UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

SUBHASH CHAUDHRY	:	CFTC Docket No. 02-R042
v.	:	
RANDI ELLEN LIVOTI	:	OPINION AND ORDER

Complainant Subhash Chaudhry ("Chaudhry") lost about $5,640 during the eight-month period that he traded commodity options through FSG International, Inc. ("FSG"). Maurice Battle ("Battle") served as Chaudhry's account executive when he began trading in January 2000. Three months later, after a dispute developed between Battle and Chaudhry, respondent Randi Ellen Livoti ("Livoti") replaced Battle as Chaudhry's account executive. Within two months, Livoti had severed her relationship with both Chaudhry and FSG. During the period that Livoti served as Chaudhry's account executive, however, Chaudhry used a portion of the $5,900 generated by his sale of a profitable soybean option position to establish a Treasury bond option position that expired worthless in August 2000.

In April 2002, Chaudhry sought to recover his loss by filing a reparations Complaint against FSG and Livoti. When both FSG and Livoti failed to file a timely answer, the presiding Judgment Officer held them in default and ordered them to pay Chaudhry $5,640 plus interest and costs. In response to Livoti's motion, however, the Judgment Officer vacated her default and gave her an opportunity to defend the Complaint's allegations on the merits. During the pre-hearing period, the Judgment

Officer used his authority under Commission Rule 12.34[1] to develop the record on all aspects of Chaudhry's eight-month relationship with FSG.

After a telephonic hearing where both Chaudhry and Livoti testified, the Judgment Officer ordered Livoti to pay Chaudhry $5,093 in damages,[2] plus interest and costs. *Chaudhry v. Livoti*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,450 (Initial Decision April 8, 2003) ("I.D."). He found that Livoti violated Section 4c(b) of the Commodity Exchange ("Act"), as well as Commission Rule 33.10, by playing a material role in a multi-faceted solicitation fraud perpetrated by FSG and Battle. According to the Judgment Officer, the fraudulent scheme included: (1) Battle's false assurance that he was an experienced and knowledgeable trader who had consistently traded profitably for his clients; (2) Battle's failure to disclose that he would be recommending out-of-the-money option positions that would significantly undermine profit potential by generating substantial commission loads; (3) Battle's failure to comply with Chaudhry's instruction to send him the $5,900 generated by the sale of his profitable soybean options position; and (4) Livoti's false assurances that she was making money for her customers and that Chaudhry would make good money in Treasury bond options within 30 to 45 days.

On appeal Livoti argues that the Judgment Officer denied her a fair hearing by implicitly holding her responsible for Battle's and FSG's conduct. In addition, Livoti challenges the Judgment Officer's favorable assessment of Chaudhry's credibility and

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[1] This rule authorizes presiding officers to order both parties and non-parties to produce documents and to submit verified statements of fact.

[2] The Judgment Officer explained that this amount was "based on the difference between the total purchase cost of $5,640, and the $547 liquidation value of the T-bond calls when Chaudhry's account was transferred from FSG and Livoti ceased to be his account executive" in June 2000. I.D. at 54,957.

contends that the judge failed to give appropriate weight to documentary evidence showing that Chaudhry understood that there was a risk of loss. Finally, she challenges the Judgment Officer's damage calculation. In this regard, she claims that the judge's finding that she served as Chaudhry's account executive until June 2000 is unsupported by the record. She also argues that Chaudhry's refusal to liquidate his losing position prior to expiration amounts to a failure to mitigate his damages.

DISCUSSION

Livoti's claim that she was denied a fair hearing rests largely on the Judgment Officer's broad approach to the issues raised in Chaudhry's Complaint. Although Livoti was the only active respondent, the Judgment Officer developed the record on all aspects of Chaudhry's relationship with FSG, and his I.D. includes findings of wrongdoing that only tangentially relate to Livoti. Livoti, who appears *pro se*, contends that the Judgment Officer's approach was biased and resulted in a decision that improperly held her responsible for the wrongdoing of others.

We agree that, in retrospect, it would have been more efficient if the Judgment Officer had used a narrower approach that focused more closely on Livoti's conduct and how it contributed to Chaudhry's losses. We do not, however, interpret the Judgment Officer's decision as holding Livoti responsible for either Battle's or FSG's wrongdoing. We view his discussion of events prior to the time Livoti became Chaudhry's account executive as relating background facts material to determining relevant issues such as

Chaudhry's knowledge and experience at the time he was solicited by Livoti.[3]

At the hearing, Chaudhry claimed that Livoti, like Battle, said that she had been helping FSG's clients to make money. He testified that Livoti initiated the discussion of Treasury bond options and insisted that he didn't know anything about that market and relied on her expertise. He also claimed that Livoti assured him that he would make good money on a position held between 30 to 45 days. Finally, he stated that when he discussed the losses that the Treasury bond position suffered shortly after it was established, Livoti told him that there was plenty of time and it would recover.

Livoti offered a sharply different version of the events relating to her solicitation of Chaudhry. She claimed that Chaudhry initiated the conversation about trading Treasury bond options and that she informed him that FSG was strongly recommending Treasury bond call options. Livoti insisted that she and Chaudhry reached a joint decision to purchase out-of-the-money options after discussing various deltas and strike prices. Livoti testified that she carefully reviewed what would happen if the market went up, stayed the same, or went higher. Finally, she claimed that after the position was established, Chaudhry began complaining about the fees he was charged. As a result of this dispute, she requested that FSG designate someone else to serve as Chaudhry's account executive.

Under our precedent, we defer to a presiding officer's credibility determinations in the absence of a showing of clear error. *Udiskey v. Commodity Research Corp.*,

[3] Livoti also complains that the Judgment Officer did not gather evidence on her behalf. A presiding officer's authority to develop the record under Commission Rule 12.34 does not relieve parties of their duty to obtain and submit evidence supporting their version of the events at issue. In any case, the record does not establish that the Judgment Officer abused his discretion in determining the focus of his discovery orders.

