



U.S. COMMODITY FUTURES TRADING COMMISSION

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JOE S. and ELIZABETH A. NOBREGA,)

Complainants)

v.)

CFTC Docket

No. 98-R161

FUTURES TRADING GROUP, INC., and,)

DAVID GREGG WEISSER,)

Respondents)

INITIAL DECISION

Overview

As elaborated upon in the findings below, Joe Nobrega opened an options on futures account with David Weisser of Futures Trading Group, Inc. ("FTG"). He told his wife he wanted to open an account, and then signed the account documents for both of them without bothering to read them. Nobrega¹ returned the forms and was approved for a \$9,000 account. He deposited \$5,000 to open the account, purchased two natural gas options on a Friday, and then arranged on the following Monday to wire transfer an additional \$24,000 to the account to purchase 28 call options on wheat futures. FTG compliance director Les Sobel and another FTG supervisor approved the increase in the account size because they believed, based on Weisser's discussions with Nobrega, that Nobrega was holding back information about his income and net worth.

Immediately after the trade, and again two days later, Nobrega specifically told Weisser he and his disabled daughter were counting on Weisser to pay for a wheelchair lift, and Weisser cautioned Nobrega that there were no guarantees of success. When the options declined by some two-thirds in value in about sixteen days, Nobrega complained to Sobel that Weisser had promised to double or triple his money so he could pay for the wheelchair lift for his disabled daughter's van. Sobel, finding out that Nobrega had previously had an account, was outraged that Nobrega portrayed himself to Sobel as a novice and conservative investor. He did not review Weisser's notes showing the conversations about the daughter. Sobel recommended that Nobrega liquidate the account, but he refused to make any adjustments to the account as demanded by Nobrega. Nobrega cashed out the profitable gas options but allowed the wheat options to expire worthless.

¹ "Nobrega" in this decision refers to Mr. Nobrega. When his wife is discussed, "Mrs." will be added.

Nobrega's allegations are as follows: first, that Weisser and FTG failed to inform him of the risks of trading options on futures; second, that Weisser disregarded his statements that he needed his money to provide for his daughter's medical conditions; third, that Weisser promised to double, triple or even quadruple his money; and fourth, that Weisser lulled him into higher losses when Nobrega wanted to get out of the market after his investment started to decline (July 15, 1998, addendum to complaint).

Respondents deny any allegations of wrongdoing. They portray Nobrega as a scheming, calculating investor who pretends to be a naive and unsophisticated novice.

The following findings reflect the written documents submitted by the parties, as well as credibility evaluations made during a lengthy telephonic oral hearing in April 1999. During the oral hearing, both complainants testified, as did respondent Weisser and Futures Trading Group's compliance officer, Les Sobel.

Findings of Fact²

Nobrega's Main Street account:

1. In May 1996, approximately a year prior to opening the FTG account (113; *see also* Exhibit D to respondents' verified statement), Nobrega had purchased Ken Roberts' book entitled *The World's Most Powerful Money Manual*, for a cost of \$195 (106, 266.) Nobrega never read the Ken Roberts materials so he did not know if the book described any of the risks of trading options or futures. Nobrega said he did not read the book because of lack of understanding or lack of interest (106-107, 109, 267). At the same time, Nobrega subscribed to Forbes magazine, eventually renewing his subscription for a total of some eighteen months, but he never read that either (275-277).

2. In November 1996, after being referred by the Ken Roberts staff (261), Nobrega opened an account with Main Street Trading, depositing \$1,000 of his personal funds (115, 118). He was interested in learning about futures trading so he could provide for his daughter (119, 266).

3. Nobrega did not read any of the documents he signed to open the Main Street account (111).³ Asked how he could learn about trading if he never read the materials, Nobrega said he wanted to learn from the opinions expressed to him by his broker (267).

² All numbers in parentheses are transcript references and reflect Nobrega's testimony unless otherwise noted. References to page numbers of exhibits to respondents' verified statement are to the exhibit letter and page number. Any dates without a year designation are from 1997.

