

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

HEINZ F. BIEKOFSKY	:	
	:	
v.	:	CFTC Docket No. 01-R54
SAMMY LEWIS BUNYARD, VISION L.P.,	:	
CHARLES BORATGIS, CONCORDE TRADING	:	OPINION AND ORDER
GROUP, and MARK HAUZE	:	
	:	

Respondents Sammy Lewis Bunyard (“Bunyard”) and Vision L.P. (“Vision”) appeal from an Administrative Law Judge’s (“ALJ”) decision requiring them to pay \$54,000 plus interest and costs to complainant Heinz F. Biekofsky (“Biekofsky”).¹ *Biekofsky v. Bunyard, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,170 (ALJ Sept. 27, 2002) (“I.D.”).* Both Bunyard and Vision contend that findings material to the ALJ’s damage award are unsupported by the record. For the reasons explained below, we vacate the ALJ’s decision and dismiss Biekofsky’s complaint against Bunyard and Vision.

BACKGROUND

I.

Biekofsky’s allegations relate to an options account he maintained at respondent Vision from late April through early June 1999. Vision served as a futures commission merchant (“FCM”) for Biekofsky, but used a different FCM to clear Biekofsky’s trades.² Respondent

¹ The ALJ also awarded damages against respondents Concorde Trading Group, Inc. (“Concorde”), Mark Todd Hauze (“Hauze”), and Charles Boratgis (“Boratgis”). These respondents did not appeal, and except to the degree necessary for an understanding of the outcome of Bunyard’s and Vision’s appeal, our decision does not address issues pertinent to these respondents.

² The second FCM is not a party to this proceeding.

Concorde served as an introducing broker (“IB”) for Biekofsky, and the account executives who solicited and traded Biekofsky’s account – respondents Bunyard, Hauze, and Boratgis – were associated persons sponsored by Concorde.

Account statements that Vision provided to Biekofsky show that complainant made two deposits to his account. Biekofsky made his initial deposit of \$10,000 on April 30, 1999, following a solicitation from respondent Bunyard. Bunyard also recommended the first two trades in Biekofsky’s account – a 7-contract spread position in unleaded gas call options, and a 2-contract long position in copper call options. Biekofsky paid about \$2,100 in commissions and fees to establish these positions and lost almost \$9,000 on the two trades.

Shortly after he opened his account, Biekofsky began receiving phone calls from respondents Hauze and Boratgis. Bunyard told him that Hauze and Boratgis were senior traders at Concorde. Hauze and Boratgis said that they had reviewed Bunyard’s financial statement and thought he should invest more money in the options market. On May 13, 1999, Biekofsky deposited an additional \$50,000 into his Vision account. Within the next week, Biekofsky traded several large option positions based on Hauze’s and Boratgis’s recommendations. These trades generated more than \$50,000 in commissions. Bunyard earned a commission of \$20 for each contract Biekofsky traded based on Hauze’s and Boratgis’s recommendations.

On June 7, 1999, Biekofsky transferred his remaining open positions and about \$22,164 to another FCM. He testified that the liquidation of the open positions left him with about \$2,000.

II.

On April 16, 2001, Biekofsky filed a reparations complaint against Concorde and several individuals whom he had dealt with at Concorde.³ He acknowledged agreeing to pay Concorde a premium commission of \$195 per option, but emphasized his reliance on its advertisements claiming to be a “professional” trading company providing advice that was “generally beneficial, well-intentioned, and designed to be in the best interest of the client.” According to Biekofsky, Concorde’s advice was actually designed to churn his account, “once [it] learned that [he] would rely on [its] advice and not question each trade.” Complaint at 1-2.

In supporting these allegations, Biekofsky focused largely on Boratgis’s and Hauze’s conduct. He did mention that Bunyard was his initial “account manager” and indicate that he initially invested \$10,000 and traded unleaded gas positions “recommended by Concorde.” As to Boratgis and Hauze, however, he claimed that they: (1) used his financial disclosure statement to coerce him into sending more funds; (2) assured him that their trading technique was “low risk” and that they had been successfully using it to make money for customers “for months,” and (3) squandered his funds by manipulating his account to maximize their return. According to Biekofsky, in the short period that his account was open, respondents took commissions and fees of \$54,000.

³ After Biekofsky submitted information clarifying his allegations, the Commission’s Office of Proceedings (“Proceedings”) determined that there was a sufficient basis for serving the complaint on Concorde, Bunyard, and Hauze. After these respondents filed their answer, Proceedings learned the correct spelling of Boratgis’s name, and served Biekofsky’s complaint on him. Boratgis did not file an answer.

