

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

DONALD M. FISHBACK, JR.
1251 ELKCHESTER ROAD
LEXINGTON, KENTUCKY 40510

and

THE DONALD M. FISHBACK
COMPANY, INC.
1251 ELKCHESTER ROAD
LEXINGTON, KENTUCKY 40510,

Respondents.

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: CFTC Docket No 01-03
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: COMPLAINT AND NOTICE OF
: HEARING PURSUANT TO
: SECTIONS 6(c) and 6(d)
: OF THE COMMODITY
: EXCHANGE ACT, AS AMENDED
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I.

The Commodity Futures Trading Commission ("Commission") has received evidence from its staff which tends to show, and the Division of Enforcement ("Division") alleges that:

SUMMARY

1. From approximately February 1996 through July 1999, Respondent Donald M. Fishback, Jr. fraudulently solicited members of the public to purchase trading products and services for trading commodity options on futures ("options") which were based on a system called Options and Derivatives Decision Support ("ODDS"). These products and services, which Fishback offered through The Donald M. Fishback Company, Inc. ("The Fishback Company"), consisted of: weekly facsimiles containing specific buy and sell options trading recommendations offered under the name The ODDS Fax Hotline and The ODDS Bond Fax Hotline (recommending Treasury Bond ("T-Bond") option trades); a monthly facsimile or mailing

containing specific buy and sell options trading recommendations called the Super Traders Journal; and options trading computer software called Trade Master. Fishback made material misrepresentations, including, but not limited to, statements that suggested that the ODDS system had achieved substantial profits through actual trading when such profits were, at best, based only on hypothetical or simulated trading, and false statements regarding his trading experience.

II.

RESPONDENTS

2. Donald M. Fishback, Jr. resides at 1251 Elkchester Road, Lexington, Kentucky 40510. Fishback is president of respondent The Fishback Company, a registered commodity trading advisor (“CTA”).

3. The Donald M. Fishback Company, Inc. is located at 1251 Elkchester Road, Lexington, Kentucky 40510. The Fishback Company was established in December 1995 and has been registered with the Commission as a CTA since May 1998.

III.

FACTS

4. From at least February 1996 to July 1999, Fishback solicited members of the public to purchase the commodity options trading products and services described in paragraph 1, supra, by advertising or causing advertisements to be placed in national newspaper and magazine publications; by distributing solicitation material or causing solicitation material to be distributed through the mail; and by holding seminars in various cities throughout the United States in which he advertised his commodity options trading products and services.

ODDS Products and Services

5. From approximately March 1996 to December 1996, Fishback, through the Fishback Company, offered the ODDS Fax Hotline, a weekly document Fishback sent or caused to be sent by facsimile to ODDS Fax Hotline customers or to APs of FCMs designated by the ODDS Fax Hotline customers. The ODDS Fax Hotline was offered to customers for a fee of approximately \$295 per month and contained specific recommendations to customers to buy or sell exchange-traded option contracts in various commodities, including cocoa, sugar, wheat, coffee, soybeans, corn, oil and gold. Customers traded pursuant to these recommendations or authorized APs of FCMs to trade pursuant to these recommendations.

6. From approximately April 1996 to November 1997, Fishback, through the Fishback Company, offered The Super Traders Journal, a monthly document Fishback sent or caused to be sent by facsimile or mail to ODDS Super Traders Journal customers or to APs of FCMs designated by ODDS Super Traders Journal customers. The Super Traders Journal was offered to customers for a fee of approximately \$400 per year and contained specific recommendations to customers to buy or sell option contracts in various commodities, including corn, natural gas, copper, gold, silver, currencies, and T-Bond option contracts. Customers traded pursuant to these recommendations or authorized APs of FCMs to trade pursuant to these recommendations.

7. From approximately February 1998 to January 1999, Fishback, through the Fishback Company, offered the ODDS Bond Fax Hotline, a weekly document Fishback sent or caused to be sent by facsimile to ODDS Bond Fax Hotline customers or to APs of FCMs designated by the ODDS Bond Fax Hotline customers. The ODDS Bond Fax Hotline was offered to customers for a fee of approximately \$295 per month and contained specific

recommendations to customers to buy or sell T-Bonds. Customers traded pursuant to these recommendations or authorized APs of FCMs to trade pursuant to these recommendations.

8. From approximately February 1996 to August 1999, Fishback, through The Fishback Company, offered the ODDS Trade Master, a computer-aided options trading software system which generated signals that indicated whether to buy or sell a particular commodity. The ODDS Trade Master purportedly was based upon the same ODDS system Fishback offered to customers in the ODDS Fax Hotline, ODDS Bond Fax Hotline and the Super Traders Journal. Fishback offered the ODDS Trade Master to customers or prospective customers for a one-time fee of approximately \$695.