³ Respondents failed to introduce copies of the Main Street account-opening documents into the record despite having obtained them by subpoena. Apparently they believed erroneously that the brokerage firm producing them (ADM) had sent copies to the complainants as well as to the CFTC, although the cover letter did not reference a copy to complainants (116-117, 229-234). At the hearing, respondents attempted to use those documents to examine both Mr. and Mrs. Nobrega, but were not allowed to treat the documents themselves as part of the record (230). Information *from* the documents, such as account value and trades on particular dates, was allowed to be

4. Nobrega said he did not do much trading in the Main Street account, and simply followed his broker's recommendations (105, 120). The account generally declined, losing more than half its value by May 1997, and falling to \$230 by the end of June (117). At one point in the interim, however, it had recovered nicely, rising to over \$2,300 by the end of March (285).⁴

5. Nobrega never filed any complaints arising from the trading with Main Street, saying he just tried to forget about his losses there (122). During the hearing, all participants questioned some of the trades recommended by the Main Street broker, including particularly a purchase of two Eurodollar put options on March 13, 1997, where he paid a total premium price of \$25 and commissions of \$190, meaning the commission rate was approximately 760% (295). These options expired worthless. Nobrega stated that the example--which was brought to his attention during cross-examination--showed how unaware he was, while respondents attempted to portray the trade as showing why Nobrega decided to change brokers (*id.*).

The Nobregas; contact with FTG's Rowland

6. In the early 1990's, Nobrega, a machine operator at DuPont, suffered an injury resulting in his permanent disability (55). He began suffering from depression at the same time but that was not shown to be work-related, so he received no disability benefits for depression, only his injury. Nobrega also suffers from anxiety (56). There is no evidence that these conditions rendered Nobrega legally incompetent, but as will be seen, they definitely affected his judgment and hindered his ability to consider and act on information provided to him.

7. Mrs. Nobrega is a technician at Eastman Kodak (56). She is primarily responsible for the care of their daughter due to Nobrega's disability (68).

8. In February 1997, an FTG broker named Peter Rowland contacted Nobrega about possibly opening an account, and sent account-opening forms (48-49, 175). Nobrega says he threw them away without reading them (49). According to Rowland's notes, in March Nobrega told him that he had been in a car accident and had to purchase a new car, and therefore told Rowland to call back another time (Exhibit B to respondents' Verified Statement). Nobrega denied telling Rowland to call again (255-257), but it seems unlikely that Rowland would have falsified his notes since doing so would have meant he was only fooling himself.

9. Mrs. Nobrega testified that they had bought a new van to transport their disabled daughter following the March car accident, purchasing it some two weeks before the FTG account was opened (20-21). The van was purchased using a bank loan (21; *see also* Nobrega's testimony regarding the loan's terms at 328-329). The Nobregas were interested in putting a wheelchair lift in

used during the hearing because Nobrega had some of his trading statements from that account and because he did not dispute having filled out and signed account-opening forms (114-115).

⁴ Nobrega himself initiated one trade in April 1997 in the Main Street account that was extremely successful, that being wheat options he bought using David Weisser's recommendation when he was beginning to trade the FTG account at issue here (285-287). *See* ¶ 18, below.

the van, which would cost about \$6,000 more (21-22). Nobrega testified that his daughter was permanently disabled as a result, they believed, of complications following a vaccination when she was 15 months old--she became unable to walk two months later (60). The Nobregas were unable to prove that the vaccine was the cause, and they did not receive any benefits to help care for their daughter (61).

Documents enclosed with the July 15, 1998, addendum to the complaint include a medical evaluation by a United Cerebral Palsy Association medical director dated in 1993 (when she was 4½ years old). That evaluation could not pinpoint a diagnosis, but stated that Brittany Nobrega suffers from a "degenerative process with the brunt of the illness affecting the motor abilities," although no diagnosis of a specific condition was made. After a lengthy discussion of numerous ways in which motor abilities had been affected, but discussing her intellectual abilities as average, the recommendation of the physician was as follows: "stimulation and preservation of function in motor respect. The future educational challenge will be to provide the child with sufficient intellectual stimulation in an environment where her rather significant physical impairment can be managed."

Mr. Nobrega opens FTG account with David Weisser

10. David Weisser inherited the Nobrega prospect and first spoke with Nobrega himself on April 7, 1997. According to Nobrega, he was interested in Weisser because he was not learning anything in his Main Street account (38). Before Weisser, Nobrega always turned down investment overtures from solicitors because he did not have enough knowledge (38-39).

11. Nobrega was attracted to Weisser because he was different than other brokers Nobrega talked to--he promised to make money for Nobrega (39). Nobrega became really excited about the chance to make so much money for his daughter that he was "really pumped up" (53-54). Asked why he trusted Weisser so much, he said it was because Weisser claimed to be a lawyer (*see also* original complaint narrative). Lawyers, according to Nobrega, are highly trusted in Portugal, where he was from (54-55). Nobrega did not recall whether Weisser specifically told him that profits were not guaranteed, but he did not think Weisser said that (67-68). Nobrega believes that Weisser did not disclose the risks of investing, but if he did so, it was in the context that loss was "almost impossible" (81).

