



U.S. COMMODITY FUTURES TRADING COMMISSION

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JAMES L. MOSS, and PHYLLIS PARKER,
Complainants,

v.

DABBAH SECURITIES CORPORATION, and
JONATHAN HERSHEL GARE,
Respondents.

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CFTC Docket No. 98-R155

INITIAL DECISION

James Moss and Phyllis Parker seek to recover \$5,000 that they lost trading options on commodity futures. Moss and Parker allege that Jonathan Gare guaranteed profits when he solicited their joint non-discretionary account and when he advised them on the status of open positions; that Gare failed to advise them to limit their losses; and that two trades were unauthorized.¹ Respondents deny the allegations.

The findings and conclusions below are based on the parties' documentary submissions and oral testimony, and reflect my assessment of the relative credibility of the parties' testimony. While none of the parties' testimony was especially convincing, Gare's testimony generally was more plausible and reliable than James Moss's or Phyllis Parker's testimony. For example, Parker's replies to questions frequently reflected an

¹ Ruth and Otis A. Carlisle, friends of James and Shirley Moss, also opened an account with Dabbah at the same time and filed a nearly identical reparations complaint which is pending before another judge.

inability or unwillingness to focus on the questions asked, and undermined the reliability of her recollection of conversations with Gare. In addition, Parker's assertions that she could not understand the account statements and that she essentially made no effort to understand them were implausible in light of the fact that she is an investment banker. As explained below – although the evidence shows that Gare cut corners in his dealings with complainants and with their friends, the Carlises, who also opened an account – it has been concluded that the preponderance of the evidence does not support a finding of any violations by Gare causing damages in connection with complainants' joint account.

Unless otherwise noted, dates are in 1997, and amounts are rounded to the nearest dollar.

Factual Findings

The parties:

1. Phyllis Parker, a resident of Mobile, Alabama, has a high-school degree and is employed as an investment banking officer. According to Parker, in that capacity she has been "basically doing investments for high-profiled, high dollar amount customers." Parker reported on her account application that she had no previous experience with commodity futures or options, but had 10 years experience with stocks, and that she had an annual income of \$60,000, and a net worth of \$380,000. [See pages 6 to 9 of hearing transcript.]

James Moss, a resident of Bay Minette, Alabama and Parker's brother, also has a high-school education, and is an owner of an employment agency. Moss had 15 years investment experience with stocks, but no experience with futures or options on futures,

when he opened the joint account at Dabbah Securities. [See account application, produced by respondents November 30, 1998.]

2. Dabbah Securities Corporation is a registered introducing broker located in New York City. Jonathan Gare has been a registered associated person with Dabbah since September 1996. Previously, he had been an associated person with U.S. Securities and Futures, American Futures Group, FSG International, Smith Barney, Prudential Bache, and Merrill Lynch Futures.

The account-opening:

3. In July of 1997, Parker called Dabbah in response to a radio commercial. Dabbah did not produce a copy of the commercial, and Parker could not recall the commercial, except that it mentioned the soybean market. Parker and Gare spoke on July 16 and 23. Neither Parker nor Gare could recall these conversations with much specificity. However, together their testimony generally suggests that Gare did not make any false or deceptive statements, did not distort the relative risks and rewards of trading options on futures with Dabbah, or rush Parker into making a decision. According to Parker, Gare did "not go into a lot of detail" but stated that she should not delay in opening an account if she wanted to take advantage of current movement in the soybean market. He said he would send her an account-opening package and that she should call him if she had any questions about those documents. Gare credibly testified that he discussed "both the pluses and minuses of options trading," such as that any losses would be limited to the purchase costs, and credibly testified that by the end of their conversations she had a

rudimentary understanding of the mechanics of trading options and the high degree of risk.

[See pages 8-13, 35-36, and 186-188 of hearing transcript.]

After Parker told Gare that she might be interested in opening a joint account with her brother, Gare sent her a Dabbah "investors kit" that included: a Dabbah brochure titled "Options on Futures"; an NFA brochure titled "Buying Options on Futures Contracts"; and a Vision Limited Partnership account application. Parker reviewed these documents and then gave them to Moss. [See pages 83-92 and 202-203 of hearing transcript.]

During a third conversation, on July 30, Parker told Gare that she and her brother were not ready to open an account with Dabbah, chiefly because Moss was too busy with his new business.² [See pages 14-27, 83-92 and 188 of hearing transcript.]

Gare decided not to follow-up, and assumed he would never hear again from Parker. [See pages 25-27 of hearing transcript.]

