UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

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PROCEEDINGS CLERK

MARION J. PLAYAN, Complainant, v. REFCO, INC., et al., Respondents.	CFTC Docket No. 98-R006
JOSEPH D. DENNIS, Complainant, v. REFCO, INC., et al., Respondents.	CFTC Docket No. 98-R007
MINA ZELLER, Complainant, v. REFCO, INC., et al., Respondents.	CFTC Docket No. 98-R008

INITIAL DECISION

Appearances:

For Complainants:

Joseph P. Pfingst, Esq.
24043 Via Silvestre
Mission Viejo, California 92692

For Respondents:

Paul E. Dengel, Esq.
Neil B. Solomon, Esq.
Schiff, Hardin & Waite
7200 Sears Tower
Chicago, Illinois 60606

Before:

The Honorable George H. Painter
Administrative Law Judge

Procedural History

On October 14, 1997, Complainants Joseph Dennis("Dennis"), Marion J. Playan("Playan"), and Mina Zeller("Zeller") caused to be filed with the Commission nearly identical reparations complaints against Respondents Refco, Incorporated("Refco"), Tone M. Grant ("Grant"), Dearborn Capital Management, Ltd.("Dearborn"), John Aiello("Aiello"), and John Frederick Miles("Miles").

The Complainants in their filings charge the Respondents with the following:

(1) fraudulent inducement in the opening of a futures trading account,

(2) material misrepresentation and omission with respect to the trading strategy used in the futures trading account and the risks associated with such trading,

(3) reckless trading,

(4) failure to make proper risk disclosures as required by CFTC Rules 1.55, 32.4, and 33.7,

(5) breach of fiduciary duty,

(6) use of a private investment club as a branch office of an FCM without installing registered supervisory personnel,

(7) use of non-registered persons as associated persons of an FCM in violation of CFTC Rule 3.12,

(8) knowingly accepting trades recommended by commodity trading advisors who were required to be registered with the CFTC, but who were not, in fact, registered with the CFTC, and

(9)aiding and abetting the members of a private investment club in the perpetuation of fraud upon the Complainants,

all of which caused substantial economic loss to the Complainants.

On October 23, 1997, the CFTC Office of Proceedings declined to forward the complaint with respect to Respondent Grant. The Respondents were served with copies of the complaint and answers were filed. A motion for reconsideration of the decision to forward the complaint was filed, and the Office of Proceedings decided to discontinue the action against Respondent Miles, but allow the action to continue against Refco, Dearborn, and Aiello.[1] The complaint with respect to the other Respondents

[1] In their proposed findings, the Complainants propose that the Court not find Respondent Aiello liable at any level in this

was forwarded for adjudication on December 1, 1997. Discovery was held during the first quarter of 1998. A hearing was held in San Diego, California from July 8, to July 10, 1998. After the hearing, but before this complaint could be settled or adjudicated, Respondent Zeller passed away. A suggestion of death was filed with the Court and no further filings were made. Accordingly, the action with respect to Complainant Zeller has abated. Post-hearing briefs were filed and the complaint is now ready for disposition.

Discussion

In 1996 Sy Gaiber("Gaiber"), an experienced futures trader not a party to this action, was a manager of the organization at the heart of this Commission complaint, The Bulls and Bears Club, Inc.("Bulls and Bears"or "the club").[2] The purpose of Bulls and Bears was "to provide a conducive atmosphere for members to monitor their investments and exchange investment ideas with their peers in a relaxed, elegant environment."[3] The club was to charge initiation fees and monthly dues from the members for its income source.[4] The Complainants were all members of the club.[5]

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case. (Comp. PFF 15.) Accordingly, the Complaint with respect to Aiello is dismissed.

[2] Gaiber at 518-519.

[3] Comp. Ex. A2

[4] Id.

[5] Dennis at 22, Playan at 71, Zeller at 215.

