceive or attempt to deceive the other person. . . .” CEA § 4b(a)(2); 7 U.S.C. § 6b(a)(2). *See also* 17 C.F.R. § 33.10.

Therefore, although I find it highly plausible on the current record that Cunningham Commodities acted with the requisite scienter in failing to verify the authority of the requesting individual purporting to represent AMBIT, more evidence by way of testimony (and perhaps the missing phone conversations) is necessary to decide whether there was sufficient intentionality—either recklessness or willful behavior—to amount to fraud under CEA. *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328-29 (11th Cir. 2002) (scienter is met “if Defendant’s conduct represents an extreme departure from the standards of ordinary care.”); *CFTC v. Kratville*, 796 F.3d 873, 893 (8th Cir. 2015) (same). If so, only then can I consider the question of whether Cunningham Commodities also breached its fiduciary duties.

C. Respondents Have Not Established the Affirmative Defenses of Ratification or Estoppel

Respondents allege that any damages here are barred by the doctrines of ratification or estoppel. Ratification bars a customer from “collecting the damages arising from a violation of Rule 166.2 if respondent establishes the elements of ratification or estoppel,” which are required for respondents to “establish not only that the customer knew of the agent’s wrongdoing, but also that . . . the customer[ ] knew he had a right to avoid financial responsibility for unauthorized trades.” *Yrag Traders, LLC v. Liberty Trading Grp.*, CFTC No. 12-R033, 2014 WL 7028077, at \*3 (CFTC Dec. 11, 2014) (internal quotation marks and citations omitted). “This is an affirmative defense requiring the respondent to carry the burden of proof that it is clear from all the circumstances presented that the intent of the customer was to adopt, as his own and for all time, the trade executed for his account without his authorization.” *Id.* (internal quotation marks and citations omitted).

This requirement that the customer know she can avoid responsibility for the unauthorized trades stems from the fact that “a broker is under [a duty to know the regulations], violates the rules at its peril, and is in a position to seek ratification from the customer by informing the customer of his right to not accept a trade that the customer did not authorize in advance. Without this requirement, the right to avoid unauthorized trades would be undermined, and the ratification defense would be a frequent and easy out for brokers who fail to abide by Rule 166.2.” *Id.*

Given the state of the case law, the bar is very high for Cunningham Commodities to establish the affirmative defense of either ratification or estoppel.

As an initial matter, it is not at all clear these defenses apply to anything other than unauthorized trading under Rule 166.2. In other words, a customer can look at her financial statements and decide—even if she did not authorize trading in certain financial products for example and knows she can undo them—to nonetheless accept and adopt those trades as her own. The same cannot be said of transferring monies from a customer’s account to an account belonging to someone other than the customer and aiding a third parties’ theft of those customer funds—whether intentionally or not.

Further, the cases Cunningham Commodities cites in support of its ratification defense do not apply to the facts of this case. *See e.g., Shefter v. Merrill, Lynch, Pierce & Smith, Inc.*, CFTC No. R81-1090-82-275, 1986 WL 65687 (April 23, 1986) (finding that the issue of whether that complainant consented to the transfers was moot because no damages arose from them); *Al-Adasani v. AML Futures, Inc.*, CFTC No. 86-R29, 1987 WL 106954 (May 15, 1987) (finding that eighteen months passed before customer made any inquiries about the transfer and that it was unreasonable for customer to believe his money was being used in a certain way without ever completing documentation for that purpose). And the Commission has made very clear that an FCM’s “failure to take prudent steps to clarify [an individual’s] apparent authority [is] unreasonable and precludes respondents from establishing an estoppel defense” in circumstances such as these. *Sansom Refining*

*Co. v. Drexel Burnham Lambert, Inc.*, CFTC No. 82-R448, 1987 WL 106873, at \*5 (July 20, 1987) (*aff'd in relevant part*, 850 F.2d 742 (D.C. Cir. 1988)).

Certainly on this record Respondents affirmative defenses of ratification and estoppel fail, and it may be that they will fail even under a more fulsome record including testimonial evidence. I nonetheless will allow Cunningham Commodities to present evidence and elicit testimony to substantiate its affirmative defenses if it chooses to do so.

### **ORDER**

For the reasons discussed herein, AMBIT's motion for summary disposition is denied. The parties are ordered to inform this Office no later than Friday, May 27, 2022 whether they prefer to hold the merits hearing in July, September or October 2022. A prehearing conference will be held between two and three weeks before the merits hearing. I will issue a Prehearing Order once the hearing month is decided. This Office will also issue a Notice of Virtual Hearing establishing procedures and practices for holding the hearing via video conference if the parties consent to this remote format.

Dated: May 20, 2022

/s/ Kavita Kumar Puri  
Kavita Kumar Puri  
Administrative Judge