

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

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KEVIN PHILIP KASEFF	:	
	:	
v.	:	CFTC Docket No. 01-R031
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AMERICAS GLOBAL TRADERS, INC.,	:	OPINION AND ORDER
DAVID JOHN MCINTYRE, and REFCO, INC.	:	
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In March 2003, a Judgment Officer ordered respondents Americas Global Traders, Inc. (“AGT”) and David J. McIntyre (“McIntyre”) to pay complainant Kevin Phillip Kaseff (“Kaseff”) \$9,769 in damages, plus interest and costs. *Kaseff v. Americas Global Traders, Inc.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,429 (Initial Decision March 13, 2003) (“I.D.”). He essentially found that respondents perpetrated a two-step solicitation fraud in violation of Sections 4b(a) and 4c(b) of the Commodity Exchange (“Act”) and Commission Rule 33.10. According to the Judgment Officer, step one involved convincing Kaseff to participate in AGT’s Paper Trading Program (the “Program”) with false claims that (1) the Program was designed to encourage learning not trading; (2) customers could participate in the Program for a significant amount of time before switching to actual trading; and (3) brokers assigned to assist customers in their use of the Program were salaried (rather than receiving a share of the per-trade commission that ABT charged). Step two involved the use of assurances that Kaseff was missing out on “certain profits” to persuade him to abandon the Program and begin actual trading. I.D. at 54,886.

Respondents AGT and McIntyre filed a joint appeal that generally challenges the Judgment Officer’s favorable assessment of Kaseff’s credibility. In addition, they claim that the Judgment Officer erred in concluding that allegedly false statements about AGT’s Paper Trading Program were a

proximate cause of Kaseff's losses. Finally, respondents emphasize that at the time of the alleged fraudulent solicitation, Kaseff was a highly educated businessman with experience trading both securities and commodities. They contend that there is no reliable basis for inferring that a person with this background would believe that profits would be guaranteed.

In his opposing brief, Kaseff insists that, despite his background and experience, he relied completely on McIntyre's recommendations. He urges the Commission to affirm all aspects of the Judgment Officer's decision.

### **DISCUSSION**

When they testified at the telephonic hearing, Kaseff and McIntyre offered sharply conflicting versions of the events at issue. For example, Kaseff testified that he wanted to pursue paper trading for a significant period, but that McIntyre pressured him into beginning actual trading by insisting that he was "missing profits" and it was time to move on and make some money. McIntyre, however, denied promising profitability and claimed that it was Kaseff's idea to abandon the Program and begin actual trading.

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.*, [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 endorsement of Kaseff's credibility, I.D. at 54,884, and respondents have not established any clear error. In these circumstances, there is no basis for an exception to our normal practice of deferring.

Kaseff's testimony shows that McIntyre misled him about the likelihood that he would earn profits if he immediately abandoned AGT's Paper Trading Program and began actual trading. Moreover, it also establishes that when Kaseff suffered the type of loss that might have led him to

reconsider his decision, McIntyre lulled him with assurances that if he continued trading, he would not only recover his losses, but also earn profits. The record shows that both statements were materially misleading.

Respondents challenge the reliability of the Judgment Officer's finding that Kaseff relied on these misrepresentations about the likelihood of profit. In this regard, they emphasize complainant's background and experience, as well as his failure to close his account either after he suffered a loss on his initial actual trade or later when his account was in a profitable position.

Our precedent acknowledges that a customer's background and experience are material in determining whether reliance was justifiable, but requires that these factors be weighed in the context of other relevant circumstances. *Jakobsen v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,812 (CFTC Nov. 21, 1985). Here, for example, the record shows that complainant approached FSG because he was interested in educating himself through paper trading. This hardly suggests that he had the sophistication and experience to independently assess the validity of McIntyre's representations. Moreover, his brief experience with paper trading did not significantly alter the information available to him. As to the loss on his initial actual trade, Kaseff credibly explained that he did not expect to profit from every transaction, and the profits he earned on his next two trades were consistent with the profit expectations touted by McIntyre. Indeed, despite a significant outlay for commissions, by the end of June 1999, the liquidation value of Kaseff's account was about \$9,600 on a \$10,000 investment.

As Kaseff acknowledged in his testimony, he certainly could have done a better job of protecting his interests. At best, however, respondents established that Kaseff's shortcomings amount to contributory negligence, and our precedent expressly recognizes that reliance can be justifiable in such a context. *Jakobsen*, ¶ 22,812 at 31,392. In view of the record taken as a whole, we affirm the

Judgment Officer's conclusion that Kaseff justifiably relied on McIntyre's misrepresentations about the likelihood of profit.<sup>1</sup>

Finally respondents challenge the Judgment Officer's reliance on the three representations that allegedly misled complainant about AGT's Paper Trading Program. In our view, these representations did not lead directly to Kaseff's losses, but are best viewed as conduct setting the stage for McIntyre's misrepresentations about the likelihood of profit. For example, contrary to the representation on AGT's web site, McIntyre's compensation was based on the commissions generated by Kaseff's actual trading. This gave him a powerful incentive to encourage Kaseff to quickly abandon AGT's Paper Trading Program. By providing false information about the nature of its compensation arrangement with McIntyre, AGT effectively covered-up the sharp conflict between Kaseff's desire to paper trade for a significant period and McIntyre's personal financial interests. While this misconduct did not directly cause Kaseff's loss, it may well have contributed to what Kaseff insists was his complete reliance on McIntyre's recommendations. In any case, even if this wrongdoing had no effect on Kaseff's decision to abandon AGT's Paper Trading Program, McIntyre's false profit assurances provide a sufficient basis for affirming the result of the I.D.

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<sup>1</sup> Kaseff's rationale for maintaining his account until June 2000 is less clear, since his account statements show that the liquidation value of his account had fallen to about \$5,000 by the end of August 1999. In other circumstances, such a failure to act might have enabled respondents to raise a persuasive failure to mitigate damages defense. Here, however, the record shows that McIntyre lulled Kaseff with assurances about recouping his losses. Given the continuing nature of the wrongdoing, the record is insufficient to support the findings necessary to a successful mitigation 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.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,754 (CFTC Sept. 23, 1985.)

Accordingly, the Judgment Officer's award of damages to complainant is affirmed.

IT IS SO ORDERED.<sup>2</sup>

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

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

Dated: October 30, 2003

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<sup>2</sup> 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 Appeal 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.