Although I find Nobrega's claims not credible that he would have paid attention to risk had it been disclosed, I conversely believe that Nobrega credibly testified that he did not recall any discussions of risk by Weisser. This finding does not mean, however, that such matters were not mentioned.

12. According to Nobrega, he informed Weisser about his daughter (35) and about his disability and depression (59).

13. Weisser sent new account forms to Nobrega, but Nobrega did not read any disclosures or other documents sent to him by FTG even though he had them for two weeks before opening the account (68). He did not read the risk disclosures (48, 68, 69, 76ff); similarly, he had never read

the documents from Rowland (49). Nobrega did not even skim the documents as he was signing them when Weisser was directing him where to sign (71, 73-74). Nobrega claimed to be totally unaware of the risk disclosure statement and all of its capitalized warnings (72). Although Weisser did not try to prevent Nobrega from reading any documents (72), according to Nobrega, Weisser never asked if he read the documents, either (76). As of the date of the hearing, Nobrega still had not read any of the documents (76-77).

14. When Nobrega opened the account, he wrote down figures for his net worth reflecting his and his wife's income as being \$50,000 income; he also revealed that he was disabled (page 3 of Exhibit A to respondents' verified statement). The net worth he wrote down was \$70,000, with a liquid net worth of \$60,000. According to Nobrega, he did not include his 401(k) plan (worth some \$150,000) as part of his net worth, but he might have mentioned it to Rowland or Weisser (75). The funds to open the account came from the Nobregas' own account (65-66).

15. To open the account, Nobrega was interviewed on April 18, 1997, by "Christian," an employee in the FTG compliance department (pages 1 through 9 of Exhibit F to respondents' verified statement). During that interview, Nobrega stated that he had not exaggerated his financial information, but had been very conservative instead (F-1). He confirmed his income as permanent (F-2). Asked whether he had traded "futures" previously, Nobrega said he had not. Christian appeared to be moving on to a new topic, but Nobrega then volunteered that he had tried trading commodity *options* (F-3), and said that he had done "great" (F-4). Christian informed him that his net worth and income led to a trading limit of \$9,000, and said that if he wanted to trade beyond that, Nobrega would have to go through compliance again. Nobrega then asked, "What about if I turn the \$5,000 into \$10-15,000? Can I just reinvest that?" and was told that he could; the limit only applied to new money (F-4). Asked if he borrowed the money, Nobrega hesitated and said "No." (F-5). Asked if he was comfortable, Nobrega said he had some "jitters" but indicated he was comfortable (*id.*). Christian asked if he read and understood the literature, and whether Nobrega was aware he could lose his entire investment, and Nobrega said "Correct" and "Right" in reply, respectively, to those questions (*id.*). When Nobrega was asked if losing his investment would change his lifestyle, Nobrega said "No, it would hurt but it wouldn't change my lifestyle" (F-6). Finally, Nobrega, when asked if he had received sales pressure or promises of profits or guarantees, said he had not (*id.*).

16. Mrs. Nobrega's name appears on all the account-opening documentation (Exhibit A to respondents' verified statement), but her signatures on those forms are markedly different from that on the complaint. According to her, she authorized her husband to sign all the forms after he explained to her that he wanted to invest, but she personally signed the complaint (11-12). Mrs. Nobrega did not read the account documents and relied entirely upon her husband for information about the investment to be made (13, 17-19). Nobrega did not tell her the investment was risky, and he seemed to really trust the person he had spoken with to open the account (15). Mrs. Nobrega had no idea how much money he was putting into the account to open it (16); she would not have authorized him to use \$5,000 because she was very "conservative" in money handling (24). Mrs. Nobrega did not know that he would be borrowing money to make any part of the investment (20). She believed her husband had informed Weisser about the plan to purchase a wheelchair lift (21). Mrs. Nobrega described her husband as "excited" and thought he said that the

investment would return profits soon (23). Neither of the Nobregas, she said, had any idea that they could lose (23-24). Mrs. Nobrega believed her husband would not have been correct if he told someone in the compliance interview that losing their investment would not change their lifestyle (25).

17. Based on Weisser's discussions with him, and immediately following the compliance interview with Christian, Nobrega placed orders to purchase two natural gas call options and three wheat call options (F-6 through F-12). The natural gas options were purchased on April 18 but the wheat options were not able to be purchased on April 18 (165).

