U.S. COMMODITY FUTURES TRADING COMMISSION
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EDUARDO E. MARQUEZ, Complainant	)	
v.	)	CFTC Docket No. 98-R195
CARL FRED EHRLICH and FUTURES TRADING GROUP, INC., Respondents	)	

INITIAL DECISION[1]

The trading facts underlying this case are simple: Complainant's first purchase (July 15, 1996) was of three call options in heating oil, followed three days later by his buying an S&P 500 call option. The S&P option was sold on August 5 at a profit of $690, which was approximately 57 % of the total purchase price. On that same day, complainant made the first of three corn call option purchases, with the last two purchases occurring on August 13 and 14. That last corn option purchase was made in tandem with the sale of complainant's heating oil calls (which had risen in price almost enough to break even). The corn options rose in price initially, but eventually expired worthless three months later, in November. The corn option transactions were recommended by respondent Ehrlich, an associated person of respondent Futures Trading Group, Inc., an introducing broker.

Distilled to its essentials, the complaint alleges that Ehrlich gave improper trading advice, churned the account, and failed to disclose the availability of stop-loss orders. Complainant's dissatisfaction with the results of the corn options was exacerbated by the fact that the heating oil options, in his words, went up "considerably" after he sold them. Respondents defend the recommendations as reasonable, deny that churning occurred, and assert that no legal duty existed for Ehrlich to recommend stop-loss orders. In addition, respondents seek their (undenominated) attorney fees for defending this case, as the beneficiaries of the contract complainant signed with the clearing broker.

Complainant's evidence does not prove misrepresentation, failure to disclose, churning, or any other fraud. Even viewed in the light most favorable to complainant, his submissions establish

[1] All dates are in 1996 and amounts are rounded to the nearest dollar.

at the very most only these simple facts: (1) his account executive, Ehrlich, made certain recommendations to sell certain positions and to take new positions; (2) some of the buy recommendations turned out to be unsuccessful; (3) the original positions, if kept, would have made money; and (4) if stop-loss orders had been used, some of complainant's losses might have been presented.

Poor trading advice does not, standing alone, constitute a basis for reparations. Otherwise, any customer losing money on a recommended trade would be entitled to recover his losses with proof of nothing other than the loss itself. Thus, the Commission does not second-guess trading recommendations. An exception exists where the advice is made without a reasonable basis, such as where a broker does no research, has no facts at his disposal, and knows nothing about a trade he recommends except that he will be earning a commission on the trade. However, complainant has provided no evidence that the recommendations were unreasonable or without foundation--except for the poor results of the trade. Therefore, the complainant's allegations of poor trading advice is without foundation and need be discussed no further except in the discussion of attorney's fees, below. Similarly, the churning allegation is without support.

A closer case exists regarding complainant's allegation that Ehrlich failed to tell him about stop-loss orders. In appropriate circumstances, failure to disclose the possibility of using stop-loss orders would indeed be the failure to disclose a material fact. One such circumstance might be where a customer has specifically told his or her broker of the desire to protect a certain portion of the customer's margin deposit—in that scenario there would be an absolute duty to discuss the possibility of using stop-loss orders because of the broker's awareness of the customer's particular needs or desires.[2]

Because the written record was silent regarding the circumstances surrounding the opening of this account (especially considering that three separate brokers handled complainant's account), and whether disclosure was necessary in this account, an oral hearing was held by conference call pursuant to Rule 12.209. During the hearing, complainant Marquez's testimony alone was necessary. Although he testified credibly, that testimony was not favorable to his cause. Specifically:

1. Marquez testified that he had never expressed to any of his brokers a desire to attempt to restrict his losses to a certain portion of his margin deposit (Tr. at 40, 44, 52, 59, 155);

[2] Clearly, as respondents pointed out in their Answer, brokers can and sometimes do abuse advice about stop-loss orders, such as where the broker suggests to a customer that risk can be minimized or limited by using such orders. Indeed, the CFTC-mandated risk disclosure document expressly cautions a customer against such expectations. *See* CFTC Rule 1.55(b)(3). Furthermore, unscrupulous brokers have been known to place "close stops" in order to manipulate a customer into immediately switching into new positions when an initial position starts to lose money. The possible misrepresentations do not by any means mandate, however, *non*disclosure as respondents seem to suggest.

2. Marquez claimed that he did not know he could limit his loss (Tr. at 41), but admitted that he had previously followed his broker's recommendation to liquidate some options at a loss rather than waiting for them to expire worthless (Tr. at 41-42);

3. Marquez testified that he knew he could sell his options at any time (Tr. at 43) but he kept the corn options on Ehrlich's recommendation because he hoped they would turn around although he knew Ehrlich could be wrong (Tr. at 69-70, 108-109);

4. Marquez testified that he also had traded at another company where he had watched the account decline, losing some $3,000, without liquidating his positions (Tr. at 46, 64-68, 77);

5. Marquez testified that he was aware of the declining value of his account because he received and understood his statements (Tr. at 108), and that he did not order liquidation despite his assertion that he would have placed 50 % stop-loss orders if he had been informed of them (Tr. at 70); and

6. Marquez testified that if he had been given the chance to use stop-loss orders he would have been able to use the remaining money in his account to purchase different options that he believed would have had a better chance of being profitable (Tr. at 78).

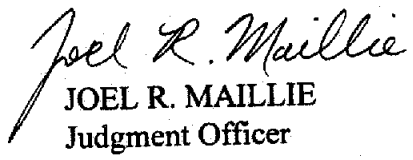
Under the circumstances, it would be impossible to determine that Marquez was deprived of materially important information as a result of respondents' failure to apprise him of stop-loss orders. Stop-loss orders appear to have been envisioned by Marquez (after he learned of them) as some mechanical method that would have forced him to switch his money into new options. He was not interested in using them to attempt to limit his exposure to loss, or to preserve some capital, or to enable him to have a working order in the market in the event he was not in touch with his broker. Instead, he simply wishes in retrospect that he had been able to get out halfway down and switch to other, equally risky positions. Having had, but not availing himself of, the opportunity to liquidate at the very level he now claims he would have stopped-out at, Marquez cannot prevail on his claim that this information in advance would have made any difference to him.

As to attorneys fees, the Commission has left open the question as to whether a claim for contractually-based attorney fees, where there is no counterclaim for a deficit balance, is cognizable in the reparations program. *See Pal v. Reifler Trading Corp.* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,237 at page 45,978 note 5 (CFTC Feb. 2, 1998). Under the circumstances of this case, where a *pro se* customer has brought, among other things, claims based on poor trading recommendations and the admitted failure by respondents to disclose facts that in other cases might entitle a customer to an award, it is determined that the contractual provision cannot be enforced. To do so would do great violence to the legislative intent of the reparations program, which invites *pro se* litigants to file claims without knowledge of the law where the claims are brought in good faith based on the facts known to the customer. Here, Marquez may have lost the case, but to award attorney fees because he is not a lawyer and because he in good faith responded to the Commission's invitation to participate in this "customer's forum," would be to punish him for not

correctly predicting the outcome of his case. Such an unjust result cannot possibly reflect congressional intent or public policy.[3]

For the reasons stated, both the complaint and the counterclaim are DISMISSED.

Dated: July 14, 1999



JOEL R. MAILLIE
Judgment Officer

[3] A contrary result might also punish a complainant who testifies forthrightly and honestly, as did Marquez, for being open, and would encourage parties to falsify their testimony to avoid exorbitant costs imposed upon them.