

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMMODITY FUTURES TRADING COMMISSION,)
)
)
Plaintiff,)
)
)
v.)
)
JOHN P. NOVAK and NEXGEN SOFTWARE)
SYSTEMS, INC.,)
)
Defendants.)

United States Courts
Southern District of Texas
ENTERED

JUL 27 2006

Michael N. Milby, Clerk of Court

Case No.: 04-2947-Werlein

~~FINAL JUDGMENT~~
CONSENT ORDER OF PERMANENT INJUNCTION

On July 20, 2004, the Commodity Futures Trading Commission ("Commission") filed the Complaint in this civil action against Defendants John P. Novak ("Novak") and Nexgen Software Systems Inc. ("Nexgen"). The Complaint seeks injunctive and other legal and equitable relief for violations of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 1 *et seq.*, and the Regulations promulgated thereunder, 17 C.F.R. § 1.1 *et seq.*

I. CONSENT AND AGREEMENT

To effect settlement of this action without a trial on the merits or further judicial proceedings, Defendants Novak and Nexgen:

1. Consent to the entry of this *Consent Order of Permanent Injunction*. ("Order").
2. Affirm that they have read and agreed to this Order voluntarily and that no promise or threat has been made by the Commission or any member, officer, agent or representative thereof, or by any other person, to induce consent to this Order, other than as set forth specifically herein.
3. Acknowledge service of the Summons and Complaint.

4. Admit that this Court has jurisdiction over them and the subject matter of this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).

5. Admit that venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).

6. Waive:

a. All claims which may be available under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), to seek costs, fees and other expenses relating to, or arising from, this action;

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

c. All rights of appeal from this Order.

7. No provision of this Order shall in any way limit or impair the ability of any third-party to seek any legal or equitable remedy against Defendants or any other person in any other proceeding.

8. Consent to the continued jurisdiction of this Court for the purpose of enforcing the terms of conditions of this Order and for any other purposes relevant to this case.

9. By consenting to the entry of this Order, the Defendants neither admit nor deny the allegations of the Complaint or the Findings of Fact contained in this Order, except as to jurisdiction and venue, which Defendants admit. Defendants do not consent to the use of this Order, or the findings of fact or conclusions of law, as the sole basis for any other proceeding brought by the Commission, other than a proceeding in bankruptcy relating to Defendants, or to enforce the terms of this Order. Solely with respect to any bankruptcy proceeding relating to

Defendants or any proceeding to enforce this Order, Defendants agree that the findings in this Order shall be taken as true and correct and be given preclusive effect, without further proof. Furthermore, Defendants agree to provide immediate notice to this Court and the Commission by certified mail of any bankruptcy proceeding filed by, on behalf of, or against them.

10. Except as provided herein, Defendants agree that neither they nor any of their agents, servants, employees, contractors or attorneys 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 this Order is without a factual basis; provided, however, that nothing in this provision shall affect Defendants' (a) testimonial obligations; or (b) right to take legal positions in other proceedings to which the Commission is not a party. Defendants shall take all necessary steps to ensure that all of agents, servants, employees, contractors and attorneys of the Defendants understand and comply with this agreement.

II. FINDINGS AND CONCLUSIONS

The Court, being fully advised in the premises, finds that there is good cause for the entry of this Order and that there is no just reason for delay. The Court therefore directs the entry of findings of fact, conclusions of law, and a permanent injunction and ancillary equitable relief pursuant to § 6c of the Act, 7 U.S.C. § 13a-1 (2002), as set forth herein.

A. Findings of Fact

1. During the relevant time period of early 2002 to February 2003, Nexgen offered a subscription service, commonly called "Nexgen Live," which generated purchase and sale signals that were transmitted to a futures commission merchant ("FCM") where a Nexgen Live subscriber had a commodity interest account. In each case, the subscriber had entered into a Letter of Direction with a FCM, instructing the FCM to trade the subscriber's trading account

according to the specific purchase and sale signals generated by Novak, on behalf of Nexgen, without discretion.

2. Nexgen was aware that the Nexgen Live signals sent to Nexgen Live subscribers' FCM were being used to direct the trading in the subscribers' accounts through a Letter of Direction that gave no discretion to the FCM to deviate from the Nexgen Live signals sent by Nexgen.

3. Nexgen did not provide any Nexgen Live subscribers with Disclosure Documents containing the information set forth in Commission Regulations 4.34 and 4.35.

4. During the relevant time period, Novak was the sole owner and officer of Nexgen.

5. During the relevant time period, Nexgen was not registered with the Commission as a Commodity Trading Advisor ("CTA").