Mr. Nobrega decides to increase his account; FTG approves

18. On April 17, apparently deciding to follow Weisser's wheat recommendations even before the FTG account could be opened, Nobrega purchased wheat options for his Main Street account (284-88). These options did well. According to respondents' theory of the case (*id.*), these trades, not Weisser's recommendations or promises of profit, caused Nobrega to become "pumped up" about wheat and to increase his account size. While that theory is reasonable, it is not inconsistent with Nobrega's statements that he thoroughly trusted Weisser. Indeed, if early returns from the trades in the Main Street account were favorable, that would have simply confirmed Nobrega's decision to trust that Weisser could make him money.

19. On Monday, April 21, Nobrega tried to call Weisser four times early in the morning as he tried to increase his investment (301). Thereafter, Nobrega decided to wire transfer an additional \$24,500 into the account and purchased 28 July wheat options (Exhibit C to respondents' verified statement; April 21, 1997, statement, attached to complaint addendum). According to Nobrega, Weisser promised to "triple or quadruple" this deposit (48).

20. The funds for the Monday trading and for increasing the account size came from an emergency account created by Nobrega's father (in Portugal) that was in Nobrega's name and that of his father (39-40, 44, 67). Nobrega did not tell his wife or his father that he was going to use funds from that account, which he virtually depleted (44-45, 251). His father was "fuming" when he later found out, and Nobrega promised to pay back the amount he had taken (*id.*). In the past he had taken some money out to pay an occasional bill, but he acknowledged that this was vastly different (46).

21. The new deposits into the Nobrega account (to an amount more than triple his prior approved limit) did not, as Christian had informed him, result in a new compliance interview with Nobrega. Instead, Les Sobel and Kerry Brewer (an FTG principal) merely reviewed with Weisser the information Weisser had already obtained from Nobrega. Based on their conclusion that Nobrega was being conservative in his income and net worth figures, they decided to approve the higher level of trading (155-158).

Mr. Nobrega's expectations and complaints

22. After the April 21 trades, according to Weisser's notes introduced by respondents into the record, Nobrega told Weisser "that he is 'counting on me'" and that "he has a disabled daughter and wants to buy lift for van" (Exhibit C to respondents' verified statement). Weisser's notes reflect that he "kept reminding him of no guarantees" and "therefore, watch market closely" (*id.*). Two days later, the notes reflect, Nobrega said to Weisser: "I'm [sic] and my daughter are counting on you," eliciting this statement from Weisser in reply: "I don't have control of markets and there is still no guarantee of returns" (*id.*).

Weisser testified that the comments made by Nobrega on the 21st occurred about an hour and a half after the trades (371). He said that Nobrega's discussion of his daughter made him feel "extremely bad" and "concerned" but he never decided to speak to anyone else about it (372-373).

Les Sobel testified that the first comments should have been brought to his attention because they probably indicated that Nobrega was trading "for the wrong reasons" (147). After the second comments, the situation definitely should have been brought to him as the director of compliance (147-148).

23. Within a week thereafter, Nobrega received a telephone call from another broker, but this was a securities broker who told Nobrega he would be "crazy" or "out of his mind" to keep his money in the futures options because he could end up losing it (96). According to Nobrega, this other broker--who had previously been a futures broker--warned him that the markets were risky, and further, that the weather information Weisser was using as the basis of his wheat recommendations was wrong (97-99). Nobrega contends that he called Weisser, who discounted the warnings given by the other broker with disparaging comments about how the other broker had left the business because he could not stand the pressure (100-101). Weisser's notes do not show any conversation with Nobrega about another broker (Exhibit C to respondents' verified statement).

24. The natural gas options purchased on April 18 eventually were sold for a profit. The wheat options, however, did poorly. They declined by over a third within two days (Exhibit C to respondents' verified statement) and continued to decline through the end of the month, although there was a slight recovery on April 30 (*id.*; see also statement for April 30, 1997, attached to complaint addendum). They market fared poorly for Nobrega's investment until by May 8 the wheat options were worth only \$2,100--about one-tenth what Nobrega paid for them (May 8, 1997, statement attached to complaint addendum).

25. On May 7, 1997, Nobrega called Les Sobel, the compliance director for FTG, and began a series of discussions in which he complained about Weisser's alleged promises of profit (Exhibit F to respondents' verified statement at pages 15 through 74). Those conversations were the subject of extensive questioning of both Sobel and Nobrega at the hearing.⁵ However, the

⁵ Sobel initially sympathized with Nobrega when he discussed his daughter's condition and was willing to check out Nobrega's claims that Weisser had misled him (F-15ff). However, he pointed out to Nobrega the numerous protections in the compliance interview, and asked why Nobrega had not revealed Weisser's alleged promises (F-

factual contents of these conversations is somewhat suspect because by that time both participants were engaged in after-the-fact posturing. Nevertheless, these conversations resulted in Sobel's informing Nobrega that he had to decide whether to liquidate the account and his unequivocal correction of any misimpression Nobrega may have had regarding expectations of profit in the account (F-24, F-26-27). On the other hand, the conversations do confirm that Nobrega had previously been informed by Weisser that he was a lawyer (F-37).