[2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,255 at 54,481 (CFTC Dec. 16, 2002). The Judgment Officer offered a reasoned explanation for his conclusion that Chaudhry was a more credible witness than Livoti, I.D. at 54,960, and Livoti has not established any clear error. In these circumstances, there is no basis for an exception to our normal practice of deferring.

Livoti argues that documentary evidence establishes that Chaudhry was aware that options trading involved significant risk. She emphasizes that in a recorded telephone conversation relating to Chaudhry's soybean option position, Chaudhry acknowledged that he could lose his entire $5,000 investment.

We agree that the record indicates that Chaudhry was aware that his option transactions exposed him to risk. Chaudhry's awareness of potential risk, however, does not undermine the Judgment Officer's conclusion that Livoti misled him about the likelihood of profits. Livoti gave Chaudhry the impression that her customers were making money and it was likely he would earn a profit within 30 to 45 days. She did not, however, disclose that most of her customers were actually losing money. Indeed, when Chaudhry suffered the type of loss that might have led him to reconsider his decision, Livoti lulled him with assurances that the value of his options would rebound. In these circumstances, the record establishes that Livoti fraudulently induced Chaudhry to first establish and then maintain his Treasury bond options position.

The record does show that the Judgment Officer erred in making findings material to his calculation of damages, but, in the circumstances presented, the errors do not warrant a reduction in the damage award. On the one hand, the record does not show that Livoti remained Chaudhry's account executive until the June 2000 transfer of his account.[4] On the other hand, however, there is no reliable basis for inferring that either Livoti's termination as Chaudhry's account executive or the transfer of his account to another clearing futures commission merchant broke the causal link between Livoti's violative conduct and Chaudhry's loss. Neither event is fundamentally incompatible with Chaudhry's continued reliance on Livoti's misleading statements about the likelihood of profit.[5]

As for mitigation, our precedent indicates that respondent has the burden of establishing the facts material to this defense. *See Sansom Refining Co. v. Drexel Burnham Lambert, Inc.,* [1987-1990 Transfer Binder] Comm. Fut. l. Rep. (CCH) ¶ 24,596 (CFTC Feb. 16. 1990); *O'Hey v. Drexel Burnham Lambert, Inc.,* [19984-1986 Transfer Binder] Comm. Fut. l. Rep. (CCH) ¶ 22,754 (CFTC Sept. 23, 1985). The record shows that Chaudhry became aware that his Treasury bond option position was accruing losses shortly after it was established. Moreover, he has offered little explanation for his decision to maintain the position until it expired worthless in August 2000.

The record, however, also shows that Livoti made lulling statements after the value of his position fell sharply. Earlier, the value of Chaudhry's soybean position had dropped sharply, only to later recover to a profitable level. This experience may have led Chaudhry to give substantial credence to Livoti's claim that the Treasury bond market would make a similar recovery. Finally, while the record indicates that Chaudhry was highly critical of Livoti in his April 26, 2000 letter to FSG, his criticism did not focus

[4] The record includes an April 26, 2000 letter from Chaudhry to FSG that specifically requests that Livoti be replaced as his account executive. Livoti also submitted records maintained by the National Futures Association that show FSG ceased sponsoring Livoti's registration in May 2000.

[5] In our view, Chaudhry's out-of-pocket loss of $5,640 is the proper measure of the damages proximately caused by Livoti's wrongdoing. Nevertheless, because Chaudhry did not appeal or otherwise request an increase in his damage award, we consider any objection to the size of the award waived.

either on Livoti's solicitation or trading advice. Indeed, it was not until October 2000 that Chaudhry complained to FSG about these aspects of Livoti's conduct. [6]

In view of the record taken as a whole, we conclude that there is insufficient evidence to permit a reliable determination that Chaudhry failed to mitigate his damages. In these circumstances, we affirm the Judgment Officer's award of $5,093 in damages,

[6] *See* October 4, 2000 letter from Chaudhry to FSG referring to Livoti's "total incompetence."

plus interest and costs.[7]

For the foregoing reasons, we affirm the result of the Judgment Officer's Initial Decision.

IT IS SO ORDERED.[8]

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

Catherine D. Dixon
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: October 30, 2003

[7] As noted above, the Judgment Officer issued a default order requiring FSG to pay Chaudhry $5,064. Livoti's liability for the award we affirm is joint and several with FSG's liability for this slightly higher award.

[8] Under 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 states that such an appeal must be filed within 15 days after notice of the Commission order, and that any appeal is not effective unless, within 30 days of the effect of the order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.

A party who receives a reparation award may sue to enforce the award if payment is not made within 15 days of the date the order is served by the Proceedings Clerk. Pursuant to Section 14(d) of the Act, 7 U.S.C. § 18(d) (1994), such an action must be filed in a United States District Court. *See also* 17 C.F.R. § 12.407 (2000).

Pursuant to Section 14(f) of the Act, (7 U.S.C. §18(f) (1994)), a party against whom a reparation award has been made must provide to the Commission, within 15 days of the expiration of the period for compliance with the award, satisfactory evidence that (1) an appeal has been taken to the United States Court of Appeals pursuant to Section 6(c) and 14(e) of the Act, or (2) payment has been made of the full amount of the award (or any agreed settlement thereof). If the Commission does not receive satisfactory evidence within the appropriate period, such party shall be automatically prohibited from trading on all contract markets and its registration under the Act shall be suspended automatically. Such prohibition and suspension shall remain in effect until such party provides the Commission with satisfactory evidence that payment has been made of the full amount of the award plus interest thereon to the date of payment.