



U.S. COMMODITY FUTURES TRADING COMMISSION

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HSUE TUNG,
Complainant,

v.

JAMES MICHAEL GARASZ,
Respondent.

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CFTC Docket No. 08-R23

INITIAL DECISION

Hsue Tung alleges that James Garasz fraudulently solicited his options account by exaggerating his trading expertise and by guaranteeing profits. Tung also second-guesses Garasz's selection and timing of trades, and complains that Garasz failed to limit Tung's losses. In response, Garasz asserts that Tung's allegations are absurd and baseless, and denies exaggerating his trading expertise or guaranteeing profits. Garasz further asserts that Tung rejected Garasz's advice to close out a profitable trade, and then refused to accept his responsibility for that rejection when the trade turned unprofitable. Tung and Garasz both appear *pro se*.

As explained below, after carefully reviewing the evidentiary record, I have concluded that Tung has failed to establish any violations by Garasz. This conclusion reflects my determination that Tung's oral testimony was evasive, unreliable and unconvincing. In sharp contrast, Garasz's testimony was coherent, plausible and believable.

Factual Findings

1. Tung, a resident of Greenbelt, Maryland, was employed as a computer specialist during the life of his account with Orion and Vision, but retired soon after he closed his account. Tung has opened at least four accounts for trading commodity futures and options, and for each of these accounts has brought a reparation complaint, the first in 1980. For these accounts, Tung relied on his account executive to direct the trading. His submissions in this case indicate that he has gained very little realistic understanding about trading derivatives.

Tung did not create or retain any notes or records of his dealings with Garasz. As a result, his allegations are based exclusively on his recollection, which could not fairly or reasonably be called reliable. During the hearing, it became clear that he could remember almost nothing about what was specifically said by him or by Garasz during any of their many conversations. Whenever that was pointed out to him, rather than sincerely conceding that he could not recall anything specific about a particular conversation, he would evade the question and offer implausible or rambling conjecture. In addition, Tung's credibility was undermined by his tendency to conceal potentially detrimental information. For example, during the account-opening he tried to conceal his previous reparations complaints by misrepresenting that he had no commodities experience.¹ More recently, during the early stages of this proceeding, he tried to conceal the money that he had received from the introducing broker and futures commission merchant under the terms of a non-confidential settlement agreement, in furtherance of fanciful hopes to recover more than his out-of-pocket losses. [See Vision LP account application (Exhibit A, Vision LP's reply to *sua sponte* subpoena); pages 1-2, Tung's affidavit (dated

¹ Tung's testimony that he did not list his commodity experience in his account application because he had relied on his commodity brokers to direct the trading on those accounts could not be squared with the fact that he did list his securities experience and for his securities accounts he had similarly relied on his securities brokers to direct trading.

September 18, 2008); Tung's testimony at pages 5-10 of hearing transcript; CFTC Repease database; and *Tung v. Concorde Trading Group* (Initial Decision on Remand dated September 27, 2006).]

2. Garasz was an associated person with Orion Futures Group, a registered introducing broker guaranteed by Vision Financial Markets, LLC, from March 2000 to January 2007. After Tung called Orion, Garasz helped him open his account, and acted as his account executive until he advised Tung that he could no longer work with him. In an affidavit, a principal of Orion stated that Garasz was the broker of record for the Tung account until September 21, 2006. However, equity runs show that the last day that Garasz was the broker of record was September 20, 2006. [Derek Dobrowolski's affidavit (dated September 19, 2008); NFA records; and Garasz's testimony at pages 46-48 of hearing transcript.]

3. In July 2006, Tung called Orion Futures. The record contains no reliable evidence concerning how Tung got Orion Futures' number. Tung claims that he was referred to Garasz by Wavestrength, a firm that recommends securities options trades. In support of this assertion, Tung has produced a promotional brochure from Wavestrength. The contents of the brochure indicate that it was mailed out in 2004 or 2005. The brochure made various claims about huge quick profits purportedly enjoyed by Wavestrength customers. The brochure does not mention trading commodity futures or options on futures, and does not mention Orion or Garasz. In this connection, Orion has stated that it has no relationship with Wavestrength. Nonetheless, Tung has convinced himself that he called Wavestrength, and in turn an employee there named "Vera" referred him to Garasz. However, Tung has failed to produce a scintilla of reliable evidence to support his implausible contention that Vera of Wavestrength introduced him to Garasz or that Wavestrength's profit claims somehow should be attributed to Garasz.