Sobel conceded that if he had known about the daughter and the need to purchase a wheelchair lift for her, he "certainly . . . would not" have approved the account increase on April 21 without conducting a new interview with Nobrega (168).

26. Rather than liquidate the account, Nobrega chose to have the natural gas options sold at a profit and the remaining cash returned to him (\$3,448.76) (May 8 and May 9, 1997, statements, attached to complaint addendum). He decided to let the options expire, apparently in an effort to recover some of his loss if the market recovered, and expressed in the hearing his awareness that he would have to take responsibility for that decision (213-214).

Discussion and Conclusions

Mr. Nobrega appears to have entered into futures trading somewhat slowly, first buying a training manual and subscribing to a financial publication for general information. It took him almost half a year to open his first account, at Main Street, and then he started cautiously, with merely \$1,000 at risk. His desire to "learn" about what he was thinking about doing was almost a textbook example of what every customer should do: learn first, trade cautiously, and see whether these markets are appropriate.

Soon after turning down Rowland's entreaties to open an FTG account, however, Nobrega's approach changed. That change occurred in conjunction with significant events in Nobrega's personal life, two car accidents in early 1997 (258) and the resulting purchase of a new van. It is not hard to see how the increased financial obligations the Nobregas had undertaken would be of concern to Nobrega, who was trying to provide for his disabled daughter with major medical and educational needs, while on a relatively limited disability income himself. After purchasing the van, the Nobregas wished to install a wheelchair lift, and that additional expected expense appears to have triggered Nobrega, whose depression and anxiety had previously not drastically affected his financial decisions, to switch from *interested* to *compulsive* in his approach to the futures markets.

Into this situation came Weisser, unwittingly providing Nobrega the financial "opportunity" to escape his anxieties. Nobrega could only focus on the profit comments, ignoring all warnings and any suggestions regarding possibilities of loss. Weisser may have been unprepared for

18). Nobrega said it was because he had been told he could not lose his money (F-19). Later, after Sobel reviewed the compliance tape, he fought long and hard against Nobrega's allegations because he concluded Nobrega had lied by portraying himself as a novice investor when in fact he had invested before (F-36ff.). In Sobel's words, that "set [him] off" (129). As a result, Sobel never reviewed Weisser's notes regarding Nobrega's account (139-142).

someone such as Nobrega, who never gave any indication that he had read none of the materials sent to him. Nobrega convinced himself that Weisser--who appeared during the hearing to be exceptionally articulate, confident, intelligent, and capable--was guaranteeing that he would double or triple his investments, but there is no credible evidence that Weisser ever made such blanket statements. Instead, it is more likely than not that Weisser used the "double" or "triple" language in some fashion, for it cannot have been a coincidence that Nobrega referred to those amounts in the compliance interview with Christian. But I credit Weisser's testimony that he talked about risk, about the lack of predictability of the markets, and about the very real chances of loss. Weisser may have mentioned the possibility of doubling or tripling when discussing possible profits, but Nobrega's anxiety-induced listening filters heard only the profit possibilities: he essentially never even heard Weisser's, or Christian's, comments about risk.

Had Nobrega read any of the disclosure materials sent to him by Main Street, Rowland, or Weisser, he might not have become so profit-obsessed. However, people are fully capable of ignoring inconvenient facts, and it stands to reason that someone with Nobrega's medical conditions, and his financial anxieties, would be even more capable of disregarding risks in order to try to "win big." Lotteries and other forms of legalized gambling would not be so popular if people acted rationally on their actual knowledge of the chances of winning--it is the dreaming and hoping that pumps money into those industries, which would wither and die if customers did not disregard their true risks. But there is a difference between *hoping* to win, which marks the casual lottery purchaser or the usual small futures investor, and *planning* to win, which is what came to characterize Nobrega.