Members of the club exchanged investment ideas and learned of futures trading strategies through educational seminars offered by the club, taught by Gaiber.[6] Gaiber explained certain futures trading strategies.[7] Specifically, Gaiber discussed the writing/sale of "strangles" on the S&P 500 contract.[8]

In order to engage in the sale of a "strangle", the trader sells a call option on a specific commodity or instrument above the market price, and simultaneously sells a put option on the same commodity or instrument below the market price. With this strategy, the trader is speculating on the volatility (or lack thereof) of the price of the underlying asset. If the price of the underlying asset remains unchanged, the options written expire worthless, and the price collected for selling/writing the options (the premium) is kept as profit for the trader who sold/wrote the options. On the other hand, if the price of the underlying asset moves above the strike price of the call option, or below the strike price of the put option, the options will most likely be exercised. The option writer/seller will either have to cover the call option by purchasing the underlying asset for delivery, or the writer/seller will have to purchase the underlying asset from the holder/buyer of the put option depending on the direction of the price movement. In

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[6] Gaiber at 519.
[7] Johnson at 461-462; Gaiber at 519, 525-526.

either situation, the seller/writer of the strangle will suffer a loss equal to the difference between the option strike price and the market price of the underlying asset (minus the premiums collected).

Members of the club attended the seminars at which Gaiber explained the writing of strangles.[9] Complainant Playan opened a futures trading account with Refco on April 9, 1997, Complainant Dennis opened a futures trading account with Refco on April 10, 1997.[10] Refco is a futures commission merchant ("FCM") registered with the CFTC, Dearborn is a guaranteed introducing broker ("IB") for Refco.[11]

Through the interaction members of the club (word of mouth/recommendations), Refco became the FCM of choice for a great majority of the trading members of Bulls and Bears.[12] In order to open an account with Refco, a potential customer would have to place a deposit with Refco and file several forms.[13]

Complainant Dennis met Sy Gaiber and Stan Rhea("Rhea"), another member of the Bulls and Bears Club not a respondent in this action, at the club to complete account opening paperwork

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[8] Id.
[9] Gaiber at 525-527.
[10] Comp. Exs. C and G.
[11] CFTC Registration Records, Miles at 293.
[12] Miles at 306, Resp. Ex. 108 - Rhea at 839, Johnson at 465.
[13] Zeller at 225.

for Refco.[14] At this meeting, Rhea produced for Dennis a Refco account opening package from a desk drawer containing multiple copies of that same Refco package.[15] Dennis and Rhea went through the paperwork and Dennis signed the forms where Rhea instructed.[16] Dennis then wrote a check in the amount of $157,000 to Refco.[17]

Complainant Playan was sent to the club by Sy Gaiber to fill out paperwork necessary to his trading futures.[18] At the club Playan met with Judy Johnson("Johnson"), a member of the Bulls and Bears Club not a respondent in this action.[19] Johnson produced a Refco account opening kit, from a drawer full of many, for Playan.[20] Playan completed the forms and made a deposit with Refco.[21]

Complainant Dennis had an account balance of $157,000 with Refco as of April 11, 1997.[22] The first trade entered into Complainant Dennis' account was made on April 21, 1997.[23] By April 29, 1997, the account value had dropped to approximately

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[14] Dennis at 23.
[15] Dennis at 23-25.
[16] Dennis at 26.
[17] Dennis at 30-31, Comp. Ex. B8.
[18] Playan at 72.
[19] Playan at 73.
[20] Id.
[21] Playan at 78, 80.
[22] Comp. Ex. C.
[23] Id.

$108,000.[24] Complainant Playan had an initial account balance of $25,000 as of April 9, 1997.[25] Playan's account stayed active until the middle of June 1997 when his account reached a debit balance of approximately $3,000.[26]

The Court must now address the legal significance of the story told by the Complainants. More specifically, the Court must dispose of the facts proven by the Complainants.