Garasz credibly testified that when Tung called, he asked Garasz if he was a “good” broker, Garasz replied “yes,” but that Garasz carefully gave a balanced explanation of the relative risks and rewards of his trading strategies, and that Garasz did not explicitly or implicitly guarantee profits. After Garasz discussed various markets and described his trading strategy, Tung decided to open an account.²

On July 20, 2006, Tung electronically signed the following account opening documents: a risk disclosure statement, an additional risk disclosure, a customer agreement, an introduced accounts agreement, an online services agreement, and an agreement to receive daily and monthly account statements via e-mail. Tung also filled out a customer information form, in which he stated that he had five years experience with stocks, three years experience with mutual funds, one year experience with bonds. However, Tung falsely indicated that he had no experience in commodity futures or options. As explained in the introduction, I found Tung’s explanation for this omission to be implausible and unconvincing. [See Wavestrength promotional brochure (attachment to Tung’s reparations complaint); account-opening documents (Exhibit A, Vision LP’s reply to *sua sponte* subpoena); ¶ 6, Dobrowolski’s affidavit (dated 3-31-9); pp. 1-3, Garasz’s answer; Tung’s reparations complaint and addendum to complaint; ¶¶ 3 and 4, Tung’s submission dated August 23, 2008; pp. 2-3, Tung’s affidavit

² Well before the hearing, I issued an Order asking Tung and Garasz to produce affidavits that described their initial conversations as well as the conversations they had while Garasz acted as Tung’s account executive. Garasz produced an affidavit that was substantially responsive to all of the requests in the order. In that affidavit, Garasz stated that he spoke to Tung several times during the solicitation and account-opening in late July and early August 2006, and that on August 2, 2006, when trading began, Tung and Garasz began speaking “on a daily basis,” until mid-September 2006, when Garasz suggested Tung work with another broker. In contrast, Tung produced an affidavit that was substantially non-responsive. Most notably, rather than listing the dates or approximate dates of conversations with Garasz, and briefly stating the subject matter of each conversation Tung merely attached a copy of his September 26, 2006 letter to Garasz, which he had previously produced as an exhibit to his complaint. In that letter, Tung did not provide the dates of all of his conversations with Garasz, did not describe the frequency of his calls, and did not otherwise describe the course of dealing with Garasz from the account opening in July to the end of trading in November 2006. Rather, Tung’s letter focused on a handful of conversations during late August and early September, and did not state the dates, or approximate dates, of those conversations.

dated September 18, 2008, and Garasz's testimony at pages 48-53, and Tung's testimony at pages 11-20, of hearing transcript.]

4. Tung would deposit a total of \$5,300: \$2,500 on July 24; \$1,500 on August 2; and \$1,300 on September 13, 2006. On December 19, 2006, Vision returned the \$186 account balance. Thus, Tung's out-of-pocket losses totaled \$5,114.

5. As noted previously, Garasz acted as Tung's account executive from August 1 to September 20 or 21, 2006. The account's liquidation value was \$3,365 at the close on September 20, and \$2,737 at the close on September 21, 2006. Thus, when Garasz ceased acting as Tung's account executive, Tung had lost between \$1,649 and \$2,377.

6. Set out below is a summary of the trades in the Tung account:

<i>Open</i>	<i>Close</i>	<i>Trade</i>	<i>Gross Loss</i>	<i>Commission</i>
08-02	09-08	buy 1 Oct. sugar call	(\$ 526)	(\$64)
08-02	11-22	buy 1 Dec. gold call	(1,800)	(64)
08-31	09-25	buy 1 Oct. sugar future	(2,016)	(64)
09-22	09-22	buy 1 Dec. coffee call	(102)	(64)
09-25	09-28	buy 1 Dec. cocoa future	(400)	(64)

[See equity runs produced by Vision.]

7. Phone records produced by Orion show that during eight of the nine weeks that Garasz served as Tung's account executive, Garasz and Tung spoke at least two or three days a week, and on those days spoke several times for significant lengths of time, with Tung initiating the majority of calls. For one week, they spoke on one day, Friday August 25, but on that day they spoke three times, once for 17 minutes. [See phone call list (attachment to order dated Oct. 2, 2008); and Tung's testimony at pages 26-27 of hearing transcript.]

8. Garasz credibly testified that he and Tung spoke nearly every day, and that he regularly reported the status of the trades in the account. In early September, Garasz reported that the sugar future was showing a nice profit and recommended that Tung sell it. Tung rejected this advice. When the sugar future reversed and began losing, the relationship between Tung and Garasz deteriorated. Tung began repeatedly complaining that Garasz should have known how to buy low and sell high, and should have urged Tung to exit before his losses got larger. Garasz informed Tung that he could not predict the high and low each day, and finally advised Tung that he did not think that they could work together and suggested that Tung switch brokers or firms. Tung decided to switch brokers. [See account statements (Ex. B, VLP 8-5-8); equity runs produced by Vision; phone call list (attachment to order dated Oct. 2, 2008); pages 1-3, Tung's 9-26-6 e-mail to Garasz); pages 1-2, Tung's complaint; pages 1-2, of Tung's addendum to complaint; Garasz's testimony at pages 53-61, and Tung's testimony at pages 20-37, and 41-46, of hearing transcript.]