By the time of the second investment, Nobrega's fixation on Weisser's suggestions of profits had become overwhelming. When Weisser's recommendations in wheat proved successful for him in his Main Street account, he decided that Weisser had proven he could deliver those types of returns. The result was Nobrega's compulsive repeated calling on Monday to try to get hold of Weisser, followed by his tapping into money he well knew was not to be used for speculative investments, money set aside by his father for emergency use only. Like a compulsive gambler, Nobrega had passed the point where even the strongest disclosure of risk would have affected him--thus, he disregarded the warnings given him within a week by the other broker regarding the risks of what he was doing. Even the warning given to Nobrega by the former futures broker was disregarded by him.⁶

Up to this point in the analysis, Nobrega alone is to be blamed for his actions--or, if his actions were the result of conditions beyond his own control, at least the respondents were not aware of those conditions and had no firm reason to suspect that Nobrega was operating on a misguided belief that he would make money. Respondents were not aware that Nobrega had ignored all the written materials, and they likewise were not aware that Nobrega was taking money

⁶ Obviously, the other broker's comments could also be considered evidence showing Nobrega's awareness of the risks. It should be remembered that at the point of the conversation Nobrega had no reason to trust this stranger over Weisser, with whom Nobrega had opened his account. Since respondents would not have had any way of knowing about this other broker or what he said, Nobrega's references to his conversations with that broker (including the warnings that, in light of the results, tend to highlight Nobrega's foolhardiness) tend to weigh against inferences that Nobrega has faked his lack of understanding of the true risks of trading.

from an emergency account to trade options. They had opened the account in standard fashion, and while the compliance interview was no model, it was adequate and it obtained the needed information regarding Nobrega's financial information and apparent general awareness of risk. Even the decision by Sobel to approve a larger account was relatively reasonable considering Nobrega's comments regarding his higher net worth than he had revealed, although Sobel's decision to not re-interview Nobrega was questionable to say the least.

Nobrega's comments to Weisser, however, changed things. Two comments in a short period of time regarding the expectations and reliance Nobrega and his daughter--with specific references to the need to purchase a wheelchair lift--were placing on Weisser should have alerted Weisser to the fact that Nobrega was neither a casual investor nor a fully aware customer. Had the comments been made as part of a larger conversation in which Nobrega personally revealed knowledge and awareness of risk, or had the comments clearly been jokes made by Nobrega, Weisser could have disregarded them. But Weisser's own reactions of nervousness and feeling "extremely bad" for Nobrega show that he personally believed that Nobrega was speaking the truth when talking about why he hoped the trades would turn out successfully.

That subjective reaction by Weisser should have given him pause especially in light of the fact that Nobrega, whom Weisser knew was on a disability income and whose wife was a technician, had just increased his account six-fold, with no additional compliance review. Weisser had suspected that Nobrega was holding back information about his resources, but he had no firm information on which to base that belief, which he knew was the sole reason why Sobel had approved the jump in account size. Weisser and Sobel had contented themselves with trying to ensure that Nobrega was suitable *financially* to trade the increased amount, but Weisser now had come into possession of information that he should have taken to Sobel for a broader inquiry. Instead, Weisser merely repeated his prior comments about how profits were not guaranteed.

The Commodity Exchange Act's antifraud provisions have been definitively interpreted by the Commission as not including a general duty to inquire into a customer's suitability to trade futures. The general principal behind these decisions is that brokers are required to disclose risks and each customer makes his or her own evaluation of the appropriateness of trading. *Phacelli v. ContiCommodity Services, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,250 (CFTC Sept. 5, 1986). However, the Commission's comments ameliorating the harsher effects of that holding are directly on point here:

This does not mean that the Act is necessarily indifferent to the individual characteristics of the complaining customer. Under traditional fraud concepts, and wholly apart from notions of "suitability," an individual's duties under the law may vary according to the characteristics and circumstances of the particular customer being solicited. Thus several courts treat conduct amounting to "overreaching" as equivalent to fraud [footnote omitted]. In analyzing the reliance element in traditional fraud cases, it has long been recognized:

... that people who are exceptionally gullible, superstitious, ignorant, stupid, dim-witted, or illiterate have been allowed to recover when the defendant knew it, and deliberately took advantage of it.

Prosser and Keeton on Torts, (5th Ed. 1984), p. 751 (citations omitted).

We have similarly considered the characteristics and circumstances of complainants in evaluating assertions that they have been misled or otherwise defrauded, [footnote omitted] and nothing in this opinion should be read as departing from that approach. Moreover, the instant cases do not involve liability for an express representation as to the "suitability" of a particular trade or strategy for a particular customer. . . .

Phacelli, [1986-1987 Transfer Binder] at pages 32,674-32,675.

The Nobrega case does not require a broad finding that Nobrega was not suitable. Furthermore, the issue here is *not* whether despite the numerous warnings he had been given, Nobrega remained subjectively unaware of the risks of trading. Instead, the issue to be decided is whether respondents, having learned of Nobrega's unreasonable belief, took appropriate action to cure it.