As an initial matter, the Complainants have abandoned several of their original claims. The Court reaches this conclusion on the basis of the Complainants' proposed conclusions of law. Of the allegations originally made, only the following are offered to the Court in the Complainants' proposed findings and conclusions: (1) Refco and Dearborn fraudulently induced Dennis and Playan into opening futures trading accounts by not providing the requisite risk disclosures pursuant to CFTC Regulations 1.55 and 33.7, and §§ 4b and 4c of the Commodity Exchange Act; (2) Refco and Dearborn are responsible for Sy Gaiber and other club members' fraudulent inducement of Dennis and Playan's opening of futures trading accounts in violation of §§ 4b and 4c of the Commodity Exchange Act; and (3) Refco and Dearborn are liable for aiding and abetting the club's acting as an IB without registering with the CFTC. These three charges

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[24] Id.
[25] Comp. Ex. G.

are alleged to be the cause(s) of the Complainants' out-of-pocket losses.[27] The original allegations not addressed in the Complainants' proposed findings and conclusions are deemed to have been withdrawn.

Taking the remaining allegations in reverse order, the charge of aiding and abetting a registration violation cannot stand. The Commodity Exchange Act ("CEA" or "the Act") provides, "Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations, or orders issued pursuant to this Act...may be held responsible for such violation as a principal."[28] Thus, in order for an aiding and abetting charge to be sustained, a violation must be shown.

The Complainants must demonstrate that a registration violation was perpetrated or attempted by the club or its members. This was not done. Section 4d(1) of the Act requires all persons acting as introducing brokers to be registered with the CFTC.[29] On this language, alone, the Complainants may have a colorable claim. However, there is more to this registration requirement than §4d(1) of the Act. The CFTC has defined the

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[26] Id.
[27] Comp. PFF at 11-15.
[28] Commodity Exchange Act § 13(a).
[29] Commodity Exchange Act § 4d(1).

term "introducing broker" as the words appear in the Act.[30] The CFTC defines an introducing broker as "Any person who, *for compensation or profit*, whether direct or indirect, is engaged soliciting or accepting orders (other than in a clerical capacity) for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market..."[31] The alleged introducing broker in this case (the club and its members) did not receive any compensation for the brokerage activities it may or may not have performed.[32] Therefore, it or they did not have to register with the CFTC. For this reason the aiding and abetting charge must be rejected. The Complainants argue that the club did benefit financially from its activities regarding futures trading (in the form of membership dues and fees) and that should be enough to keep this analysis alive. This argument is not persuasive. The phrase "for compensation and profit" is defined otherwise (i.e., compensated on a per trade basis).[33] No facts have been proved which meet that specific definition.

Turning to the next allegation, the Complainants assert that the Respondents are liable for the frauds perpetrated by the club and its members with respect to the opening of

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[30] CFTC Regulation 1.3(mm).
[31] Id. (emphasis added).
[32] Johnson at 481, Gaiber at 539, Rhea at 874-875.
[33] 48 FR 35248, 35251 (August 03, 1983).

complainants' futures trading accounts. Thus, Complainants must demonstrate that frauds were perpetrated by the club and its members.[34] And, Complainants must demonstrate that the alleged purveyors of the fraud were agents of Respondents.[35] The record compiled in this matter does not support either required showing.

First, the Complainants must demonstrate fraud. Complainants make a great deal of the seminars presented by the club featuring Sy Gaiber. Complainant Dennis testified that Gaiber made the representation that the strangles-trading strategy was perfectly risk-free.[36] Complainants called other witnesses who testified to the same effect.[37] Respondents also had a parade of witnesses willing to testify as to what Mr. Gaiber said and did at the seminars. The Respondents' witnesses testified that Gaiber did not make representations that strangle trading was risk-free and did, in fact, make warnings about the risks involved in selling strangles.[38] Confronted with these two

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[34] Harris v. Connelly, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 25,919 at 41,010 n.6 (January 03, 1994).
[35] Knight v. First Financial Group, Inc., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 26,942 (CFTC January 14, 1997).
[36] Dennis at 49.
[37] H. Schneider at 167, Playan at 69, L. Schneider at 199-200, Zeller at 228-229.
[38] Johnson at 462-464, Rhea at 844-845, McGuire at 386-388, Wall at 561-562.

versions of the facts, the Court finds that the complainants have not carried the burden imposed upon them to prove fraud.

