



U.S. COMMODITY FUTURES TRADING COMMISSION

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GREGORY WALKER,
Complainant,

v.

ROBBINS FUTURES, INCORPORATED,
ROBBINS TRADING COMPANY, and
JOEL S. ROBBINS,
Respondents.

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CFTC Docket No. 97-R30

Appearances:

Gary M. Sinclair, Esq., Chicago, Illinois, for complainant;

Jeffrey M. Henderson, Esq., and Christopher M. Burky, Esq.,
Henderson & Lyman, Chicago, Illinois, for respondents

Before: Philip V. McGuire, Judgement Officer

INITIAL DECISION

Gregory Walker alleges that respondents Robbins Futures, Incorporated and Robbins Trading Company, registered respectively as a futures commission merchant and an introducing broker, violated CFTC rule 4.31 by failing to provide a Commodity Trading Advisor ("CTA") disclosure document for the trading systems, recommended by an agent for both firms, to be used by Walker for his guided account. Walker also alleges that an agent for both firms, and the commodity trading advisor who designed the trading systems, misrepresented the performance

history of the recommended trading systems, and essentially guaranteed that the trading systems would generate substantial profits;¹ that respondents churned his account; and that both firms failed to supervise diligently Joel S. Robbins, a principal of both firms. Respondents deny that they were acting as a CTA or otherwise required to provide a CTA disclosure document because they merely "facilitated" Walker's request to utilize the trading systems. Respondents also deny the fraud, churning, and failure to supervise allegations.²

The findings and conclusions below are based on the parties' documentary submissions and the oral testimony of the parties' witnesses, and reflect my determination that Walker's testimony was generally more convincing and reliable than the testimony of respondents' witnesses, Gail Minogue and Jeff Roy. Unless otherwise stated, dates are in 1995, and amounts are rounded to the nearest dollar.

Factual Findings

The Parties and Witnesses

1. Gregory Walker, a resident of Mobile, Alabama, has a varied background. Walker grew up on a farm, and majored in business administration at Auburn University between 1965 and 1968. From 1970 to 1976, he worked as a licensed stock broker; from 1976 to 1984, he managed a 300-acre soybean and wheat farm; and since 1982, he has worked as a machinist. In 1994, Walker inherited his family

¹ Walker did not name the Robbins agent or the CTA as respondents.

² Because Walker had failed to produce any evidence of specific statements or actions by Joel Robbins, the allegation that RFI and RTC had failed to supervise Joel Robbins was dismissed at the hearing.

farm and began investing the proceeds in a series of unsuccessful investments, as part of an as-yet unrealized dream to become a professional investor. These investments included several non-discretionary commodity accounts with J.C. Bradford, R.J. O'Brien, American Futures Group, RB&H, Opportunities-in-Options, and First American Discount Corporation. [See pages 4-6, 46-66, 63-67, 89-90, and 101-103 of hearing transcript.]

On the RFI account application, Walker stated that he was born in 1946, had four dependents, was employed as a machinist with an annual income between \$25,000 and \$50,000 and a net worth between \$100,000 and \$500,000, and that he had two to three years of experience trading futures accounts and ten years of experience with securities. [Exhibit D to respondents' final verified statement.]

2. Robbins Trading Company ("RTC") is a registered introducing broker, guaranteed by Robbins Futures, Incorporated ("RFI"), a registered non-clearing futures commission merchant. (Here, RTC and RFI are collectively referred to as "Robbins.") Robbins marketed and solicited clients to open accounts with RFI and to participate in RFI's System Assist Trading Service ("System Assist"), a system-following trading service. [See pages 121-122 of hearing transcript.]

Under System Assist, an RFI customer could purchase or lease commodity interest trading systems ("third-party trading systems") from authors of those systems, such as Roy. Pursuant to a limited power of attorney, RFI executed the trades signaled by the client's trading system. A System Assist client could override or modify the signals generated by the system, and the trading system author had no

control over the how the client used the system after the client had purchased or leased it.

The authors of the trading systems were compensated by RFI clients either by selling the system for a lump sum payment or by receiving an ongoing subscription fee. In this case, Roy would receive a total of \$1,100 in subscription fees from Walker.

In addition to advertisements in financial and business publications that promoted the System Assist program, Robbins promoted specific system authors, including Roy, directly to its customers by printing prominent announcements at the top of the confirmation statements. [See, e.g., confirmation statements dated October 13 through November 14 ("Jeffrey Roy, CTA, Programs Trading Systems. For a Free Consultation on Programming or Enhancing Your System, Call Jeff at [Robbins' toll free telephone number].")]