9. On September 26, 2006, Tung sent a rambling e-mail to Garasz in which he essentially threatened to sue him if he did not reimburse him his entire loss:

We are very sorry to inform you that we are very unhappy and frustrated about our investment in your hands. Clearly you have 15 years experience and should know protective ways to protect your clients' equities. . . . We heard people made great money with great brokers. Of course you were so confident to also make good money for us, otherwise you wouldn't take us or offer your solicitation, otherwise it is not suitable. . . . Last week about Wednesday [actually Friday September 15] the [sugar] contract went above 12.55. You told me to sell but also told me to hold for higher profit over 13.00. . . . Now I must propose a settlement at this point as you brokers do not use stop loss and take profit and pick proper commodity at right time."

[Attachment to Tung's reparations complaint.]

10. When Tung filed his reparations complaint, he sought to recover \$5,114 in actual damages for his out-of-pocket losses. He also preposterously sought \$1,500 in extraordinary costs for the “over 100 hours” that Tung purportedly had “easily” spent preparing his two-page complaint, and sought an additional \$1,500 in punitive damages. Tung’s request for extraordinary costs and punitive damages was properly stricken by the CFTC Office of Proceedings.

11. Rather than file answers to Tung’s reparations complaint, Orion and Vision entered a settlement agreement with Tung. On May 7, 2008, Tung signed a settlement agreement which simply provided that in exchange for payment of \$2,000, Tung agreed to release Orion and Vision, and “reserve[d] the right to continue my legal action against James Garasz.” The agreement did not contain a confidentiality clause. Tung also signed a joint Notice of Satisfaction and Withdrawal on which he hand-wrote: “Tung still remains [sic] the full right to complain against James M. Garasz and all the damages, etc.” [Underlining in original.]

Tung’s subsequent conduct during this proceeding indicates that he planned to conceal the \$2,000 payment in hopes of avoiding a reduction in the amount of damages which he could potentially recover from Garasz. First, when the CFTC Office of Proceedings asked him how much he had received from Orion and Vision, he strongly implied that he had received no money and that he was withdrawing the complaint against Orion and Vision simply “because [he] did not want to hold them responsible.” Second, in an affidavit filed in reply to a *sua sponte* discovery order, Tung refused to state the amount that he had received and falsely asserted that the amount was “mutually confidential.” Faced with these inconsistent and dubious assertions, I asked Vision to produce a copy of the agreement. A review of this document established that Tung’s assertions about that document were, at best, inaccurate and unreliable. [See Settlement

Agreement dated May 7, 2008; joint Notice of Satisfaction (filed June 9, 2008); Tung's reply to *sua sponte* discovery order (dated July 2, 2008); Doherty affidavit (dated August 5, 2008); Order dated September 4, 2008; page 3, Tung's affidavit (dated September 18, 2008); and Tung's testimony at pages 36-38 of hearing transcript.]

Conclusions

Tung's principal allegations are that Garasz guaranteed profits and that Garasz's trades lacked a reasonable basis. Tung has the burden to establish the alleged violations by a preponderance of the evidence. Tung virtually assured that he could not carry this burden by producing implausible and unreliable testimony, and otherwise by failing to substantiate his allegations. Tung's claim that Garasz guaranteed profits hinges on his assertion that Wavestrength introduced him to Garasz and that Wavestrength's profit claims should be attributed to Garasz. However, this claim must fail because Tung has failed to produce any reliable evidence that establishes any factual nexus between Wavestrength and Garasz, or that establishes any misrepresentations by Garasz. Similarly, Tung's other claim -- that Garasz failed to "take profit and pick proper commodity at right time" -- must fail. First, Garasz cannot be held responsible for Tung's decision to reject Garasz's advice to exit the sugar trade when it was profitable. Second, the Commission generally does not second-guess the trading strategy employed or recommended by an advisor. The fact that a strategy proved unprofitable does not, by itself, create an inference of violations, and here Tung has not produced any evidence to shift the burden to Garasz to articulate the basis for the trades in Tung's account. *See Syndicate Systems v. Merrill Lynch, Pierce, Fenner & Smith*, Comm. Fut. L. Rep. (CCH) ¶ 23,289 (CFTC 1986).

ORDER

Hsue Tung has failed to show any violations by James Garasz. Accordingly, this matter is dismissed.

Dated June 1, 2009.


Philip McGuire,
Judgment Officer