Vision did not become a respondent until after the case was assigned to an ALJ for adjudication. Because the ALJ viewed Vision as an “essential party” to the proceeding, he ordered the FCM to show cause why it should not be added as a respondent September 24, 2001 Order at 2. Vision’s October 5, 2001 response argued that there was no basis to add it as a respondent because it did not have a guarantee relationship with Concorde, the complaint did not allege that Concorde was acting for Vision as an agent, and Vision did not have a duty under Commission Rule 166.3 to supervise Concorde’s solicitation or trading of Biekofsky’s account. Vision also claimed that any amendment of the complaint was barred by Section 14’s two-year statute of limitations. On October 16, 2001, the ALJ amended the complaint over Vision’s objections because he deemed Vision “an essential party to [the] proceeding.” October 16, 2001 Order at 1.

The joint answer filed by Concorde, Hauze, and Bunyard claimed that Biekofsky was aware of the risks of options trading and made an informed decision to open and trade his account. In support, respondents noted that in his account-opening application, Biekofsky acknowledged having two-years' experience trading futures and options.⁴ They insisted that that Bunyard, Boratgis, and Hauze provided good faith recommendations, and emphasized documentary evidence showing that Biekofsky was aware of both the fees and commissions he would be charged and their impact on profit potential.⁵ In addition, these respondents asserted that Biekofsky made all the trading decisions in his account and failed to offer a timely protest of any of the trades.⁶

During the discovery and pre-hearing phase of the proceeding, counsel for Concorde, Hauze, and Bunyard withdrew from the case. He advised the ALJ that he was unable to maintain contact with representatives of Concorde and that Hauze and Bunyard had decided to proceed *pro se*. In April 2002, Vision and Biekofsky filed a document in which Biekofsky stated that he agreed to dismiss his reparations claim against Vision. In response to a demand from the ALJ, Biekofsky acknowledged that he had received \$4,000 to "settle this case" with Vision. May 20, 2002 Letter to ALJ.

⁴ Biekofsky's account opening application was attached to respondents' answer. The application indicated that Biekofsky was 62 years old, employed as a senior field sales engineer, earned \$100,000 a year, and had a net worth of \$450,000.

⁵ In this regard, respondents stated that Biekofsky signed a "Commodity Options Fee Rider" informing him that he would make a profit if the "amount generated from the option transaction exceeds the premium, commission and other fees" and that the possibility of making a profit on deep-out-of-the-money options is remote. Answer at 4.

⁶ Vision submitted an answer after the ALJ amended the complaint to add it as a respondent. It noted that its customer agreement informed customers of its status as a non-clearing FCM and of its responsibility for arranging trade execution and providing bookkeeping, trade confirmations, and monthly statements. Vision also reiterated that it did not authorize Concorde or its account executives to act as its agent.

Only Biekofsky and Bunyard participated at the hearing that the ALJ conducted in June 2002. Prior to Biekofsky's testimony, the ALJ advised that he would consider all of complainant's written submissions as part of the evidentiary record, and urged Biekofsky to provide a five or ten-minute recap that focused on "any grievance [he had] with Mr. Bunyard." (Transcript at 6.) Nevertheless, complainant focused the bulk of his presentation on the conduct of Boratgis and Hauze. When the ALJ asked what Bunyard represented to complainant during their first conversation, Biekofsky said that they talked about the gas futures that Concorde was advertising.⁷ (Transcript at 8.) When the ALJ asked whether Bunyard suggested that complainant could make a substantial profit on his investment, Biekofsky stated that:

I believe [Bunyard] was minimally involved initially. I mean we just had some conversations. I made the investment and it was all quiet. And then I called him and I said, you know, "I received a call from Mark Hauze and I was wondering, you know, who is he?" And he told me at that time [Hauze] was "one of [Concorde's] senior traders."

(Transcript at 11.) Finally, during cross-examination, Biekofsky acknowledged that after he began speaking to Hauze and Boratgis, he stopped speaking to Bunyard. (Transcript at 22.)⁸

The ALJ then questioned Bunyard about his background and trading recommendations for complainant. Bunyard testified that he had been in the commodities business for six months when he solicited Biekofsky, and based his recommendations on those developed by Concorde. (Transcript at 24.) He said that he earned \$50 for each of the contracts included in complainant's first two trades, and \$20 for each contract Biekofsky traded based on Hauze's and Boratgis's

⁷ Biekofsky did not describe the content of Concorde's advertisement.

⁸ Biekofsky testified about Hauze's misrepresentations and how the account was churned after Bunyard was no longer involved. Biekofsky testified that he was aware of the amount of the commission but not how Concorde distributed the commissions among its employees, nor did he know that Bunyard benefited from his trading with Boratgis and Hauze. Shortly before he transferred his account to another firm, Biekofsky stated, he learned that the trades that Boratgis and Hauze had recommended had little chance of breaking even.

recommendations. (Transcript at 25-26.) He insisted, however, that he had “nothing to do with” the latter trading. (Transcript at 25.)⁹

III.