3. Joel Robbins is a principal and associate person with RFI and RTC. Joel Robbins spoke to Walker once during the solicitation. Respondents' telephone logs contain a notation that that Walker had "a million questions" for Joel Robbins. After the solicitation, Joel Robbins spoke to Walker two or three more times. Respondents' telephone logs report merely that the subject matter of these conversations was the amount of commissions paid by Walker, with Walker a "happy camper" in an August conversation, and dissatisfied in an October conversation. However, neither side produced a detailed description of any of these conversations. [Telephone log produced December 12, 1997.]

4. Gail Kathleen Minogue, not named as a respondent by Walker, was a registered associated person with RTC and RFI at the relevant time. Minogue acted as the "investment consultant" for Walker's account. In that capacity, she handled Walker's initial call to RTC, recommended that Walker use Jeff Roy's 3-D and 3-D-O trading systems for his guided account, and acted as Walker's principal contact during the solicitation and trading of the account. Minogue's compensation was based on a "small" percentage of the initial investment, not on a percentage of the commissions. [See tape-recording of account-opening compliance review (exhibit A to respondents' final verified statement); and pages 26-27, and 156-157 of hearing transcript.]

5. Jeffrey S. Roy, also not named as a respondent by Walker, was registered as a commodity trading advisor at the relevant time,³ and maintained his office on the premises of Robbins, where he received calls from Walker. Roy was employed exclusively by Robbins as a "computer consultant." In that capacity, Roy designed and leased the 3-D and 3-D-O trading systems exclusively for Robbins to offer to customers.⁴ Although Robbins' advertisements did not specifically mention Roy or his systems, Robbins did actively promote Roy's services to its clients by way of prominent messages at the top of the confirmation statements. Also, Roy

³ Roy was a registered CTA from October 28, 1993 to December, 31, 1994, and again from March 13, 1995 to the present, doing business as Consumer Mortgage Analysts and Market Solve. Roy also became registered as an associated person with Robbins Trading on February 8, 1996 – three months after Walker closed his account. Roy is currently registered as an associated person with Green Street Discount.

⁴ The 3-D system was a currency and bond day-trading system, and the 3-D-O system was an overnight trading system.

did not independently advertise his services, and relied on Robbins for referrals. [Pages 115-116, 121-133, and 155-156 of hearing transcript.] When Walker first contacted respondents, Roy had not managed money pursuant to discretionary trading authorization or power of attorney. However, he had leased the 3-D and 3-D-O systems to about 20 of Robbins clients for their guided accounts, none of which had been profitable. [Pages 129-133, and 138-140 of hearing transcript.] Roy testified that he never discussed the performance of his systems with Robbins. [Pages 130-133 of hearing transcript]. However, it is reasonable to conclude that Robbins was well aware of the systems' unprofitable performance since the guided accounts using Roy's systems were introduced and carried by Robbins.

Robbins' request for regulatory relief on behalf of its system authors

6. By letter dated November 22, 1994, Lawrence Herst, RTC's Managing Director, had requested the CFTC's concurrence that the authors of the trading systems used by RFI's System Assist clients were not required to register as commodity trading advisors. [Produced on December 15, 1997.] By letter dated April 12, 1995, the CFTC Division of Trading and Markets responded that the authors must be registered as CTAs because they were providing commodity trading advice to others through media of the nature specified in the Commodity Exchange Act, and that the authors did not qualify for the exclusion under Section 1a(5) of the Commodity Exchange Act for publishers because their business was providing trading advice and thus could not be considered "solely incidental" to their

publishing enterprise. The Division also advised that certain activities, such as steering clients to certain third-party systems, could constitute "directing" client accounts, and if so would subject Robbins to CTA registration requirements.

[Produced on December 12, 1997.]

The Account Opening

7. On or about July 1995, Walker responded to an advertisement in a futures magazine promoting Robbins System Assist program. The ad did not mention any specific trading systems. [See Minogue testimony at pages 151-152 of hearing transcript.] Walker credibly testified that Minogue referred to the 3-D and 3-D-O systems as Robbins' "in-house" system. According to Walker, she claimed that she had not seen any other system make as much money, that the 3-D and 3-D-O systems had consistently been realizing profits, that the other Robbins customers had been "very happy" with the trading results of these systems, and that the systems could realistically produce triple profits over the long run. Walker also credibly testified that Roy confirmed Minogue's profit projections and assured him that he could probably remove \$1,000 each month in profits. When Walker asked Roy for documentation of the profits, Roy replied that he had a printout, but that it would be too bulky to send to Walker. [Pages 8, 12-13, 16-17, 21-22, 58-80, 90 of hearing transcript.]