Complainant Dennis testified that he had been led to believe that Gaiber's trading strategy posed no risk at all.[39] However, upon cross-examination, Dennis testified that he had become concerned that he could be in a position to lose money based upon commodity price fluctuations that had been reported.[40] This testimony detracts from the credibility of Dennis' original statement that Gaiber presented strangles trading as risk-free. It also lends support to the testimony presented by Respondents that Gaiber did not hold out strangle trading as risk-free. If Dennis had truly believed (or if Gaiber had truly led people to believe) that Gaiber's strategy was entirely risk-free, then Dennis should not have been concerned about possible losses when he saw certain price movements. Whether Gaiber was simply overly optimistic or engaged in puffery is not of consequence now, as the Court finds that the Complainants have not proven fraud.

Second, even if fraud had be shown by a preponderance of the evidence, the Complainants would have to prove that an agency existed between the purveyors of the fraud and the Respondents. This also has not been proved.

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[39] Dennis at 49.
[40] Dennis at 51.

Like any assertion made by a complainant, an agency relationship must be proved by a preponderance of the evidence.[41] Furthermore, there is no specific formulation with respect to when an agency relationship will be found to exist; triers of fact are called upon to balance the evidence tending to show an agency against the evidence tending to show no such relationship.[42] An explicit agreement need not be shown to prove an agency relationship, inferences raised by the actors' words and actions may suffice.[43]

While there are factors on both sides of the scale, the balance of the evidence weighs to not finding an agency relationship. First, the factors tending to show agency. As both sides have essentially conceded, Respondents did send account opening forms to the Bulls and Bears Club.[44] Also, many of the Bulls and Bears members trading futures were trading through Refco.[45] Refco earned commissions from the trading activity spawned by the club and its members.[46] Moreover, members of the club such as Judy Johnson and Stan Rhea helped newly-joining members complete paperwork necessary to open a

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[41] Berisko v. Eastern Capital Corporation, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 22,772 (CFTC October 01, 1985)(citations omitted).
[42] Id.
[43] United States v. Marroso, 250 F. Supp. 27, 30 (S.D. Mich. 1966)(citations omitted).
[44] Miles at 353.
[45] Gaiber at 550.

Refco account.[47] Refco and Dearborn contacted Gaiber about margin calls on various accounts held by various club members.[48] And finally, employees of Refco gave the club a gift in the form of an expensive cigar humidor and made a visit to the club, hosting a dinner for club members.[49]

On the other side of that same coin is the factors tending to show that an agency did not exist. The club and its members and the Respondents did not have any explicit agreement to solicit accounts.[50] Club members or people joining the club were not required to open a Refco account or leave their current brokers.[51] Club members discussed commission pricing and exchanged information regarding brokers and fees.[52] Respondents did not send forms to the club for future use. Forms were sent by Refco to the club in the belief that specific people had expressed an interest in opening an account.[53] Refco personnel had, or attempted to have, direct personal contact with customers regarding account opening procedures.[54] Refco and the club and its members did not have in place any type of fee- or

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[46] Miles at 349.
[47] Dennis at 26, Resp. Ex. 108-Rhea at 840-841, Johnson at 475-476.
[48] Comp. Ex. V - transcript of Emil van Essen.
[49] Miles at 354.
[50] Miles at 305-306.
[51] Johnson at 465-466, Gaiber at 521.
[52] Johnson at 465, Miles at 305-306.
[53] Johnson at 473-474.
[54] Michel at 285-286.