4. In early October, Parker received a call from Ruth Carlisle, who was a friend of James Moss and his wife, but had never met Parker. Ruth Carlisle told Parker that while on a weekend trip she and her husband Alex, and James Moss and his wife Shirley, had discussed radio commercials – not sponsored by Dabbah – that touted a return of \$20,000 on a \$5,000 investment by speculating in the soybean market.³ James Moss mentioned Parker's contacts with Gare in July and suggested that they ask Parker to set up a conference call with Gare. Parker then called Gare and told him that her brother was now

² As discussed below, once the account was opened and trading began, Gare, Parker and Moss would all be "too busy" to devote proper attention to the account, which significantly contributed to the misunderstandings that gave rise to the complaint.

³ According to respondents, Dabbah was not running radio commercials in the fall of 1997. Moss could not recall details about the commercial, including the name of the sponsoring firm.

interested in opening a joint account with her, and that their friends the Carlises were also interested in opening an account. Parker arranged for Gare to call the Mosses and the Carlises at the Mosses' house on October 5. [See pages 25-28 of hearing transcript, and page 2 of Hearing Notice (December 8, 1998).]

The telephone conversation was not a conference call in the traditional sense, because the Mosses had only one phone and did not have a speaker phone. Therefore, the conversation was conducted principally with James Moss and Alex Carlisle speaking to Gare while handing the phone back and forth to each other. Parker, Ruth Carlisle and Shirley Moss occasionally passed written notes or questions to James Moss or Alex Carlisle, and overheard their responses or questions to Gare. Gare's testimony concerning this conversation was more plausible and convincing than the testimony of James Moss, Shirley Moss, or Phyllis Parker. Complainants did not produce the Carlises as witnesses.

According to James Moss, Gare failed to discuss the possibility of loss, and failed to explain that he would be recommending spread trades. Moss testified that on one hand, Gare told him "there are no guarantees" of profits, but on the other hand repeatedly stated that Dabbah had projected a dramatic price increase in soybeans and thus Gare was sure that Moss was "going to make good money." In contrast, Gare credibly testified that he balanced his strongly bullish view on soybeans with reminders of the "strong likelihood" of losing all or part of the amount invested. Gare also credibly testified that Moss and Parker gave him the impression that Parker would be the principal decision-maker. In this connection, the first paragraph of customer contract provided: "Each customer having an interest in a joint account shall have the authority to issue instructions and generally to deal with Vision." [Dabbah's reply to Order dated October 8, 1998 (filed December 1, 1998).]

Moss also testified that Gare explained that Moss would be buying contracts that expired in late February or early March, and that Gare told Moss that he could exit the market any time before expiration if the market did not behave as expected. Thus, Moss was aware that the option trade recommended by Gare had a limited time to work out, and that he could exit the market before that time if he wanted.

Finally, Moss testified that Gare said because he had so many customers, he "could not put a lot of time into the account," and therefore would be talking to either Moss or Parker, but not both, on a regular basis. [See pages 30-39, 92-111, and 189-205 of hearing transcript.]

On October 8, Parker filled out the account-opening documents. Parker and Moss each signed the account-opening documents, and each deposited \$2,500, for a total of \$5,000. Parker and Moss directed that the account statements be sent to her home address. Gare credibly testified that Moss and Parker indicated that Parker would be the principal decision-maker, which appeared reasonable to Gare because she was an investment banker, because Parker had instructed him to mail the account statements to her house with no duplicates to Moss, because Parker had filled out the account application, and because Parker she had set up the conference call with Moss and the Carlises. The Carlises opened a joint account at about the same time. [Pages 191-193 of hearing transcript.]

Trading Activity:

5. Gare took three option positions for the Moss-Parker account, all of which expired worthless on February 20, 1998. Gare made identical trades for the Carlisle

account. The first trade, a March soybean call option spread was initiated on October 14, and is not disputed by complainants.⁴ Gare credibly testified that he explained to Parker why he recommended this spread. However, Parker did not pass this explanation on to Moss, who was confused by the fact that options had been sold as part of this transaction. [Pages 204-205 of hearing transcript.]

Complainants allege that the second and third trades were unauthorized. The second trade was a March corn option spread with the long leg initiated on October 16 and the short leg initiated on October 22. The third trade was a long wheat call also initiated on October 22. In contrast, Gare credibly testified that he explained to Parker the basis for his recommendations to make these trades, and that he obtained her approval. When Moss asked Gare about these trades, Gare explained that he had obtained Parker's authorization. Parker then told Moss that she had not given the authorization, but Parker and Moss did not promptly protest these trades. [Page 194 of hearing transcript.]