In contrast, Minogue frankly testified that she could not specifically recall her conversations with Walker during the solicitation. [Pages 144-146 of hearing transcript.] However, Minogue asserted that it was her practice never to guarantee

profits and always to refer questions about the actual or hypothetical performance of a trading system to the system author. She also admitted that she would suggest or recommend a trading system, after discussing a client's basic trading objectives.

[Pages 146-154 of hearing transcript.] Roy similarly could specifically recall his conversations with Walker, but denied that he ever guaranteed profits or misrepresented performance. [Pages 116-120, 133, 138 of hearing transcript.]

8. Walker understood that the 3-D and 3-D-O systems would generate significant commissions, but was not concerned because, based on Minogue's and Roy's profit projections, he was sure that the expected profits would overcome the commissions. [Pages 19-21, 79, and 110 of hearing transcript.]

9. Walker decided to open an account and trade the account exclusively using the "3-D" trading system, and made an initial investment of \$15,000. [Pages 58, and 67-75 of hearing transcript.]

10. In connection with his selection of Roy's trading systems, Walker signed and executed a "Letter of Direction" which stated in pertinent part:

I have applied for a Commodity Futures Trading Account with Robbins Futures, Inc. (RFI). . . . I . . . have subscribed or authorized RFI to execute a trade recommendation service (RFI's or another) . . . which I may revise from time-to-time. . . . I hereby and grant discretion to RFI to enter trades from my account in accordance with trading signals generated by my program.

— RFI will accept limited power of attorney for my account and thereon will enter orders from my account in accordance with the trading signals generated by my program. . . . I grant limited power of attorney in favor of RFI, solely for the purpose of entering orders in accordance with the signals generated by my programs. If my program is a third-party developed system, I direct RFI to . . . deduct the cost of the system. . . from my account for payment to the developer.

[Emphasis added; exhibit A to respondents' final verified statement.]

11. The account-opening package included several documents with risk warnings. For example, the Letter of Direction contained the acknowledgement that

there is no trading system or trading advice free from the risk of loss and that no one can guarantee profits or freedom from loss in commodity trading. Neither RFI nor RTC can imply or guarantee that I will make a profit and I agree that neither will be held responsible for the performance of my program or trading losses in my account.

[¶4 of Letter of Direction, exhibit A to respondents' final verified statement.] In addition, the Robbins customer contract contained similar language about guarantees, and the standard rule 1.55 risk disclosure statement warned of the substantial risk of loss. [See pages 75-84 of hearing transcript.]

12. During the account-opening compliance review, a Robbins employee, Kirsten, confirmed the accuracy of Walker's information in the account application; confirmed that he understood that he would be paying a \$55 round-turn commission per contract; and asked a short series of questions about Minogue's solicitation:

Kirsten: Do you feel that Gail or anyone here at Robbins employed high pressure sales solicitation?

Walker: Oh no.

.....

Kirsten: has anyone asked you to disregard the risk of loss disclosure that you read on Form B, or asked you to make any misrepresentations on the account forms?

Walker: No.

Kirsten: Has anyone told you that you would make money or achieve a particular level of profit?

Walker: No. Except, well, the systems so far have seemed to prove profitable. And, you know, that's certainly a factor in my decision.

Kirsten: Okay.

Walker: You know, to open a system assist account.

Kirsten: Sure. Has any one told you that you could not have losses?

Walker: No.

[Emphasis added; tape-recording of account-opening compliance review (Exhibit A to respondents' final verified statement).]

Trading Activity

13. The trading activity in Walkers' account began on July 24 and ceased on November 9. During this entire time, signals from the 3-D system were followed. Between August 10 and October 12, signals from the 3-D-O system were also followed. [See tape-recording of conversation with Larry Hurst on October 12 (exhibit A to respondents' final verified statement).]

14. Walker would deposit a total of \$50,000 (\$15,000 on July 19, and \$35,000 on August 18), and would withdraw a total of \$33,979 (\$2,000 on August 18, \$25,000 on October 25, and \$6,979 on November 15), and thus would realize an aggregate out-of-pocket loss of \$16,021.

15. Walker's account would be charged \$16,885 in commissions and \$600 in administration fees, paid to RFC; and also would be charged \$500 in 3-D fees and \$600 in 3-D-O fees, paid to Roy.

