



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

RECEIVED
C.F.T.C.

1999 JUL 22 A 8:03

OFFICE OF
PROCEEDINGS

OFFICE OF PROCEEDINGS
PROCEEDINGS CLERK

ROBERT S. FOO, Trustee for The Robert
S. Foo Family Trust,

Complainant

v.

ALARON TRADING CORPORATION
and ALAN CAPTAIN,

Respondents

CFTC Docket
No. 99-R006

INITIAL DECISION

The complainant in this action ("Foo") granted respondent Captain discretionary trading authorization over the trust's futures and options account. He now contends that Captain misrepresented how successful the trading would be and disregarded guidelines Foo had given him as to how the account was to be traded. The respondents do not dispute that guidelines were given, but instead defend on the basis that the trading fell within Foo's guidelines. They also deny the misrepresentation allegation.

The record is simple and contains mostly undisputed facts. Foo initially opened an Alaron account in December 1997. That account was self-directed. In the spring of 1998, Foo decided to explore day-trading. His account executive referred Foo to Captain, a day-trading specialist. In April 1998, Foo personally observed Captain's trading for 1½ days. He then opened a second trading account, this time with discretion to trade granted to Captain, and began trading on May 14, 1998. Soon, Foo gave Captain some guidelines for trading the account. Foo's written summary of the guidelines he gave to Captain (attached to the complaint) contains notations for two dates. On May 21, 1998, Foo's notes indicate the following instructions were given by phone at 5:40 a.m. PDT: (1) "authorized Alan [Captain] to do up to two (2) trades/day but not more"; and (2) Captain "doesn't have to make daily trades.—no problem with me if he doesn't do any trades for a couple of days."

On May 26, 1998, according to Foo's notes, the following conversation occurred at 5:48 a.m. PDT, again by phone:

We agree the trading range is 1125¹ on the upside & \cong 1100 on downside. Alan wants to continually trade within that range but take profits on a narrower range. If that doesn't work, will then wait for a breakout on either side before entering the market. Limit to 2 trades/day except on above breakouts, then has authorization to enter the market.

The specifics of Foo's complaints are (1) that when he visited Captain to observe his trading Captain allegedly told Foo that he should expect 65 to 70 % of the trades to be profitable, with a 100 to 200 % gain; (2) that Captain did not inform him on May 26 that he was unable to trade that day because of a computer problem; and (3) that Captain executed more than two trades per day on June 2, 3, and 4, 1998, in violation of the guidelines provided by Foo. He claims Captain to have been an incompetent trader who misled Foo by holding himself out to be a "savvy Professional Trader." Foo seeks return of his net loss of \$16,053.20 from May 14 (when trading began) through June 4, 1998.

Putting aside the misrepresentation allegation for the moment, the others are easily resolved by reference simply to Foo's own submissions. As to the problem with the computer preventing trading on May 26, the guidelines given by Foo expressly anticipated that Captain was authorized, but not required, to trade daily. A better business practice would have had Captain contact his client, but the issue is whether Captain failed to disclose a material fact. Clearly Captain would have been required to inform Foo if there were a problem preventing him from providing services Foo was expecting, but daily trading was not required or promised. If the break had occurred because Captain simply chose to exercise his discretion not to trade, Foo could raise no objection. That result does not change because the break in trading was caused by a temporary electronics problem. Under the circumstances, since Foo does not support the charge with any specific trades that should have been made—and that would have been made if he had been informed of the computer crash²—no violation can be found.

Foo's allegation that Captain excessively traded the account on June 2, 3, and 4 by engaging in (respectively) 4, 4, and 3 trades, when only 2 trades daily were authorized, is belied by his own evidence. Among other things, he seems very confused about the number of trades that occurred, since his own account statements show 2, 3, and 3 trades occurring on those days.³ More importantly, the guideline provided to Captain on May 26 authorized more than 2 trades on any day where the trading range was below 1100. A review of the trading history (the chart provided by Foo with his complaint, with an annotated version provided in his July 6, 1999, verified statement, shows that on the days in question the trading prices ranged below 1100. If Captain interpreted the

¹ This number is handwritten and might be 1128, but this upper parameter was never at issue.

² Foo contends he could have had his other Alaron broker trade for him that day. But Foo has not identified specific trades he would have placed with the other broker, to whom authority was not granted. Obviously, if there were a violation of failure to disclose a material fact, it would be presumed that Foo would have made use of the information had it been provided to him. The lack of materiality, under the circumstances present here, is underscored by the utter impossibility of applying the presumption without reaching the result of choosing at random among all possible winning trades occurring on May 26.

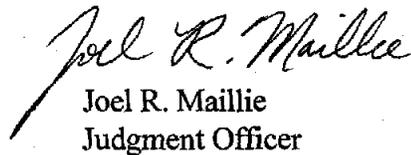
³ In addition, why Foo objects to the trades on June 2 is a mystery. The trades that day were profitable.

fall in prices below 1100 on the June dates as a "breakout" authorizing his trading of several more contracts (a total of 2 more than Captain was restricted to), that was a matter within his discretion. Simply put, if Foo did not want discretionary trading, he should not have granted discretionary authority to Captain.

The misrepresentation claim likewise is without merit. In a 2-page, single-spaced typed letter of complaint written to Alaron in July 1998, attached by respondents as Exhibit F to their answer, Foo analyzed all the trading done by Captain, angrily voices several complaints about Captain (including the trading allegations discussed above), and expresses dissatisfaction with Captain's trading results because he did not achieve the 60-65% winning percentage Foo was "hoping for . . . as determined by some of the books which I have read."⁴ The complaint letter of July 1998 does not mention or even hint that Captain himself had led Foo to expect such results, and limits the charges to incompetence. It does not stand to reason that Foo would have omitted a strong fraud claim from this lengthy, relatively contemporaneous expression of outrage, or left out any facts that would have supported his request for reimbursement. People tend to be more upset about being lied to than about encountering simple incompetence, especially when demanding their money back. Foo's earlier letter to Alaron, and his discovery production, severely undermine the reliability of his subsequent complaint here, and under the circumstances, effectively rebuts his allegations of fraud.⁵

For the reasons stated, the complaint is DISMISSED.

Dated: July 22, 1999


Joel R. Maillie
Judgment Officer

⁴ During discovery, Foo identified two sources for his belief that a competent expert trader should be able to make profitable trades 60 to 65% of the time. See pages 2-3 of Foo's discovery production, and attachments thereto. These statements in discovery indicate that Foo's dissatisfaction was with the performance, not the representations by Captain, which are not likely to have mirrored the same numbers Foo found in his literature.

⁵ This decision involves no analysis of the wisdom or competence of Captain's trading. The Commission's reparations program does not engage in second-guessing the trading methods or decisions of brokers, absent evidence of fraud, churning, or that the trade was made without any reasonable basis.