commission-splitting arrangement.[55] At one point club members had contemplated leaving Refco and opening accounts with another FCM.[56] The club had account opening forms from FCMs other than Refco.[57] And finally, when the club requested that a Refco representative be stationed at the club premises on a full-time basis, Refco refused to make such an arrangement.[58]

An examination of the factors tending to show an agency reveals that such factors lend little support to a finding of an agency relationship in this case. With respect to the fact that the club used Refco forms and traded through Refco, club member interaction and discussion explains how Refco came to be the broker of choice. Moreover, Refco sent forms pursuant to (what it thought was) specific customer requests. Also, any benefit Refco derived from the trading was the same benefit any broker receives from any trading, namely commissions. This was not a campaign to recruit customers. As for the fact that members of the club helped people complete the forms, the record does not demonstrate that such help was made available under authority of Respondents. In fact, Judy Johnson did not even offer to help Complainant Playan complete the forms and refused

[55] Miles at 335, Aiello at 424.
[56] Gaiber at 521, 539-540.
[57] Johnson at 474.
[58] Gaiber at 539-540.

to mail the forms to Refco upon completion.[59] Moreover, Complainant Dennis and Stan Rhea were friends for some time before Rhea spoke with Dennis about the club and Refco.[60] This suggests that Rhea was acting on behalf of Dennis and not Refco when helping Dennis complete the forms. And, whether Rhea may or may not have minimized the importance of the account-opening paperwork has little bearing on the question of whether he was acting on behalf of Refco. Rhea could have just as easily been acting on behalf of the club, rather than Refco, in his efforts to persuade people into trading. Rhea has nothing to gain from an increase in Refco's business, but stands to gain on a personal level from increased membership in the club to which he already belongs and for which he serves as a director.[61] If Refco earns more commissions, Rhea probably does not care. Rhea would probably benefit from his club taking on more members (more precisely, more membership dues and initiation fees). As far as the contact between Gaiber and Refco/Dearborn regarding margin calls is concerned, Gaiber had authority over some accounts and was the person to speak with regarding margin calls.[62] And, as far as the cigar humidor and the visit by Refco/Dearborn employees are concerned, the record is clear

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[59] Johnson at 476.
[60] Dennis at 25.
[61] Rhea at 836, 898.
[62] Miles at 359-360, Gaiber at 532.

that the humidor was a gift to a large block of Refco customers and the visit was a chance to talk business with customers.

When these factors are compared to the factors tending to negate an agency relationship the Court finds that no agency relationship existed between Respondents and the club and/or its members. Therefore, the activities of the club and/or its members, whether fraudulent or not, will not be imputed to the Respondents under the facts proved in this case.

Finally, Complainants allege that Refco and Dearborn fraudulently induced Dennis and Playan into opening futures trading accounts by not providing the requisite risk disclosures pursuant to CFTC Regulations 1.55 and 33.7, and §§ 4b, 4c of the Commodity Exchange Act. This fraudulent inducement is alleged to have caused Complainants' losses.

CFTC Regulations 1.55 and 33.7 require certain disclosures regarding the risk involved in commodity futures and options trading.[63] Specifically, an FCM must provide a standard CFTC warning to the customer who is opening an account, and obtain from that customer a signed and dated acknowledgement that the customer has received and understood the required warning.[64] The issue in the present case is whether Refco or Dearborn provided

[63] CFTC Regulations §§ 1.55 and 33.7. Regulation 33.7 directly governs the situation because this case deals with options on futures, but the two regulations are essentially the same where pertinent to this case.

Complainants with the risk disclosure statement as contemplated by Regulation 33.7 and 1.55.