16. Almost all of the trades would involve currency or financial futures.⁵ Set out below is a summary of the trading activity:

<i>month</i>	<i>trades</i>	<i>net p/(l)</i>	<i>comm.</i> ⁶	<i>ratio</i> ⁷
July	9	\$ (1,251)	\$ (495)	09.91 %
August	59	(3,236)	(3,795)	11.76
September	78	4,043	(5,115)	11.54
October	71	(10,150)	(6,600)	18.45
November	14	(3,724)	(880)	18.65

17. The trades were generally profitable the first half of August. On August 18, Walker "congratulated" Roy, and decided to withdraw \$2,000. Walker credibly testified that Roy represented that the 3-D-O system had been even more successful than the 3-D system, which convinced Walker to invest an additional \$35,000.

[Pages 23-24 of hearing transcript.]

18. On September 26, Walker agreed with Roy's recommendation to modify the signals.

19. By mid-October, Walker became upset by the mounting losses and commission charges and in mid-November ordered that the account be closed.

⁵ A complete set of monthly account statements was produced with the complaint, and a complete set of confirmation statements was produced with Walker's post-hearing submission.

⁶ Commissions here do not include the administrative fees paid to RFI, the 3-D and 3-D-O fees paid to Roy, or the miscellaneous exchange and NFA fees. See Walker's and respondents' post-hearing submissions.

⁷ The monthly commission-to-equity ratio is a rough measure of the detrimental effect of commissions on potential profitability. Here, Walker's method of calculating the average daily equity was used (based on the average of the equity balance on each trading day), instead of respondents' calculation (based on the mean between the balances on the first and last days of the month), because respondents' method is distorted by various factors, such as cash deposits and withdrawals. See Walker's and respondents' post-hearing submissions.

Conclusions

Walker has established that an agent of RTC and RFI violated Section 4b of the Commodity Exchange Act by failing to disclose the unprofitable trading history of the 3-D and 3-D-O trading systems and by making false and misleading statements about the trading history of those systems, and that in reliance on these material omissions and misrepresentations he suffered \$16,201 in damages. Here, Roy was employed exclusively and full-time by Robbins and was physically present in the Robbins' office where he regularly received Walker's phone, and Roy relied on Robbins to obtain and refer new clients such as Walker. Moreover, Robbins' agent Minogue described the 3-D and 3-D-O systems as Robbins' systems, and recommended these systems when Walker told her he had no system of his own. In these circumstances, Robbins and Robbins' agents were obligated to obtain information regarding the 3-D and 3-D-O systems, including the past performance of the guided Robbins accounts that followed those systems, sufficient to satisfy their obligation to provide prospective customers with all material facts prior to opening an account. Merely referring a prospective customer to Roy, as Minogue asserted she did, did not satisfy this disclosure obligation. Where Roy's 3-D and 3-D-O trading systems had proved to be unprofitable for about 20 guided Robbins accounts, representations such as that the 3-D and 3-D-O systems were the best Minogue had seen, that the Robbins' customers who had used the systems were very happy, and that Walker could realistically expect to realize substantial profits were patently misleading. The reckless nature of these statements is underscored by the fact that they had no reasonable basis in fact.

The same set of circumstances does not, however, establish that respondents were required to register as CTAs and to provide a CTA disclosure document to Walker. Section 1a(5) of the Commodity Exchange Act excludes an FCM from the term "CTA" if the FCM's advisory activities are "solely incidental" to the conduct of the FCM's business. CFTC rule 4.14(a)(6) similarly excludes an IB from the term "CTA" if the IB's advisory activities are rendered "solely in connection with its business as an IB." Although Commission interpretive letters have indicated that the determination whether advice is given in a manner "solely incidental" to an FCM's business or "solely in connection with" an IB's business should not be strictly based on a formulaic numerical standard, these letters have indicated that the proportion of the firm's accounts to which it is providing advisory services is an important factor to be considered. See, e.g., CFTC Interpretive Letter No. 95-85, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,540 (CFTC October 10, 1995). Walker did not take discovery relevant to this issue, and otherwise produced no evidence showing that a significant percentage of respondents' clients used the 3-D or 3-D-O systems. Thus, Walker's claim that respondents were required to provide a CTA disclosure document must fail.

Finally, Walker's churning claim must fail because he has not shown that respondents deviated from the trading strategy that he understood and approved.

ORDER

Robbins Trading Company and Robbins Futures, Incorporated are ORDERED to pay to Gregory O. Walker reparations of \$16,201, plus interest on that amount at 5.434% compounded annually from July 19, 1995 to the date of payment, plus \$125 in costs for the filing fee. Liability is joint and several.

No violations by Joel Robbins having been shown, the complaint against Joel Robbins is DISMISSED.

Dated June 3, 1998

A handwritten signature in black ink, appearing to read "Philip V. McGuire". The signature is written in a cursive, flowing style.

Philip V. McGuire,
Judgment Officer