Commissions for the Moss and Parker account totaled \$2,000.

Over time, all of the trades steadily lost value: the account liquidation value was \$2,306 on October 31; \$2,031 on November 10; \$1,630 on November 30; and \$1,123 on December 11. [See monthly account statements, and Appendix B.]⁵ By December 31, the account liquidating value had declined to \$355; and on February 20, all of the options expired worthless.

⁴ Gare delayed the first trade until he received confirmation from Parker's bank that it did not object to her opening a speculative account. See letter dated October 9, 1997 from Compass Bank to Dabbah (produced by Dabbah on December 1, 1998).

⁵ Appendix B is a printout of the price history of the options in the Moss/Parker account, which was provided by the CFTC Division of Economic Analysis. Liquidation values are based on the settlement prices.

Communications Between Gare and Complainants:

6. All confirmation statements and monthly account statements were mailed to Parker's home. Parker regularly forwarded – by mail or in person – the statements to her brother, but never told Gare that she was doing so. Parker's testimony that she could not understand the statements was especially unconvincing, in light of the fact that she works as an investment banker and in light of her testimony that she told her brother that she was concerned about the declining account liquidation value that was reported in the November monthly account statement.

7. Because he was supposedly so busy handling so many customer accounts, Gare relied on Parker to relay information to Moss and the Carlises, and vice-versa. Similarly, Parker testified that she was "too busy" and distracted to focus on the account-opening documents and the account statements, and thus gave them to her brother, who in turn handed them off to his wife because he was also "busy." Parker eventually indicated to Gare that she did not want to be called during business hours, because she did not want her personal business to interfere with bank business. [See pages 13-14, 23, 59-60, 64-65, 84, and 109 of hearing transcript.]

Gare credibly testified that he spoke to Parker to obtain authorization for the disputed trades. Gare also credibly testified that he principally spoke to Parker every week, at least until early December 1997, to discuss the status of the account, and that she was aware of, and concerned about, the declining liquidation value. In this connection, Parker testified that when she reviewed the November monthly account statement, she told Moss that she was concerned about the declining liquidation value. Gare credibly testified that

he informed Parker about the status of the account, and that neither of them mentioned liquidating the options to limit losses.

Dabbah's phone bills show Gare spoke to Moss, either at Moss's home or work number, on October 6, 7, 8, 9, 10 and 13. The only calls longer than one minute, and the only calls initiated by Moss, were on October 8 (2.8 minutes) and 9 (10.5 minutes). These conversations took place before trading had begun. The phone bills show no calls to Moss' phone numbers after October 13.⁶

The Dabbah phone bills show that on October 21, Gare shifted to calling the Carlises. Neither side explained this shift. The phone bills show fourteen calls between Dabbah and the Carlises' phone numbers: on October 21; November 10 (two conversations); December 1 and 11; January 14; and February 6 (two conversations), 9, 10, 11, 20 (two conversations), and 27. According to Moss, sometime in early or mid-December, the Carlises told him that Gare had told them that their account was worth more than \$5,000. However, as noted above, Moss did not produce the Carlises as witnesses. In contrast, Gare credibly testified that he did not misrepresent the account value, and that he advised Parker, Moss and the Carlises that he remained confident that the long-term bull strategy would work out. [See pages 71-72, 146-158, and 203-204 of hearing transcript.]

8. The Dabbah phone bill does not support Moss's contentions that he initiated most calls with Gare and that Gare did not return his phone calls. Two calls from Moss's phone numbers were initiated on October 8 and 9. However, these were made before the

⁶Phone calls to and from Parker's toll-free work number were not charged to Dabbah's telephone number, and thus were not reflected on Dabbah's bills.

first trade, and were three minutes and ten minutes long, respectively. As noted above, Moss apparently participated in some of the calls with the Carlises. Out of the 14 calls involving the Carlises' numbers, just five were initiated from the Carlises' numbers: on October 21; November 10; and February 6, 11 and 20. Only the call on October 21 does not have a call from Dabbah to the Carlises that corresponds close in time before or afterwards. The call on November 10 was immediately followed by a call from Dabbah that lasted seven minutes. The call on Friday, February 6 (by which time the account value was negligible) was preceded by a brief call earlier that day and followed by four minute call on Monday February 9. [See Appendix A; Order dated December 23, 1998; Parker's reply to Order (filed January 4, 1999); Dabbah's reply to Order (filed January 4, 1999); Moss' reply to Order (received January 6, 1999); Doherty affidavit (produced January 25, 1999); and pages 40-47, and 194-200 of hearing transcript.]