The Commission has provided guidance as to the method of delivery required by the regulations.[65] In Knight v. First Financial Group an FCM had entered into an agency agreement with a person for the solicitation and opening of customer accounts. While soliciting the customer account application of Complainant Knight, the agent provided a risk disclosure statement. In so doing, the agent minimized the importance of the risk disclosure warning such that the Commission sustained the Complainant's allegation that the FCM had not provided the proper statement.[66] In its opinion the Commission addressed the agency issue and stated that either the FCM had entered into an agency agreement for the purposes of risk disclosure or the FCM had been derelict in its duty to make disclosures regarding the risks in commodity futures trading by allowing the required forms to pass through the hands of a third person.[67] This leaves subsequent tribunals with the principle that an FCM must either have an agency with the person actually giving the risk disclosure form to the customer or the FCM has violated the regulations by not directly

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[64] Id.
[65] Knight v. First Financial Group, Inc., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 26,942 (CFTC January 14, 1997).
[66] Id.
[67] Id.

delivering the risk disclosure statement to the new customer. Thus, as Knight speaks to the issue here, Respondents did not comply with CFTC Regulations.

Although a regulation violation has been demonstrated, Complainants must still prove that the violation proved caused the losses sought to be recovered.[68] Particularly, Complainants must demonstrate that they relied on Refco and Dearborn's failure to comply with the regulation in opening an account. In such a case as this the Complainants enjoy a rebuttable presumption of reliance.[69] The Respondents may rebut the presumption by showing that the disclosure of risks was made to Complainant, or Complainant was otherwise aware of the risks of commodity futures trading.[70]

With respect to Complainant Playan, Respondents have rebutted the presumed reliance. The record is clear that Playan received an actual risk disclosure statement. Playan had as much time as he wanted to examine and complete the paperwork, no one from the club helped him complete the paperwork, and Playan even took the forms home. Disclosure was made to Playan.

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[68] Sher v. Dean Witter Reynolds, Inc., [1984-1986 Transfer Binder] Comm Fut. L. Rep. (CCH) P 22,226 (CFTC June 13, 1984).
[69] Id.
[70] Batra v. E.F. Hutton & Co., Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 23,937 at 34,287 (CFTC September 30, 1987).

With respect to Complainant Dennis the record also supports a finding that the Respondents rebutted the presumed causation.

Dennis is correct, as was Playan, that Respondents did not comply with the CFTC regulations perfectly. However, Dennis must also show causation.[71] Dennis attempts to use the presumptive reliance to show his losses were due to Respondents' errors. But, on the record, Dennis' argument cannot succeed. Dennis acknowledged on cross-examination that the forms provided by Refco/Dearborn were given to him and he signed them after examining them for about two minutes.[72] The Court is not persuaded by Complainant Dennis' testimony that he did not read any of the documents presented to him. On direct examination Dennis claims to have not read anything, but Dennis also testified that he read the documents where he signed them.[73] Additionally, Dennis admitted on cross-examination that he at least glanced at the front page of the documents he signed, but when asked if he had seen the title on the front page of a document Dennis replied, "I don't know". Rather than reply in the affirmative (which would be consistent with his testimony given immediately before this question), or in the negative (which would be consistent with complainant's allegation that he had been hurried through the paperwork) Dennis simply claimed

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[71] Sher, Comm Fut. L. Rep. (CCH) P 22,226 at 29,371.
[72] Dennis at 55.

ignorance.[74] This testimony cuts against Dennis' credibility with respect to the contention that he did not read the documents. The Court finds that Dennis inspected the papers presented to him and signed them. The presumption that Dennis' loss was caused by Respondents' error has been rebutted by Respondents.

Finally, the Complainants seek to impose liability upon Respondents under §4 of the CEA. In this allegation, rather than by way of an agency argument, Complainants attempt to hold Respondents directly responsible for fraud. Complainants argue that by violating CFTC Regulations, or by somehow not disclosing the risks involved in futures trading, Respondents have violated §§4b and 4c of the CEA and fraudulently induced Complainants into opening trading accounts.

