



U.S. COMMODITY FUTURES TRADING COMMISSION

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WALTER EDWARD LEYLAND, and	*
NYDIA I. SANTIAGO,	*
Complainants,	*
	*
v.	* CFTC Docket No. 00-R117
	*
BARKLEY FINANCIAL CORPORATION, and	*
ELAINE BARABARA GELLER,	*
Respondents.	*

ORDER OF DISMISSAL

Respondents have filed a motion to dismiss the complaint on the grounds that a financial dispute no longer exists, because they have tendered payment in the amount of the \$3,200: the sum of complainants' out-of-pocket loss, plus prejudgment interest and the cost of the filing fee. In response, complainants have opposed the motion to dismiss, effectively seeking to amend their complaint to increase the amount of damages sought to an indeterminate amount in excess of their out-of-pocket losses. Complainants had initially sought to recover their out-of-pocket losses, plus punitive damages for emotional distress, but then withdrew their claim for punitive damages after being advised by the Director of the Office of Proceedings that the claim for punitive damages could not be considered.

Complainants invested \$3,000, and withdrew \$168, and thus lost \$2,832 trading with Barkley. The first trade, heating oil options recommended by complainants' first broker Gail Schachter, lost about \$1,957 (net premium paid, plus \$675 paid in commissions and fees). The second trade, a Swiss Franc option recommended by complainants' second broker Elaine Geller, lost about \$875 (net premium paid, plus \$225 paid in commissions and fees).

Complainants allege that Geller churned their account by using a variety of fraudulent and deceptive tactics to convince them to switch to a different trading strategy in order to generate commissions, as soon as she became their new account executive. In this connection, the Commission has held that in churning cases involving options on futures, the proper measure of damages may be based on trading losses, rather than the amount of commissions and fees, where the

complainant establishes accompanying acts of fraud, as complainants have alleged here. See *Hinch v. Commonwealth Financial Group, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶27,056 at 45,022 (CFTC May 13, 1997) (“Trading losses may be awarded [rather than commissions] when there exists evidence of fraudulent promises, fraudulent profit guarantees, and exposure to greater market risk than was necessary.”). However, as a matter of law, the Commission generally has not permitted damages based on hypothetical retroactive trading results.

Complainants oppose respondents’ motion to dismiss because, they now assert, they are entitled to lost profits that they could have realized if Geller had not convinced them to sell the heating oil options. Complainants have been given ample opportunity to marshal and produce evidence in support of their damage claim, but have only produced the bare assertion that “our trading strategy was to wait for a reasonable profit.”¹ Complainants have not quantified the amount, or approximate amount, of their lost “reasonable profit,” and otherwise have not specifically described their heating oil strategy. In light of the fact that complainants and Schachter have admitted that they cannot specifically recall the relevant portions of their discussions about this trade, it is most unlikely that complainants would ever be able to provide a reliable, good-faith calculation of their lost “reasonable profit.” Thus, since complainants have not set forth the amount of the alleged lost profit, their request to amend the complaint to seek damages in excess of their out-of-pocket loss must be DENIED.

Finally, because respondents have tendered payment in the amount of the \$3,200 – which covers complainants’ out-of-pocket losses, plus prejudgment interest and the cost of the filing fee, and thus represents the most that complainants could recover if they were to prove churning – the underlying financial dispute has been extinguished,² and this proceeding is hereby DISMISSED.

Dated April 6, 2001.



Philip V. McGuire,
Judgment Officer

¹ See complaint and addendum to complaint, and the parties’ replies to the Orders dated December 12, 2000, and January 31, February 22 and March 6, 2001.

² CFTC rule 12.17 provides, in an analogous situation, that a respondent may satisfy a complaint by paying the amount of damages claimed in the complaint, in lieu of filing an answer to the complaint. This rule also requires that the parties submit a joint stipulation, and thus does not contemplate the rare and exceptional situation where a complainant resists dismissal despite full recovery of damages.