

United States of America
Before the
Commodity Futures Trading Commission

HEINZ F. BIEKOFSKY,

Complainant,

v.

SAMMY LEE BUNYARD, et al.,

Respondents.

CFTC Docket No. 01-R054

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Appearances at Trial:

Complainant Heinz F. Biekofsky, *pro se*.

Respondent Sammy Lewis Bunyard, *pro se*.

Before: Painter, ALJ

I. Procedural History

Heinz F. Biekofsky filed his reparations complaint against Respondents Concorde Trading Group, Inc., Mark Todd Hauze and Sammy Lewis Bunyard on or about April 16, 2001, charging that Respondents violated the Commodity Exchange Act in connection with the handling of his account. More specifically, Complainant alleges that Respondents churned his account and generated \$54,000 in commissions and fees in the brief period of time the account

existed. The account was carried by Vision , LP, a licensed futures commission merchant. The complaint was served on Concorde, Hauze and Bunyard on or about May 31, 2001.

Respondents filed a timely answer on July 13, 2001. On or about August 9, 2001 the Complaint was amended to include Charles Boratgis as a respondent. Although the Complaint was served on Boratgis' registered address, he failed to file an answer. By Order issued September 24, 2001 Boratgis's was found to be in default.

Respondents Concorde, Bunyard and Hauze filed a Pre-hearing Memorandum on December 20, 2001. Complainant Biekofsky filed his Pre-hearing Memorandum on January 30, 2002. Counsel for Concorde, Hauze and Bunyard withdrew in March 2002.

On October 16, 2001 this court amended the Complaint to include Vision L. P., the futures commission merchant ("FCM") that carried Complainant's account, as a Respondent. On April 1, 2002, a Notice of Satisfaction between Biekofsky and Vision L.P. was filed with the Court. Vision paid Biekofsky \$4,000 to settle his claim against Vision.

At the June 4, 2002 hearing in Los Angeles, California, only Complainant Biekofsky and Respondent Bunyard appeared. Accordingly, the Answer filed by Respondents Concorde and Hauze was struck from the record. Respondents Hauze, Boratgis and Concorde are in default and subject to default judgment. Complainant Biekofsky and Respondent Bunyard were afforded an opportunity to file post-trial briefs, to include proposed findings of fact and conclusions of law. Complainant filed his post-trial brief August 26, 2002. Respondent Bunyard filed nothing. This matter is ready for decision.

The Findings of Fact set out below are based on the exhibits admitted in evidence, and the credible testimony adduced at trial.

II. Findings of Fact

1. Heinz F. Biekofsky is a resident of California. He holds an undergraduate degree in physics. He indicated on account opening documents that he had traded “Futures/Options” for two years prior to opening the account at issue. (Complaint and Attachments to Answer)

Although Complainant did not grant any Respondent power of attorney to trade his account, he testified that he did in fact rely on recommendations made by Bunyard, Hauze or Boratgis in trading the account. (Complaint; Tr. 10-11; 15) This Court finds that Respondents Bunyard, Hauze and Boratgis had *de facto* control over the account.

2. Concorde Trading Group, Inc. was at all relevant times registered with this Commission as an introducing broker, guaranteed by Vision L. P., the carrying FCM. (Commission records)

3. Vision L.P. was at all relevant times registered with the Commission as a futures commission merchant (“FCM”). Vision was not a member of any exchange. Vision was at all relevant times the guarantor of introducing broker Concorde Trading Group, Inc. (Commission records) Concorde introduced Complainant’s account to Vision. (Complaint and Answer) The guarantee agreement (see Com. Fut. L. Rep. [CCH] Vol. 1 at paragraph 3503, pp 3579-4 and 3579-5) provides, *inter alia*, that Vision “...shall be jointly and severally liable...” for all obligations of the introducing broker under the Commodity Exchange Act, even though Vision may not have violated the CEA or any rule promulgated there under.

4. Sammy Lewis Bunyard is a resident of California and was at all relevant times an employee of Concorde. Bunyard testified that Biekofsky made a telephone inquiry after watching a Concorde television commercial, and that he later called Biekofsky. On Bunyard’s recommendations Biekofsky, on April 30, 1999, opened an account with Vision L. P., with an initial deposit of \$10,000. (Tr. 24; Answer to Complaint)

5. Bunyard had only "...been in the business for six months..." at the time he solicited Biekofsky to open an account with Vision L. P. Although he solicited Biekofsky to open the account, he could not recall the name of a single customer who had made a profit on closing an account introduced by Concorde. (Tr. 21, 34) Bunyard also testified that Concorde made all trading recommendations to customers. (Tr. 24)

6. Bunyard placed the first order for Biekofsky on April 30, 1999. He then informed Biekofsky that Respondents Hauze and Boratgis, registered associated persons of Concorde, were "senior" traders with more experience. He had Hauze talk with Biekofsky and Hauze induced Biekofsky to invest an additional \$50,000 in the account. Bunyard had no dealings with Biekofsky after the initial transaction on the account. (Tr. 22) However, Bunyard received a portion of the commissions generated by the trading done by Respondents Hauze and Boratgis. (Tr. 28) In his verified complaint, Biekofsky stated that he informed Hauze and Boratgis that he would rely on their advice as he, Biekofsky, had little experience. Biekofsky further stated that Hauze and Boratgis assured him "Not to worry" as they would watch the account for him.