Section 4b of the CEA subjects brokers to liability for material misrepresentations and omissions made in connection with commodity futures sales or purchases.[75] In addition to proving omission or misstatement, §4b requires that Complainants show scienter on the part of Respondents and causation of damages.[76] Complainants have not done this.

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[73] Dennis at 29.
[74] Dennis at 55.
[75] Baghdady v. Robbins Futures, Inc., et al., 1999 U.S. Dist. LEXIS 3394, *9 (N.D. Ill. 1999).
[76] Harris v. Connelly, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 25,919 at 41,016 n.6 (January 03, 1994)(citations omitted).

Section 4c prohibits the execution of any transaction in a regulated commodity which is contrary to the CFTC rules or regulations.[77] Therefore, Complainants must show a regulation violation and causation of loss in order to prevail under §4c. Complainants have not done this.

Complainants argue that Respondents had an obligation to make more disclosures than those which are required under the CFTC Regulations (i.e., Respondents are alleged to have made a material omission). True enough, at times brokers may have to provide more risk disclosure than that which is required by the CFTC Regulations. However, this is not such a case.

In Knight, a case in which such an obligation was found, a broker had made risk disclosures pursuant to CFTC Regulations but had also made false representations about futures trading which vitiated or undermined the disclosures made.[78] Basically, the broker had been speaking out of both sides of his mouth (by making the written disclosure and at the same time contradicting or minimizing the risk disclosure). In those circumstances, the

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[77] Commodity Exchange Act, §4c(b). The Court is unsure whether Complainants argue that Respondents violated CFTC Regulation 33.10 (anti-fraud) or 33.7 (risk disclosure) to give rise to a §4c violation. In either case Complainants do not prevail. If Complainants rely on 33.7, they have not demonstrated causation of losses, as discussed, supra. If Complainants rely on 33.10 they must show fraud the same as under §4b of the CEA. Therefore, the discussion of §4b is dispositive with respect to the §4c allegation.

[78] Knight, Comm. Fut. L. Rep. (CCH) P 26,942 at 44,554-44,556.

Commission held, the signed risk disclosure form was insufficient.[79] That is not the case here. No omission or misstatement has been proved.

Respondents here provided risk disclosure statements without making any other representations with respect to the possibility of success or the impossibility of failure. Any (mis)representations that may have been made were allegedly made by members of the club (persons neither associated with, nor agents of, Respondents), not Respondents.[80] Accordingly, even if such false or vitiating statements had been made, Respondents were not obligated to supplement the required risk disclosures because they are not to blame for any such statements. Thus, Complainants argument that Respondents violated §4 of the CEA is not accepted.

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[79] Id.

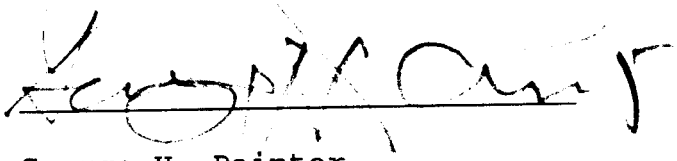
[80] As noted earlier, Complainants have not proven that misrepresentations were made. Furthermore, Complainants have not proven that anyone minimized or vitiated the risk disclosure statements. Playan testified he was told he would have to fill out some forms. (Playan at 72.) That was not an untrue statement, and the Court cannot see how such a statement would minimize the warning in the account opening documents. Moreover, when Dennis was questioned directly by his own attorney, "Why didn't you read them [the account opening forms]?" Dennis replied that Rhea told him to sign the papers to open the account. (Dennis at 29.) This does not necessarily prove that anything was said that could or did vitiate the warnings in the documents.

Conclusion

Based on the previous discussion, the Court concludes that Respondents are not to be held liable for Complainants' losses. Therefore, the complaints are **DISMISSED**.

It is so ordered.

On this 30 day of April, 1999



George H. Painter
Administrative Law Judge

Judicial Intern:

Jason Zajicek