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KENNETH G. PLATT, Complainant,	*	
v.	*	CFTC Docket No. 99-R12
KENNETH SCOTT EUBANKS, Respondent.	*	

INITIAL DECISION

Platt alleges that R.J. Fitzgerald & Company ("RJF") associated person Gerald Gonzalez fraudulently solicited his account in March of 1998, and that RJF associated person Kenneth Scott Eubanks made fraudulent trade recommendations and churned his account. Platt also named RJF and Iowa Grain Company, RJF's guarantor, as respondents. Eubanks filed an answer denying any wrongdoing. Platt negotiated separate settlement agreements with Gonzalez and with RJF and Iowa Grain, and withdrew the complaint against those respondents before they filed answers. As explained below, Platt has established that he is entitled to an award of $3,114.

Factual Findings

Background

1. Kenneth Platt, a resident of Baltimore, Maryland, has worked for 12 years with the Government Printing Office as bookbinder. When he opened the account with RJF on March 28, 1998, he was 28 years old, with an annual income of about $60,000 and a net worth of about $40,000. He had traded stocks for a couple of years, but had no experience with futures or options on futures. Platt's testimony was truthful and indicated that he is of average intelligence. [*See* pages 5-9 of earring transcript.]

2. R. J. Fitzgerald & Company, Incorporated ("RJF) at the relevant time was a registered introducing broker, guaranteed by Iowa Grain Company, and located in Tampa, Florida. RJF is no longer in business. [NFA records.]

On July 8, 1999, the CFTC filed a six-count injunctive complaint in the U.S. District Court for the Middle District of Florida against RJF and various firm principals and agents charging, among other things, that from January 1996 through July 1998 RJF's owners had run the firm in a systematically fraudulent manner, that RJF agents routinely made misrepresentations and omissions to customers about the likelihood of profits, and that RJF agents churned customer accounts by exercising *de facto* control over the accounts and recommending trading strategies designed to generate commissions without regard for the customers' interests. This matter is currently pending. (*CFTC v. R.J. Fitzgerald & Company, Inc., et al.*, Civil Action No. 99-Civ-1558-T-23F.)

RJF divided its work force into "brokers" who solicited and opened accounts, and "traders" who recommended and placed trades. RJF brokers and traders received identical training and were compensated with a percentage of commissions.

3. Gerald R. Gonzalez convinced Platt to open the RJF account on or about March 13, 1998. Gonzalez was a registered associated person with R. J. Fitzgerald from February 13 to May 22, 1998, but is not currently registered.

Gonzalez also convinced Platt to withdraw the reparations complaint by claiming that Eubanks was the principal wrongdoer and that "he didn't know what was going on." As discussed below, it would be more accurate to state that Gonzalez has no reasonable basis in fact to support the statements he made to Platt during the solicitation, such as that Platt's RJF account executive, or "trader," would educate him about trading, would look after his best interests and would only recommend winning trades. [*See* pages 72-74 of transcript.]

4. Kenneth Scott Eubanks acted as Platt's account executive. Eubanks was a registered associated person with R. J. Fitzgerald from June 9, 1997 to August 10, 1998. He is not currently registered.

On May 28, 1999, Eubanks executed a sworn declaration for the use by the CFTC Division of Enforcement in its injunctive action against RJF. Eubanks credibly testified that the assertions in that declaration were truthful. The declaration was based on Eubanks direct observation of statements by Raymond Fitzgerald and other owners and supervisors at RJF, as well as his dealings with customers in his capacity first as a broker and then as a trader. In his declaration, Eubanks described how RJF

was run in a systematically fraudulent manner. According to Eubanks, RJF's owners and supervisors instructed Eubanks, and other brokers, to downplay risk and to emphasize profits when soliciting new accounts and when recommending trades, despite the fact that all, or almost all, RJF clients had failed to realize actual profits. RJF's owners and supervisors also instructed Eubanks, and other brokers, to represent that RJF was a full-service broker that provided a personal trader who would tailor a trading strategy to each clients objectives. However, this statement was patently false and misleading because RJF's owners and supervisors also instructed and pressured Eubanks, and other brokers, to churn customer accounts, by inducing clients to make trades every two or three weeks with false statements that the recommended trade was essentially guaranteed to make a huge profit, and by implementing only short-term position trade recommendations generated by the firm regardless of the client's trade objectives. For example, RJF owner Raymond Fitzgerald repeatedly instructed Eubanks to "roll over clients' money twice a month," and also made clear the firm's policy with statements such as:

- "The only good trade is one that you can sell to a client."
- "[Since all of our clients lose money,] we need to get as much business as possible before they go broke or the account is closed."
- "While they're [our clients] we might as well make money from them."