Obviously, in deciding to rely upon futures options to make money to provide for a disabled daughter, Nobrega was definitely "exceptionally . . . ignorant" of the true risks of trading. And that remains true even if his ignorance was due in part to his own neglect of the numerous materials sent to him, and even if his ignorance--and accompanying expectation of profits--was due to his failure to listen even to the cautions given him by the other broker. There is no doubt, furthermore, that Weisser did not act with evil intent to take advantage of Nobrega's foolhardy lunge into options--indeed, I have no doubt that Weisser was seriously troubled and conflicted when he learned of Nobrega's situation. The issue here is simply whether Weisser intentionally, or recklessly, disregarded information that should have alerted him to Nobrega's unrealistic profit expectations and lack of true appreciation of risk. *See Hammond v. Smith Barney, Harris Upham & Company, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at page 36,659 (CFTC March 1, 1990) (requiring broker to act with *scienter* to violate antifraud provisions of Section 4b(A) of the Act; *scienter* can be established by showing the broker acted either "intentionally or with reckless disregard for [his] duties under the Act").

The evidence compels the conclusion that Weisser's decision not to bring the information to Sobel's attention, and the resulting inability of FTG to use that information to ensure its customer understood the risks, was indeed reckless at minimum.⁷ This conclusion is no different for this case, where Nobrega's comments were made after trading began, than it would be for a case where

⁷ It is also conceivable that Weisser, finding himself in the anomalous position of discovering information tending to question his customer's suitability right after convincing Sobel to increase the account size because of his impression of Nobrega's conservative financial disclosures, decided to keep the information to himself rather than looking extremely foolish to his employers.

the customer's comments had been made during an initial compliance review. Simply put, a broker has the duty to correct a customer's erroneous beliefs about trading risks or expected profits when, as here, the broker becomes aware of those beliefs. Where, as here, reminders of previous warnings do not correct the customer's delusions, the broker is responsible for taking additional action.

The next inquiry, then, is whether Weisser's disregard actually did have any effect on Nobrega's self-created delusion. As discussed in the Findings, above, Sobel testified that he would have thought differently about Nobrega's desire to increase the account size had he known what Nobrega said to Weisser. He also testified with no hesitation that Nobrega's comments showed he was trading for the wrong reason, which Sobel would have wanted to address. We can conclude that at a minimum, Sobel himself or another responsible person at FTG would have contacted Nobrega for an additional compliance interview, as had been mentioned in the first interview with Christian. Speculation can be had either way regarding that interview--perhaps Nobrega would have agreed to everything he was told and acknowledged risk, or perhaps he would have revealed what he was expecting in terms of profits. We know that Nobrega was capable of reciting the right words about risk awareness, but a proper inquiry--*an inquiry asking him what his understanding was of the risks*--easily would have enabled the questioner to elicit the same information as was available during Nobrega's conversations with Sobel in May, or the information adduced during the hearing upon questioning by the Judgment Officer and by respondents' counsel.⁸

Under the circumstances, the failure to make any additional inquiry is solely the responsibility of the respondents. When Weisser reminded Nobrega of the lack of any guaranteed profits after the first comment, that perhaps could have been enough if he were satisfied that Nobrega understood everything. But Weisser's uncomfortableness--his feeling "extremely bad" after that conversation--speaks volumes. He clearly was uncertain what Nobrega actually thought, but he let that uncertainty remain unaddressed. Then the second comment by Nobrega showed Weisser that Nobrega had totally disregarded that warning, as well as all the others. Weisser's decision not to tell a supervisor, and his second perfunctory mention of no guarantees, prevented any additional inquiries to Nobrega that would have either uncovered Nobrega's abysmally incomplete awareness of his own situation or allowed respondents to protect themselves from judicial second-guessing by obtaining explicit waivers from Nobrega himself.

Accordingly, it is determined that Weisser's failure to make additional inquiries into Nobrega's financial situation, and the failure to forward the information about the basis for Nobrega's expectations of profit to pay for needed medical equipment for his daughter, constituted reckless disregard for Weisser's duties under the Act. These actions violated CFTC Rule 33.9,

⁸ Hundreds of compliance interviews listened to, and read, during the past twelve years have led the undersigned to conclude that commodity futures brokers would do well to have their customers answer open-ended questions about their understanding of risk rather than obtaining "Yes" or "No" answers to a number of recited questions. Asking someone what he believes the risk to be is far more revealing than asking if he understands the risk. That type of interview, it should be noted, would also prove far more probative when used in litigation.

prohibiting fraud in connection with options transactions, for which violations both Weisser and his employer FTG are liable.⁹

Would Nobrega have continued trading anyway? Would FTG have allowed him? Those are not questions that can be easily answered with certainty, nor do they need to be. Certainly it would be respondents' burden to demonstrate that their disregard of the duty to inquire had no effect.¹⁰ That is not a burden they have carried on this record. Weisser was trusted enough by Nobrega that it is clear that Nobrega would have listened to Weisser directly telling him he was misunderstanding the risks of trading--perfunctory warnings and comments about watching the market carefully were certainly not enough. On the whole, having failed to make the inquiry, respondents cannot claim that the inquiry would not have mattered.