Fishback's Material Misrepresentations and Omissions

9. In solicitation material Fishback distributed or caused to be distributed to prospective customers during the time period of approximately February through March 1996, Fishback falsely stated that ODDS had a successful trading history with options. The solicitation material included the following statements:

- a. "ODDS has conquered the markets and amassed fortunes" by having been "100% accurate for six months;"
- b. "[ODDS] specific recommendations produced \$48,112.50 profit and no losses;"
- c. "for five months every ODDS trade has been a winner."

10. The statements described in paragraph 9 were false or misleading in that they suggested that ODDS' profits were based upon actual trading, when, in fact, the purported profits were based only upon, at best, hypothetical or simulated trading.

11. In solicitation material Fishback distributed or caused to be distributed during the time period 1996 to 1997, Fishback falsely stated that the recommendations contained

specifically in the ODDS Bond Fax Hotline had made substantial profits. The solicitation material included the following statements:

- a. “Since mid-March, the ODDS Bond Fax has not had one loser, letting you really “load the boat” on every trade. By catching only the most valuable moves – by winning on 98 of every 100 trades – you could pile up profits that others only dream about!”
- b. “Enormous Profits in T[reasury]-Bond Options . . . Our historical record in the enclosed table – \$4,441 average profit per month!”

12. The statements described in paragraph 11 were false or misleading in that they suggested that ODDS’ Bond Fax Hotline profits were based upon actual trading, when, in fact, the purported profits were based only upon, at best, hypothetical or simulated trading.

13. In solicitation material Fishback distributed or caused to be distributed to prospective customers in or about October 1997, Fishback falsely stated that ODDS made profits trading in the following commodity options markets, including, for example, such statements that:

“Another super-simple rule has generated the following trades so far this year:

\$\$\$	\$96,000 <u>Profit</u> in Soybeans
\$\$\$	\$64,640 <u>Profit</u> in Cocoa
\$\$\$	\$86,800 <u>Profit</u> in British Pound
\$\$\$	\$30,450 <u>Profit</u> in Copper
\$\$\$	\$20,625 <u>Profit</u> in T-Bonds; [and]
\$\$\$	\$79,750 <u>Profit</u> in S&P 500.

That’s 6 Wins for a \$378,265 PROFIT!!”

14. The representations described in paragraph 13 were false or misleading in that they suggested that profits in these commodities markets were based upon actual trading with ODDS, when, in fact, the purported profits were, at best, based only upon hypothetical or simulated trading.

15. In advertisements placed in national magazines during the time period of approximately November 1996 to July 1999, Fishback falsely stated that ODDS could:

“Profit in any market . . . [and] virtually eliminate losing trades.”

16. The statement described in paragraph 15 was false or misleading because it predicted profits against a background of losses, and suggested trading was risk-free.

17. In solicitation material Fishback distributed or caused to be distributed to prospective customers in or about October 1997, Fishback falsely represented his trading experience. The solicitation material included the following statements:

“Fishback is considered one of the world’s most successful options traders;”

“[Fishback] is one of a tiny handful of major league traders;” and

“[Fishback] can attribute all of his market success” to his ODDS system.

18. The statements described in paragraph 17 were false or misleading because Fishback has never successfully traded commodity options with his ODDS system or otherwise engaged in successful options trading.

IV.

COUNT I

VIOLATIONS OF SECTIONS 4c(b) OF THE ACT AND COMMISSION REGULATION 33.10: SOLICITATION FRAUD

19. The allegations contained in paragraphs 1 through 18 above are realleged and incorporated herein by reference.

20. Fishback and The Fishback Company engaged in this conduct in or in connection with offers to enter into, the entry into, the confirmation of, the execution of, or the maintenance of, commodity option transactions.

21. From at least February 1996 to approximately July 1999, Fishback and The Fishback Company violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (1994), and Commission Regulation 33.10, 17 C.F.R. § 33.10 (1999), in that they cheated or defrauded or attempted to cheat or defraud ODDS customers or prospective ODDS customers and deceived or attempted to deceive ODDS customers or prospective ODDS customers by making material misrepresentations and omissions, including, but not limited to, the misrepresentations and omissions alleged in paragraphs 9 to 18 above.

COUNT II

VIOLATIONS OF SECTION 4o(1) OF THE ACT: COMMODITY TRADING ADVISOR FRAUD

22. The allegations contained in paragraphs 1 through 18 above are realleged and incorporated herein by reference.

23. From at least February 1996 to July 1999, The Fishback Company acted as a CTA because, for compensation or profit, through the ODDS Fax Hotline, ODDS Bond Fax Hotline, Super Traders Journal and ODDS Trade Master, it engaged in the business of advising others as to the value of or the advisability of trading in commodity options.

24. From at least February 1996 to July 1999, Fishback and The Fishback Company violated Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (1994), in that, by use of the mails or other means or instrumentalities of interstate commerce, they directly or indirectly, employed a device, scheme or artifice to defraud customers or prospective customers, or engaged in a transaction, practice, or course of business which operated as a fraud or deceit upon such persons, including, but not limited to, the advertisements described in paragraphs 9 to 18 above.