In his I.D., the ALJ made limited factual findings specifically relating to Vision and Bunyard. As to Vision, he primarily found that the FCM was Concorde’s “guarantor.” I.D. at 54,108. As to Bunyard, the ALJ found that the account executive: (1) had been in the commodities business for six months when he solicited Biekofsky; (2) could not recall a Concorde customer who closed his account with a profit; (3) based his trading recommendations on those provided by Concorde; (4) informed complainant that Hauze and Boratgis were senior traders; and (5) received a portion of the commission generated by Hauze’s and Boratgis’s trading. *Id.*

In analyzing respondents’ liability, the ALJ did not distinguish between Bunyard, who appeared and testified at the hearing, and Hauze and Boratgis, who failed to appear. For example, he indicated that Hauze and Boratgis and Bunyard told Biekofsky that they were making money for their clients using a spread involving S&P 500 options and bond options. I.D. at 54,109. He also analyzed factors material to complainant’s churning claim as if Hauze, Boratgis and Bunyard were acting in concert when they recommended trades to Biekofsky. *Id.* Consistent with this approach, he found Bunyard liable for the same violations as Hauze and Boratgis, and held him jointly and severally liable for the same amount as these respondents -- \$54,000. *Id.*

⁹ The ALJ questioned both Biekofsky and Bunyard about Vision’s involvement with complainant’s account. In response to the ALJ’s questions, Biekofsky stated that Bunyard’s failure to tell him that Vision was not a member of any exchange was not important to him. (Transcript at 9.) Biekofsky told the ALJ he did not know what benefit Concorde derived by working with an FCM such as Vision that could not directly clear its customers’ trades. (Transcript at 30.)

As for Vision, the ALJ acknowledged that Biekofsky had agreed to settle his reparations claim against the FCM. The ALJ, however, interpreted the settlement agreement as relating solely to Vision’s liability for violations of the Commodity Exchange Act (“Act”). Consequently, he concluded that he could still award damages against Vision in its role as Concorde’s guarantor.¹⁰ On this basis, he held that Vision was jointly and severally liable for the \$54,000 awarded to complainant. *Id*

IV.

As noted above, Vision and Bunyard filed appeals challenging the ALJ’s factual analysis. Biekofsky did not respond to the appeals.

DISCUSSION

I.

Vision argues that the ALJ erred by finding that Vision was Concorde’s guarantor during the period at issue. Our review of the relevant registration records confirms Vision’s claim. Consequently, the ALJ’s award against Vision cannot be sustained.

Moreover, the record indicates that Biekofsky executed a written statement requesting the ALJ to “withdraw and dismiss the complaint and my claim as to [Vision] with prejudice.” This language clearly suggests that Biekofsky wished to terminate the proceeding against Vision. The statement did not include any language suggesting that Biekofsky was drawing a distinction between a claim based on a violation of the Act and a claim based on a purported guarantee agreement. Nor did the ALJ suggest an alternative basis for determining that Biekofsky’s reference to his “claim” was intended to be limited to allegations of a violation of the Act. In

¹⁰ The ALJ implicitly held that Concorde was liable for the wrongdoing of its agents, Bunyard, Boratgis, and Hauze.

these circumstances, the ALJ’s strained interpretation of Biekofsky’s intent cannot be sustained. We conclude that the settlement between Biekofsky and Vision extended to all theories of recovery arising out of the facts and circumstances described in the complaint.

II.

The ALJ also erred by failing to make an independent assessment of Bunyard’s liability based on the specific evidence in the record. As noted above, Biekofsky offered little or no evidence that Bunyard either deceived him or traded his account to generate commissions. Contrary to the ALJ’s analysis, there is no evidence that Bunyard made any claims about his trading success or touted spreads involving S&P 500 options and bond options. Nor is there any reliable evidence that Bunyard’s admitted characterization of Hauze and Boratgis as “experienced traders” was deceptive.

As for churning, the record establishes clear distinctions between the trades recommended by Bunyard and those recommended by Hauze and Boratgis. The former included two trades involving a 7-contract option spread and a 2-contract long call option position. The latter included several trades for no less than 25 option contracts. The former generated about \$2,100 in fees and commissions in the context of a \$10,000 deposit. The latter generated more than \$50,000 in fees and commissions in the context of a \$50,000 deposit.

The record establishes a single link between the trades Bunyard recommended and those recommended by Hauze and Boratgis – Bunyard’s receipt of a share of the commissions generated by the latter trading. While such commission sharing provides a potential motive for Bunyard’s cooperation in a scheme to churn complainant’s account, there is insufficient reliable evidence to establish either that such a scheme actually existed or that Bunyard was a knowing

participant in it. Given the limited record, there was no reliable basis for the ALJ to award damages against Bunyard.

CONCLUSION

Accordingly, we vacate the ALJ's decision as it relates to Vision and Bunyard. We dismiss the complaint against Vision in light of the parties' settlement, and dismiss the complaint against Bunyard for a failure of proof.¹¹

IT IS SO ORDERED.¹²

By the Commission (Chairman NEWSOME and Commissioners HOLUM, LUKKEN and BROWN-HRUSKA).

Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: March 5, 2003

¹¹ As noted above, our decision does not affect the finality of the ALJ's decision regarding respondents Concorde, Hauze and Boratgis.

¹²Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 18(e)) (1994), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing is held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.