As to damages, it is determined that if Nobrega had been informed of the true risks of trading after revealing his misunderstandings to Weisser, the account would have been closed. The evidence as to the value of the account at the exact time of the second conversation is not definitive, but a statement is available showing the account value at the close on the previous day (April 22, 1997, statement attached to complaint addendum). That will be taken as the price at which the Nobregas damages began. Nobrega's failure to totally liquidate the account when he finally spoke to Sobel--and when he was explicitly made aware of the incorrectness of anything he formerly believed--on May 8, when the account was worth \$2,100 (379), sets the outer time limit on the damages.

The account after the close on April 22 was worth \$18,245.90 (statement attached to complaint). On May 8, the value was \$5,548.70. The damages proximately caused by respondents' violation is the difference, \$12,697.20.

That amount represents less than half of the Nobregas' total loss on their trading. It may seem unfair in some respects that Nobrega should collect anything, since he acted in apparent utter disregard for so many warnings and in violation of the trust placed in him by his wife and father (as well as his daughter, on whose behalf he ostensibly made these ventures). And, furthermore, it

⁹ At the hearing, it was stated that the evidence in the written record appeared to suggest a failure to supervise violation by FTG based on, in part, Sobel's failure to inquire into Nobrega's financial state when the account was expanded on April 21 since he had no hard information establishing that Nobrega's resources would have supported the larger account (4, 145). His response to Nobrega's complaint also was minimal, with Sobel satisfying himself merely with listening to the compliance interview and becoming outraged at the temerity of Nobrega to call himself a novice, all without reviewing Weisser's notes that would have alerted him to the greater problem. No damages are based on failure to supervise since Nobrega's testimony established that a second financial inquiry would probably have resulted in the approval anyway. Sobel's decision to combat Nobrega when he complained did not increase any losses.

¹⁰ This situation seems markedly similar to the presumption of reliance in a fraud case based on failure to disclose: the customer, the law presumes, would have relied on material information not provided to him or her, because it would be very difficult, if not impossible, for the customer to prove reliance in a situation where the violation itself prevents reliance. The test really is whether the information is "material." Here, it could be said that the failure to make additional inquiries to Nobrega constituted failure to inquire into "material" information--had the material information regarding Nobrega's trading expectations been elicited in the inquiry, it can be presumed that it would have been used, as indeed Sobel testified.

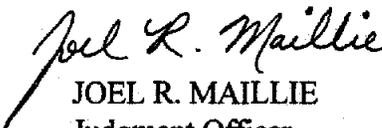
seems a shame that respondents should have findings of violations and have to pay reparations when they did not initially know their customer was essentially a victim of a gambling fixation. However, it cannot be forgotten by respondents that their duties to their customers include far more than just getting their customers to recite the proper words, or to demonstrate access to funds with which to make these investments. When confronted with direct and hard evidence that their customers do not understand the risk warnings--or that those warnings have been ignored because of some characteristic of the customer other than a rational and deliberate choice--it is the responsibility of the brokers, who know the true facts about these types of investments, to take appropriate action. Here, Weisser did not do so, and it is not unfair to hold him accountable for keeping hidden critical information regarding his customer's misunderstandings.

Reparation Award

Violations having been found, respondents David Gregg Weisser and Futures Trading Group, Inc., are ORDERED to pay reparations to complainants Joe S. Nobrega and Elizabeth A. Nobrega in the amount of \$12,697.20, plus prejudgment interest compounded annually at the rate of 5.163% from April 23, 1997, to the date of payment, plus \$125.00 in costs.¹¹

That part of the complaint seeking damages beyond the amount awarded is DENIED.

Dated: July 1, 1999


JOEL R. MAILLIE
Judgment Officer

¹¹ Questions about whether Mrs. Nobrega was properly a party to this action, since the account was opened as an individual--rather than a joint--account, have been answered in her favor. The complainants intended the account to be a joint account; Mrs. Nobrega intended to authorize her husband to sign for her in opening the account; Christian confirmed during the account opening that it was to be a joint account; and respondents established at the hearing that it was the clearing broker that incorrectly opened it as an individual account (194). Mrs. Nobrega's interest in the account supersedes the erroneous designation on the account statements.