



U.S. COMMODITY FUTURES TRADING COMMISSION

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JAMES P. CHATTERLEY, Sr.,
Complainant,

v.

CHARLES JOHN HINMAN,
Respondent.

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CFTC Docket No. 97-R121

INITIAL DECISION

James Chatterley filed a concise complaint alleging that Charles John Hinman, an associated person with American Futures Group, fraudulently solicited his account by claiming that Chatterley "could not go wrong," and that "there was an assured potential to make a worthwhile profit." Chatterley also alleged that Hinman churned his non-discretionary options account. Hinman filed a joint answer with American Futures Group, Incorporated ("AFG") and American Financial Services, Incorporated ("AFS") denying the allegations. On the eve of the hearing, Chatterley and respondents entered onto a settlement agreement which involved payment by AFS on behalf of itself, AFG and Hinman. However, AFS failed to make any payments, and a default order was entered against AFG, AFS and Hinman. Subsequently, Hinman filed a motion to vacate the default, which was granted; and a telephonic hearing was held.

Throughout his testimony, Chatterley could not recall any meaningful details of his conversations with Hinman, and thus was unable to substantiate, or elaborate on, his general allegations of deception and misrepresentations during the solicitation and trading of his account. In contrast, Hinman's testimony appeared reliable and plausible. As a result, it has been concluded that Chatterley has failed to show by a preponderance of the evidence any violations by Hinman during the solicitation and trading of his account.

Factual Findings

James Chatterley is a World War II veteran of the Canadian Air Force and U.S. Army Air Corps and is a retired automobile design engineer. When he opened his account with AFG in 1996, he was 72 years old and his investment experience had been limited to a mutual fund. On his account application, Chatterley listed his annual income as \$120,000, and his net worth as \$900,000.

American Futures Group, Incorporated was a registered introducing broker during the relevant time. American Financial Services, Incorporated was a registered futures commission merchant that guaranteed AFG during the relevant time. AFG and AFS were disciplined by the National Futures Association for fraudulent sales practices, and are no longer in business. Charles John Hinman was a registered associated person with AFG during the relevant time. Hinman is not currently registered.

Chatterley testified that Hinman was "relentless" during the account solicitation. However, Chatterley could not recall the frequency or duration of

Hinman's calls, and conceded that he knew he could have terminated the calls, but chose not to, chiefly because he was curious. Chatterley testified that he believed that he "practically couldn't lose." However, when asked to describe the specific representations by Hinman that had caused that belief, Chatterley could only recall a promise by Hinman "to take care of the whole account." Otherwise, Chatterley could not recall any other statements by Hinman during the solicitation or at anytime during the life of the account, concerning matters such as general and specific risk, costs, profit projections, past performance, investment objectives, or trading strategies. Chatterley also testified that his decision to open the account was influenced by an AFG promotional brochure, which stated in pertinent part:

[AFG] provides managed accounts for those clients who want to participate in the futures markets but have neither the time nor the experience to make their own trading decisions. . . . The unique ability of AFG to provide full service to accounts of any size, prompt market analysis and updates, specific trading ideas, direct "to the floor phone fills," charts and electronic mailbox for statements, all while maintaining competitive commission rates, puts AFG in a special class.

[Chatterley's discovery replies.] However, Chatterley did not show how any of these assertions were false or misleading, when read alone or in conjunction with Hinman's promise to take care of the whole account. In contrast, Hinman provided sufficiently plausible and convincing testimony that he provided a fair and adequate disclosure about material matters such as the mechanics, the relative risks and rewards, and the costs of trading options with AFG.

Chatterley invested a total of \$10,100, and received back \$83, resulting in out-of-pocket losses totaling \$10,017. A total of \$3,208 in commissions and fees

was charged to Chatterley's account. In this connection, Chatterley testified that he was aware of the commission charges. The commission-to-investment ratio and the commission-to-premium-paid ratio were both approximately 34%.

Conclusions

Chatterley's subjective impression that if he opened an AFG account he "practically couldn't lose," based on Hinman's promise "to take care of the whole account" and AFG's assertion that AFG had a "unique ability . . . to provide full service to accounts of any size" is, by itself, simply insufficient to support a finding that Hinman distorted the relative risks and rewards of trading options, especially where Chatterley could not recall any other specific statements by Hinman that could be remotely considered to be deceptive, misleading or fraudulent. In contrast, Hinman gave credible testimony that he provided a fair and adequate disclosure of the relative risks and rewards of trading with AFG. Thus, Chatterley has failed to show by a preponderance of the evidence that Hinman defrauded him during the solicitation.

In order to establish churning, Chatterley must prove that: (1) Hinman controlled the level and frequency of trading activity; (2) the overall volume of trading was excessive in light of Chatterley's trading objectives; and (3) Hinman acted with intent to defraud or with reckless indifference to Chatterley's interests. *Hinch v. Commonwealth Financial Group, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,056 (CFTC 1997); and *Johnson v. Don Charles*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,986 (CFTC 1991). The

fact that Chatterley was an unsophisticated, novice trader and reposed a high degree of trust in respondents to select trading strategies and to provide trading advice supports the conclusion that Hinman controlled the level of trading in Grey's account. However, the fact that the commissions eventually consumed a third of Chatterley's total investment may be troubling, but, by itself, is insufficient to establish churning. Thus, where Chatterley produced absolutely no evidence about his trading objectives and failed to establish that Hinman misled him about the commission costs or the effect of the heavy commission load on potential profitability, the churning claim must fail.

ORDER

James P. Chatterley has failed to establish by a preponderance of the evidence any violations by Charles John Hinman. Accordingly, the complaint against Charles John Hinman is DISMISSED.

Dated March 10, 2000.



Philip V. McGuire,
Judgment Officer