9. On February 20, 1998, all of the options expired, and Parker sent a letter to Gare complaining about his handling of the two accounts. Significantly, the letter did not allege any unauthorized trades or promises of profits:

First I am very disappointed to say the least, concerning your lack of communication with me and/or my brother James Moss. That was a commitment from you that "sold" me/us on you in the first place, even to getting our friends Alex and Ruth Carlisle to also invest with you.

Now, we are all in a "pit" over the loss we have incurred through no choice of our own. We were not given the option to "stay" or bail, it was made for us; the reason, no communication. Your apology is not acceptable at this time. [H]ad you lived up to your commitment, I would not feel as if I have been had. . . .

Your commitment from day one was to communicate via telephone weekly with either myself or my brother and keep us abreast of what was going on. You did not. The only times we had spoken has been when we originated telephone conversations.

In December, I understand the value of our account was considerable [sic] more than the original investment of \$5,000.00 for my brother and I and also for Alex and Ruth on their original investment of \$5,000.00,

We have lost our backsides because of your lack of communication. . . . We tried to call and was [sic] never able to reach you. You are our only contact with this account but as our representative you never kept us informed. That is your fault. . . .

[Exhibit to complaint; see pages 159-163 of hearing transcript.] As noted above, Parker's assertion that "the only times we had spoken has been when we originated telephone conversations" was contradicted by Dabbah's phone bills. Thus, the principal allegation in this letter appears to be, at best, implausible, and, at worst, a blatant fabrication. In either case, this letter – written close in time to the disputed events – contains a dubious allegation and fails to mention any unauthorized trades or false promises, and thus undermines the overall reliability of the allegations in the complaint.

Conclusions and Discussion

Complainants have failed to establish by a preponderance of the evidence any violations causing damages by Gare. In connection with the allegations of profit guarantees during the solicitation account, both sides do not dispute that Gare gave a balanced presentation of risk and reward to Parker during their initial conversations in July 1997. Gare credibly testified that Parker was relatively sophisticated and understood the risks and mechanics of trading options, and also credibly denied deceptively presenting risks and profits to Moss. Moreover, the circumstances surrounding the solicitation are not consistent with a fraudulent solicitation. Most significantly, in July, Gare did not call Parker once she said that she was not interested; between July and October, Parker and Moss had

ample time to review the account-opening documents, including the risk disclosure statement; and, after the account was opened and after complainants' money had been received by the clearing broker, Gare waited to place the first trade until after Dabbah had received clearance from the bank that employed Parker. Finally, the absence of any reference to alleged profit guarantees in Parker's protest letter written the same day that the options expired weighs heavily against the allegations of profit guarantees.

Similarly, the absence of any reference to allegedly unauthorized trades in Parker's protest letter, and the absence of any prompt concerted protests by Parker or Moss in October 1997, are simply inconsistent with unauthorized trading activity. Moreover, even though Moss may have claimed to be personally unaware of the trades and confused by the spread strategies, the customer contract authorized *either Parker or Moss* to make binding decisions for the joint account. In that regard, Gare credibly testified that complainants indicated that Parker was the principal decision-maker and that she approved each transaction.

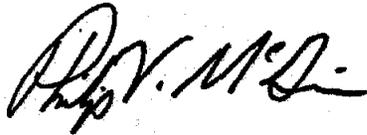
Finally, complainants have failed to establish that Gare was under an affirmative duty to remind them that they could liquidate their account to limit their losses. Here, complainants never told Gare that they actually wanted to limit their losses; Gare explained to Parker and Moss that the options expired in late February and that they could liquidate the options before that time if the market did not perform as expected; and Gare (and the account statements) regularly informed Parker about the steadily declining account value. Thus, complainants possessed sufficient knowledge to instruct Gare to liquidate the option positions if they had wanted to limit their losses; and, in the absence of any

instructions about limiting losses, Gare was not required to advise complainants to liquidate their positions to limit losses, or to remind them that they could do so.

ORDER

Complainants have failed to establish violations causing damages. Therefore, the complaint is DISMISSED.

Dated April 9, 1999.

A handwritten signature in cursive script, appearing to read "Philip V. McGuire".

Philip V. McGuire,
Judgment Officer