7. Account statements of record, confirmed by the testimony of Bunyard, show that trading on Biekofsky's account generated commissions and fees in excess of \$54,000 from April 30, 1999 to May 19, 1999. The remaining equity in the account, \$2,508, was transmitted to another commodity firm on or about June 7, 1999. (Tr. 14)

8. In their answer filed July 13, 2001, Respondents Concorde, Hauze and Bunyard appended cassette tapes purportedly containing recordings of conversations between the compliance unit and Biekofsky for all trades made on the account. The cassette tapes are blank. (Answer of Respondents Concorde, Hauze and Bunyard)

9. The \$54,000 in commissions and fees charged to the account at issue was distributed as follows: \$8,000 to Bunyard; \$12,360 to Boratgis; \$12,360 to Hauze; and approximately \$22,000 to Concorde. (Account statements; Bunyard testimony @ Tr. 28)

10. Complainant invested a total of \$60,000 in the account at issue. Commissions and fees totaled \$54,000. Net trading losses amounted to \$4,000. Slightly more than \$2,500 was transferred to another futures commission merchant. Complainant received \$4,000 from Vision to settle all charges in the complaint. Complainant's out-of-pocket losses from the account total approximately \$54,000, the amount of commissions and fees charged to the account.

III. Discussion:

Complainant Heinz F. Biekofsky alleges that he was induced to invest in a commodity account after watching a television commercial by Concorde Trading. The commercial represented that Concorde had a trading program that was generally beneficial to customers. Biekofsky alleges in his complaint that Respondents Hauze, Boratgis and Bunyard represented that they were making money for clients by using a "Bull-call spread" with S & P 500 options and bond options, and that Biekofsky should give them a chance to show what they could do. Complainant invested \$10,000 on about April 30, 1999, and at the insistence of Respondents Hauze and Boratgis, invested an additional \$50,000 on or about May 6, 1999. Trading from April 30, 1999 to May 18, 1999 generated commissions and fees of \$54,000, resulting in a commission-to-equity ratio of 95% per month. A commission-to-equity ratio of that magnitude leaves no doubt as to the true purpose of the trading scheme: churning. Respondents, indeed, showed what could be done with Bieofsky's money.

In order to prove a churning claim, it must be shown that the broker controlled the account, that the account was excessively traded, and that the broker acted with the requisite

scienter, that is, trading for the purpose of generating commissions and without regard to the trading objectives of the customer. *Schindler v. Stockley*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,679, *aff'd*, 788 F.2d 3 (2d Cir. 1986) (S.D.N.Y. 1985). It is undisputed that Respondent Bunyard recommended the initial transactions on the account, and Biekofsky testified that he relied on recommendations made by Respondents. Generally, he testified, he would receive a telephone call from one of the Respondents who would "...tell me what he was doing." This court finds that the account was controlled by Respondents and that the trading was done solely to generate commissions, and not for the benefit of the Complainant. Most of the commissions and fees (\$50,136) were generated during the period May 13 to May 19, 1999. Thus, in one week the Respondents amassed commissions exceeding the \$50,000 invested by Biekofsky on May 12, 1999.

As noted in the findings, the commissions charged to the account were distributed as follows: \$8,000 to Bunyard; \$12,360 to Boratgis; \$12,360 to Hauze; and \$22,000 to Concorde. Concorde, of course, had to pay certain fees and charges to Vision. As neither Concorde nor Vision participated in the trial of this matter, it is not possible to ascertain those fees and charges. Vision, the guarantor of Concorde, paid \$4,000 to Biekofsky to settle all charges against Vision. Simple math shows that Complainant suffered a loss of \$54,000 by reason of the churning of his account by Respondents Concorde, Bunyard, Hauze and Boratgis. These Respondents are jointly and severally liable to Complainant for these losses, plus the filing fee of \$250 and interest on the judgment at the rate of 1.73% per annum from May 12, 1999 to the date the judgment is paid.

Vision was at all relevant times the guarantor of Concorde Trading Group, Inc. The guarantee agreement provides that Vision shall be "...jointly and severally liable..." for all

obligations of Concorde Trading Group, Inc. under the Commodity Exchange Act. The agreement further provides that Vision "...acknowledges that at the time of execution of this guarantee agreement there are not any conditions precedent, concurrent or subsequent affecting, impairing or modifying in any manner the obligations of the futures commission merchant hereunder..." The settlement between Vision and Biekofsky ensures only that Biekofsky may not bring an action against Vision for alleged violations of the CEA. However, that settlement in no manner or form affects, impairs, alters or modifies Vision's joint and several liability for this judgment against Concorde and in favor of Biekofsky. Vision remains liable for payment all or any portion of this judgment that remains unpaid 15 days after this decision becomes final.

ORDER

Complainant Heinz F. Biekofsky has established by the preponderance of the evidence that Respondents Concorde Trading Group, Inc., Sammy Lewis Bunyard, Charles Boratgis, and Mark Todd Hauze engaged in a scheme to churn his account, in violation of Section 4b(A) of the Commodity Exchange Act, 7 U.S.C. 6b(A), resulting in monetary damages to the complainant in the amount of \$54,000. Respondents are ORDERED to pay to the Complainant \$54,000, plus interest at the rate 1.73% per annum on this amount from May 6, 1999 to the date this judgment is satisfied, plus the filing fee of \$250. Respondents and Vision L.P. are jointly and severally liable for payment of this judgment.

Vision LP, the guarantor of Concorde Trading Group, Inc., is ORDERED to pay to Complainant all or any portion of this judgment that is not paid within 15 days after this

decision becomes final. Should Vision fail to comply with this Order, it shall be prohibited automatically from trading on or subject to the rules of any designated exchange, and its registration shall automatically be suspended pursuant to Section 14(f) of the CEA, 7 U.S.C. 18(f).

so ordered

Issued September 27, 2002

A handwritten signature in black ink, appearing to read "G. Painter", written over a faint circular stamp or watermark.

George H. Painter

Administrative Law Judge