When Eubanks became a trader, he knew from his clients' statements that RJF brokers continued to use these fraudulent sales practices. RJF ran television commercials that promised to help educate customers in trading the commodity

markets. However, these ads were false and misleading because RJF's owners actually instructed the brokers to avoid educating their customers.

In the spring of 1998 – when the Platt account was open -- Iowa Grain had expressed concern to RJF's owners about mounting customer losses, but made no follow-up inquiries or on-site inspections despite the fact that the losses and abuses continued. [*See* pages 77-92 of hearing transcript.] In August of 1998 – after Platt had closed his account – Eubanks quit after Raymond Fitzgerald instructed him to falsify customer documents. [See pages 104-107 of hearing transcript.]

Opening and Trading the Account

5. On or about March 13, 1998, Platt responded to a television advertisement featuring Raymond Fitzgerald, the president and sole owner of RJF, promising prospective clients that RJF would help educate its clients about the commodities trading and would provide individual personalized attention. These promises were patently false, because Raymond Fitzgerald discouraged Eubanks, and other brokers, from teaching his clients about the markets and because Raymond Fitzgerald instructed and encouraged Eubanks, and other brokers, to make identical trade recommendations to all of his clients in order to generate commissions without regard to the individual client's trading objectives or risk tolerance.

Gonzalez called Platt, and repeated and reinforced Raymond Fitzgerald's false and misleading message. Gonzalez told Platt that he would help Platt open the account and that RJF would assign him an account executive as soon as he opened the

account. When Platt mentioned that he was a novice and concerned about losses, Gonzalez assured him that RJF only selected low-risk trades that were likely to make profits. Gonzalez told Platt that commissions would be $150 per trade, which was misleading because the commission charge was actually $150 per contract. Gonzalez also exaggerated the likelihood of profits and downplayed risks so that Platt was "anxious" to receive and fill out the account application and begin trading. During a second conversation, Gonzalez rushed Platt through the various account-opening documents, showing him where to sign, but not explaining any of the documents or determining whether Platt had actually read and understood the documents. However, Gonzalez only instructed Platt to fill out the first of two booklets. The first booklet contained the account application and the customer contract.[1] The second booklet contained the risk disclosure statement. [*See* pages 11-31 of transcript.]

6. On March 24, 1998, Platt deposited $5,000. Also on this date, Gonzalez introduced Eubanks to Platt. Eubanks could not recall this conversation with any specificity, but testified that he did not treat Platt any differently from his other clients. [*See* pages 92-98 of transcript.] According to Platt, Eubanks told him that his goal was to make money for Platt and promised that Platt could rely on him to look out after Platt's best interests and to select and recommend appropriate trades. Eubanks then

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[1] The Iowa Grain customer contract contained a third-party indemnification clause –principally providing that Iowa Grain could avoid liability for violations by RJF or RJF agents and that Iowa Grain could collect attorneys fees regardless of the outcome of any lawsuit arising from the account – which has been found by the CFTC to be contrary to public policy, void and unenforceable. *Clemons v. Iowa Grain*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,537 (CFTC January 29, 1999), *affirming* Initial Decision [1998-1999 Transfer Binder] Comm v. FADC. Fut. L. Rep. (CCH) ¶ 27,284 (March 31, 1998); and *Violette v. First American Discount Corporation*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,537 (CFTC February 24, 1999), *affirming* Initial Decision [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,419 (August 31, 1998).

told Platt that is was urgent that he buy a July corn straddle before a crop report was issued. Platt then accepted Eubanks' recommendation to buy three 270 corn puts and buy three 280 corn calls,[2] and was charged $900 in commissions.

When Platt received the confirmation statement reporting the $900 commission charge, he called Eubanks to complain that Eubanks and Gonzalez had not provided an accurate disclosure. In response, Eubanks deflected Platt's protest by replying that Platt had signed a "Notification of Fees" form that stated that Platt would be charged "$150 per contract."

7. On March 31, 1998, Eubanks followed RJF instructions to turn over positions in his clients accounts, and advised Platt to sell the July corn straddle and buy a December corn straddle. Platt then accepted Eubanks' advice to sell the July corn straddle – which realized a net loss of about $1,425 – and to buy a December corn straddle which generated another $600 in commissions. [See pages 44-56 of hearing transcript.]