B. Conclusions of Law

1. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which provides that whenever it shall appear to the Commission that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order promulgated thereunder, the Commission may bring an action against such person to enjoin such practice or to enforce compliance with the Act.

2. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2002), in that Defendants are found in, inhabit, or transact business in this district, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this district, among other places.

3. This Court has personal jurisdiction over the Defendants, which acknowledge service of the Complaint and admit the Court's personal jurisdiction over them.

4. As the sole owner and officer of Nexgen, Novak was a principal and controlling person of Nexgen.

5. By causing transactions to be effected for subscribers commodity interest accounts through Nexgen's generation and transmission of purchase and sale signals to a Nexgen Live subscribers' FCM, with the knowledge that those purchase and sale signals would be used to place trades in Nexgen Live subscribers' accounts under a Letter of Direction without the subscribers' specific authorization of each trade, Nexgen operated as a CTA as defined in Section 1a(6) of the Act and, by doing so pursuant to its subscription service agreements with clients, violated Section 4m(1) of the Act by operating as a CTA without being registered with the Commission as a CTA.

6. As a CTA required to be registered under the Act, Nexgen violated Regulation 4.31(a) and (b) by failing to provide subscribers with the mandatory Disclosure Document containing the information set forth in Commission Regulations 4.34 and 4.35.

7. As Nexgen's controlling person, Novak is liable for Nexgen's violation of Section 4m(1) of the Act and Commission Regulation 4.31(a) and (b) pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2002).

III. ORDER FOR PERMANENT INJUNCTION

NOW THEREFORE, IT IS ORDERED THAT:

A. Defendants Novak and Nexgen are permanently restrained, enjoined, and prohibited from directly or indirectly:

1. Violating Section 4m(1) of the Act by failing to register as a CTA under the Act while directing client accounts, as defined in Section 4.10(f) of the Commission's Regulations; and

2. While acting as a CTA required to be registered under the Act, violating Section 4.31 of the Regulations by failing to provide clients with disclosure documents containing the information set forth in Sections 4.34 and 4.35 of the Commission's Regulations for the trading program used to direct the client's account and to enter into agreements to direct client accounts without acknowledgement that such clients received the required disclosures.

B. The injunctive provision of this Order shall be binding upon the Defendants, upon any person insofar as he or she is acting in the capacity of officer, agent, servant, employee or attorney of the Defendants and upon any person who receives actual notice of this Consent Order, by personal service or otherwise, insofar as he or she is acting in active concert or participation with the Defendants.

IV. ORDER FOR PAYMENT OF CIVIL MONETARY PENALTY

IT IS FURTHER ORDERED THAT:

Defendants shall pay a Civil Monetary Penalty in the amount of \$20,000, due within ten days of the date of the entry of this Order. Payment is to be made by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies the Defendants as the payor and the caption of this proceeding. Defendants shall simultaneously transmit a copy of

the cover letter and the form of payment to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581.

V. MISCELLANEOUS PROVISIONS

IT IS FURTHER ORDERED THAT:

A. This Order incorporates all of the terms and conditions of the settlement among the parties. Nothing shall serve to amend or modify this Order in any respect whatsoever, unless: (1) reduced to writing, (2) signed by all parties, and (3) approved by order of the Court. If any provision of this Order or the application of any provision or circumstance is held invalid, the remainder of this Order shall not be affected by the holding.

B. This Order shall inure to the benefit of and be binding on the parties' successors, assigns, heirs, beneficiaries and administrators.

C. This Court shall retain jurisdiction of this matter to ensure compliance with this Order and for all other purposes related to this action.

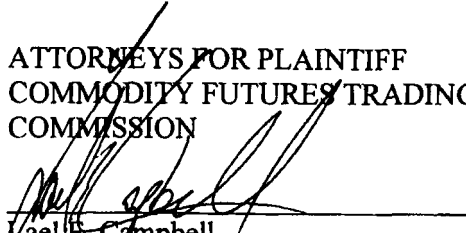
D. There being no just cause for delay, the Clerk of the Court shall enter this Final Judgment against Defendants Novak and Nexgen forthwith and without further notice.

DONE AND ORDERED this 27TH day of July, 2006.

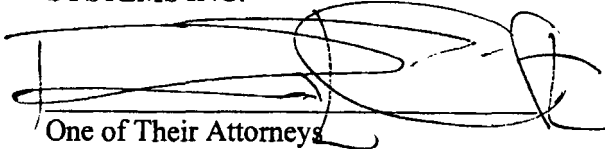

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

Consented to:

ATTORNEYS FOR PLAINTIFF
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