

the amount of your investment” when purchasing options and even more if he were in futures (*id.* at 5-6), and that his positions could “expire worthless” if he declined to place a stop order (*id.* at 8). Bensaid also flatly denied in the interview that anyone prompted his answers in that interview, yet answered in discovery that all of his answers had been prompted. Asked about the discrepancies, Bensaid had no explanations (Mar. 5 oral hearing transcript at 109-110). In addition, the account-opening documents contained numerous disclosures of risk (*see* complainant’s discovery production).

Similarly, Bensaid’s allegation of nondisclosure (he claimed that he was not told that commissions were \$195 per option rather than per transaction) was demonstrably false. In fact, the commission rate was disclosed during the taped account-opening interview where the amount “per option” was itemized twice (account-opening transcript at pages 5-6), and revealed in the written commission disclosure signed by him (complainant’s discovery production). Confronted with the numerous trading statements that also clearly demonstrated that he was paying something on the order of twenty times more than the amount of commissions he supposedly had expected, Bensaid defended his continuing to do business with Wayne as caused by his inability to read the statements. He was unable, however, to explain what was hard to understand since the commission charges are clearly labeled as such on the statements and he knew what the word meant (Feb. 26 at 33-34). Eventually, Bensaid admitted that he actually did understand the later statements, and understood the amount of commissions he was being charged after the first trades, yet he continued trading nonetheless (Feb. 26 at 36-37).¹

¹ Bensaid may have had only a vague recollection of the events about which he testified, and he obviously overreached by claiming nondisclosure. After all, the complaint was filed nearly two years after the trading, and he did not have a copy of the account-opening interview until right before the oral hearing. His actual dissatisfaction appears to have been that the commissions were simply too high. In his complaint, Bensaid followed the allegation of
(Footnote continued on next page)

On the whole, Bensaid's testimony regarding Wayne's actions during the account solicitation was too weak to support his allegations of solicitation fraud. It is therefore found that Bensaid has not carried his burden of demonstrating that his ignorance was due to any misdeeds of respondents.

"Reckless trading" claim: In his complaint, Bensaid alleged that Wayne's trading was "reckless," but he did not elaborate as to precisely what this charge meant. However, in another sentence several paragraphs before that one, Bensaid stated that Wayne did not protect him against losses as promised, and further, that Wayne did not diversify his account. In discovery, Bensaid wrote:

Mr. Wayne committed wrongdoing by telling me to invest within one market, and [by] not diversifying. Mr. Wayne said I would not loose [sic] my investment. He would put a stop to any loss.

(Answer to Interrogatory 1c.)

The trading recommended to Bensaid was clearly questionable. It is undisputed that after earning huge profits on two long call option positions (twenty at 220 strike price, fourteen at 250 strike price), Wayne predicted that the market would drop and recommended that Bensaid grant a number of call options (twenty) in the same futures contract at a strike price *between* (240 strike) the two long call positions. As the Judgment Officer noted during the first hearing session, the question raised was whether Wayne thus caused Bensaid literally to be "betting against himself" (Feb. 26 at 9 and 11). Evidence was taken during extensive questioning during two hearing sessions regarding the legitimacy of a recommended trade that Wayne called a "hedge" but which

nondisclosure with a comment that the \$195 per option contract is "excessive"; *see also* Feb. 26 transcript at 38 (Bensaid never "happy" with amount of commissions even after he understood them). However, the CFTC has long held that it will not regulate the size of disclosed commissions charged by futures brokers. *Johnson v. Fleck*, [1990-1991 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,957 at footnote 5 (CFTC Nov. 20, 1990).

the Judgment Officer termed a “sandwich” (Mar. 5 at 10-11). Respondents were also given the opportunity to submit the affidavit of any expert they could find who could justify that trade. Consideration of all this evidence leaves little doubt that Wayne’s trading strategy had no reasonable basis.²

However, as discussed during the oral hearing, there is a substantial question as to whether complainant Bensaid himself has raised this issue (Feb. 26 at 15 and March 5 at 24). Bensaid’s allegation of “reckless trading” invites further inquiry into the trading particulars, but his elaboration in both his complaint and discovery demonstrate that his concern in filing the complaint was Wayne’s lack of diversification and the failure to “stop” losses. That latter allegation contradicted his own statements in the account opening that showed he was aware that no stop-loss orders were placed. The record contains no indication prior to the Judgment Officer’s questions at the hearing that Bensaid at any point found fault with the “sandwich” recommendation. In fact, not only did Bensaid not raise the issue of that recommendation’s effects on profits, but he also did not even know the account had ever become profitable until the

² The strategy seems to have guaranteed a loss regardless of whether the market fell, rose, or stayed static. Accordingly, under the circumstances, Wayne’s trading recommendation was not within the reasonable range of alternatives available at the time. All of his explanations, and that of the “expert” (actually, a mere trader married to a Trendex employee), focused entirely on how the “hedge” protected against the *original* purchase of the lower call position, and totally ignored the substantial profits already in that position at the time of the grant (*see, e.g.*, Feb. 26 at 80-121). Wayne thus failed to consider a highly relevant factor to Bensaid’s trading success. *See Syndicate Systems v. Merrill Lynch Pierce Fenner & Smith, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,289 at 32,788 (CFTC September 30, 1986) (“In our view, a recommendation has a reasonable basis when the commodity professional has considered those relevant factors that were reasonably ascertainable in the context of the particular recommendation and exercised rational judgment in light of them. For these purposes, it is not necessary that the recommendation at issue be unassailable or even the most preferable of available alternatives. If it is within the range of acceptable alternatives, it has a reasonable basis.”)

At one point during Wayne’s testimony he was asked about the huge loss suffered on the two long call positions (over \$21,000) during the period when Wayne tried to say the “hedge” had “worked” because it had brought in some premiums (actually less than \$10,000). Wayne stated that Bensaid had not lost any money because he had not liquidated the position yet (Feb. 26 at 103), confirming that he simply did not consider the effect on existing profits relevant.

issue was discussed at the hearing (Feb. 26 at 39-40). It therefore would be impossible to infer from his general "failure to protect against losses" allegation that Bensaid was specifically dissatisfied with the trading that erased those profits.

Upon review of the record, it is determined that although respondents were given ample opportunity to develop the record at the hearing and afterward, nevertheless the issue was not ever mentioned by the complainant as among his dissatisfactions with respondents' actions. Thus, respondents did not develop their answer considering this issue, or to take discovery or to make their final pre-hearing submission with this determinative issue in mind. The Commission long ago held in a similar circumstance that a complainant's charge of improper "disclosure" did not warrant a full-scale inquiry into all possible non-disclosures as well.³

Accordingly, the complaint is dismissed.

Dated: July 22, 2003


JOEL R. MAILLIE
Judgment Officer

³ *Johnson v. Fleck, supra*. In that case, the judge awarded damages with no oral hearing, based on his finding from the written materials that respondents' disclosures failed to include warnings about the low possibility of profit due to exorbitant commissions. Upon holding that the issue was injected by the judge, the Commission remanded for an oral hearing solely on the other allegations of wrongful solicitation, excluding consideration of the issue raised by the judge.