8. On May 27, 1998, Eubanks represented to Platt that he could "make $2,000 real quick" if he initiated a cotton spread. Platt accepted Eubanks advice, and sold the December corn straddle and bought the cotton spread. The December corn straddle realized a net loss of about $2,677, and the cotton spread generated another $300 in commissions.

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[2] Gonzalez and Eubanks had provided such an inadequate explanation of the mechanics of trading options that Platt did not understand such basic terms as strike price, and did not even understand that puts and calls were types of options.

On July 21, 1998, Platt instructed Eubanks to liquidate the cotton spread and close the account. The cotton spread realized a net loss of about $256. The next day, RJF wired the $361 account balance.

9. Platt lost a total of $4,339, and paid total commissions of $1,800.

10. On October 18, 1998, Platt filed his reparations complaint. On October 23, 1998, the CFTC served the complaint on Iowa Grain, R.J. Fitzgerald, Gonzalez and Eubanks.

By letter dated November 4, 1998, Henderson and Lyman, the law firm representing Iowa Grain and R.J. Fitzgerald, threatened Platt with a costly counter suit for attorneys fees and costs if he did not immediately withdraw his complaint.[3] On November 12, 1998, Iowa Grain, RJF and Platt signed a settlement agreement and release in which Iowa Grain and RJF agreed to pay Platt a total of $1,125. On November 27, 1998, Iowa Grain, RJF and Platt filed a joint stipulation of dismissal, and the complaint against Iowa Grain and RJF was dismissed shortly afterwards. Platt also withdrew his complaint against Gonzalez after Gonzalez convinced him that Eubanks was the principal wrongdoer.

Conclusions

Platt has established by a preponderance of the evidence that Gerald Gonzalez and R.J. Fitzgerald & Company fraudulently solicited his account by

[3] The letter grossly mischaracterized the governing law by asserting that the risk warnings in the customer contract signed by Platt effectively barred his fraud claim. However, in light of Platt's insistence at the hearing that Eubanks should be solely liable for the balance of his claim, the record

deceptively downplaying the risk, and grossly exaggerating the likelihood of profits, involved in trading with R.J. Fitzgerald, by making false promises to educate Platt about trading commodities and to look out after his best interests, and by misrepresenting the size of commissions. The blatantly false nature of these statements, along with Eubanks' detailed description of the pervasive fraud directed and encouraged by the firm's owners and supervisors, establishes that these acts of fraud were intentional. Kenneth Eubanks facilitated and perpetuated these deceptive acts when he falsely promised to look out after Platt's best interests, and when he repeated, or failed to cure, Gonzalez's misrepresentations and omissions. Eubanks' knowledge that RJF's owners and supervisors were instructing and encouraging its agents to lie to clients and to churn their accounts, his knowledge that the vast majority of the firm's clients lost money, and his knowledge that Platt was an unsophisticated and inexperienced investor establishes the intentional nature of his misrepresentations and omissions.

Platt has also established that Eubanks churned his account, by showing that Eubanks controlled the trading activity, that the trading activity was contrary to Platt's best interests, and that Eubanks acted in reckless disregard of Platt's interests. Several factors support the conclusion that Eubanks, and not Platt, controlled the trading activity: Platt's lack of sophistication and lack of trading experience, Platt's reliance on Eubanks' promise to look after his best interests and to select trades, and Platt's reliance on Eubanks' failure to disclose that his trade recommendations were

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in this proceeding will not be re-opened to determine whether the settlement agreement was fraudulently or unethically procured.

primarily intended to generate commission income. *See Lehman v. Madder Trading Company*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,417 (CFTC 1984). Here, Eubanks has conceded that he merely followed the firm's directives and gave Platt trading advice in order to generate commissions without any consideration for Platt's interests. Similarly, the fact that Eubanks followed the firm's prime directive to churn customer accounts -- for example, by position-trading the corn straddle -- establishes that he was acting in reckless disregard of Platt's interests. The appropriate measure of damages for churning in conjunction with fraudulent promises and fraudulent profit guarantees is Platt's trading losses, which were $4,339. *See Hinch v. Commonwealth Financial Group*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,056 (CFTC 1997).

ORDER

Kenneth G. Platt has established that Kenneth Scott Eubanks churned his account in violation of section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10, causing $4,339 in damages. This damage amount shall be reduced by the $1,225 that Platt has received from Iowa Grain and R.J. Fitzgerald. Accordingly, Kenneth Scott Eubanks is ORDERED to pay to Kenneth G. Platt $3,114, plus 5.670% compounded annually from March 24, 1998, to the date of payment, plus $125 in costs for the filing fee.

Dated December 29, 1999.

Philip V. McGuire,
Judgment Officer