COUNT III

VIOLATIONS OF COMMISSION REGULATION 4.41(a): COMMODITY TRADING ADVISOR FRAUDULENT ADVERTISING

25. The allegations contained in paragraphs 1 through 18 and 23 above are realleged and incorporated herein by reference.

26. From approximately February 1996 to July 1999, Fishback and The Fishback Company violated Commission Regulation 4.41(a), 17 C.F.R. § 4.41(a) (1999), in that they advertised in a manner which employed a device, scheme or artifice to defraud customers or prospective customers or involved any transaction, practice or course of business which operated as a fraud or deceit upon any such person, including, but not limited to, the advertisements described in paragraphs 9 to 18 above.

COUNT IV

VIOLATIONS OF COMMISSION REGULATION 4.41(b)(1)(i): COMMODITY TRADING ADVISOR FAILURE TO INCLUDE HYPOTHETICAL OR SIMULATED PERFORMANCE DISCLAIMER

27. The allegations contained in paragraphs 1 through 18 and 23 above are realleged and incorporated herein by reference.

28. Commission Regulation 4.41(b)(1)(i) requires that the presentation of the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a CTA, or any principal thereof, be accompanied by the following statement:

Hypothetical or simulated performance results have certain inherent limitations. Unlike an actual performance record, simulated results do not represent actual trading. Also, since the trades have not actually been executed, the results may have under- or over-compensated for the impact, if any, of certain market factors, such as lack of liquidity. Simulated trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation

is being made that any account will or is likely to achieve profits or losses similar to those shown.

29. From approximately February 1996 to July 1999, Fishback and The Fishback Company violated Commission Regulation 4.41(b)(1)(i), 17 C.F.R. § 4.41(b)(1)(i) (1999), in that they failed to include a hypothetical or simulated performance disclaimer that comports with the requirements of Commission Regulation 4.41(b)(1)(i) in their solicitation material, including, but not limited to, the advertisements described in paragraphs 9 to 18 above.

V.

By reason of the foregoing allegations, the Commission deems it necessary and appropriate, pursuant to its responsibilities under the Act, to institute public administrative proceedings to determine whether the allegations set forth in Sections I through IV above are true and, if so, whether an appropriate order should be entered in accordance with Sections 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9 and 13b (1994).

Section 6(c) allows the Commission to enter an order (1) prohibiting a respondent from trading on or subject to the rules of any contract market and requiring all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the Commission's Order, (2) if such respondent is registered with the Commission in any capacity, suspending, for a period not to exceed six months, or revoking the registration of that respondent, (3) assessing against the respondent a civil penalty of not more than the higher of \$110,000 or triple the monetary gain to the respondents for each violation of the Act or Regulations committed after November 27, 1996, and a civil penalty of not more than the higher of \$100,000 or triple the monetary gain to the respondents for each violation of the Act or Regulations

committed before November 27, 1996, and (4) requiring restitution to customers of damages proximately caused by the violations of the respondent.

Section 6(d) allows the Commission to enter an Order directing that a respondent cease and desist from violating the provisions of the Act and Regulations found to have been violated.

VI.

WHEREFORE IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the allegations set forth in Section I above be held before an Administrative Law Judge in accordance with the Commission's Rules of Practice under the Act ("Rules"), 17 C.F.R. §§ 10.1 et seq. (1999), at a time and place to be fixed as provided by Section 10.61 of the Rules, 17 C.F.R. §10.61, and that all post-hearing procedures shall be conducted pursuant to Sections 10.81 through 10.107 of the Rules, 17 C.F.R. §§ 10.81-10.107.

IT IS FURTHER ORDERED that the each Respondent shall file an Answer to the allegations contained in this Complaint within twenty (20) days after service pursuant to Section 10.23 of the Rules, 17 C.F.R. § 10.23, and shall serve two copies of such Answer and of any documents filed in this proceeding upon Scott R. Williamson, Acting Regional Counsel, and Camille M. Arnold, Trial Attorney, Commodity Futures Trading Commission, 300 South Riverside Plaza, Suite 1600-North, Chicago, Illinois 60606. If any Respondent fails to file the required Answer or fails to appear at a hearing after being duly served, such Respondent shall be deemed in default and the proceedings may be determined against such Respondent upon consideration of the Complaint, the allegations of which shall be deemed to be true.

IT IS FURTHER ORDERED that this Complaint and Notice of Hearing shall be served upon each Respondent personally or by registered or certified mail, pursuant to Section 10.22 of the Rules, 17 C.F.R. § 10.22.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecutorial functions in this or any factually related proceeding will be permitted to participate or advise in the decision in this matter except as a witness or counsel in a proceeding held pursuant to notice.

By the Commission.

Jean A. Webb
Secretary to the Commodity Futures
Trading Commission

Dated: November 16, 2000