U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, N.W., Washington, DC 20581

Office of Proceedings

ALAN PENSLER, Complainant v. CAROL JO DANNENHAUER, Respondent	)	CFTC Docket No. 05-R069

INITIAL DECISION

Complainant has alleged (1) that respondent failed to monitor his CTA adequately and failed to divulge negative information to him about that CTA; and (2) that respondent did not act in timely fashion to close out his open positions managed by that CTA when he followed respondent's recommendation to fire the CTA and close that account.

The second issue is addressed first because of a procedural issue involving a question as to whether summary judgment for complainant on the issue would be appropriate. In the Order dated June 30, 2006, the parties were asked to address the question of whether liability could be imposed upon respondent as a matter of law based upon her admission that it took several days to close out some positions when he directed her to close the account due to dissatisfaction with the (unaffiliated) commodity trading advisor (CTA) who was managing the account.

Complainant has responded by urging liability for the reasons discussed in the June 30 Order. Respondent contends that any delay in carrying out the closing was authorized by complainant's account agreements. Neither side has urged that an oral hearing would be necessary to decide this issue – or, despite being asked, as to any other issue in this matter.

The evidence in this matter demonstrates that no liability can or should be imposed, and that complainant's claim is based on a simple mistake on his – and later, respondent's – part. Respondent's "admission" was in fact improvident, and it seems she has missed her better defense here: complainant was not affected by any delay. The liquidations of the open positions were reflected on complainant's monthly statement listed by the date on which each liquidation confirmation statement was sent to complainant, so the monthly statement makes it look like his instructions of April 6, 2004, resulted in closing transactions *reported* on April 8 and April 12. The confirmation statements themselves (submitted by respondent), show, however, that the liquidation transaction in each case was actually confirmed as if it had occurred on April 6, 2004,

which was the date on which complainant gave his instructions. The monthly statements reflecting the later dates were in fact misleading and did not reflect the adjusting of the positions to the date when the account was ordered closed. Therefore, the claim of a delay in liquidating his open account is denied.

As to complainant's general failure-to-monitor and nondisclosure contention, the facts relating to his dissatisfaction with respondent are set out adequately in his complaint, on which the discussion here is based. Respondent was an associated person of Lind-Waldock, a division of Refco.[1] In December 2003, complainant sought to open a CTA-managed account pursuant to a Lind-Waldock program that tried to find CTAs appropriate for customers' individualized needs. Respondent was assigned to his account and, after fairly extensive discussions, recommended a CTA referred to in the complaint as V-Tek for a variety of reasons.

Trading was unsuccessful in almost every month the account was open, but complainant accepted respondent's general advice when he opened his account that customers with managed accounts had to be patient to allow for temporary downturns. During that time, respondent told complainant at one point that she was dissatisfied with V-Tek's trading results and that he had missed a major move in the stock index futures market that other CTAs had taken. In February 2004, the unsatisfactory results motivated complainant to open an account managed by a different CTA, and respondent recommended he open an account with a trader identified by complainant as Trader A. He did so.[2] By April, respondent issued a firm recommendation that complainant should close the V-Tek account, and he agreed, sending her an email dated April 6, 2004, directing the account be closed. According to complainant, respondent did not tell her that Lind-Waldock was dropping V-Tek from its list of recommended CTAs.

Over the next few months, respondent helped complainant open accounts managed by three additional CTAs (referred to a Traders B, C and D in complainant's narrative). By March 2005, she told complainant that Trader C was retiring soon and therefore the account with that CTA would be closed. At nearly the same time, respondent recommended closing the account managed by Trader D because he was not making trades yet complainant was still paying a management fee.[3]

By April of 2005, complainant started to wonder if Lind-Waldock had a practice of removing losing CTAs from its list in order to make the overall performance of its customers look better. When he asked respondent, she told him that she knew of only two who had been removed, V-Tek and Trader C. He became suspicious because he found it odd that of the five CTAs recommended to him by Lind-Waldock and respondent, four of them had losing records in his accounts and respondent had recommended closing his accounts with two of them. When he asked why they had dropped V-Tek, respondent told him that V-Tek "had a problem with a website and an off shore fund" (quote of respondent by complainant). She also told him that the problems did not affect his account.

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[1] Due to Refco's filing for bankruptcy, Lind-Waldock was dismissed as a respondent. *See* CFTC Rule 12.24.

[2] The fate of this account is unknown.

[3] Complainant has questioned this recommendation because his research suggested that the commodity industry was in a downturn, and therefore Trader D might have been smart by leaving the money unexposed for longer periods.

Complainant expanded his research to the National Futures Association website, and eventually talked to an NFA enforcement attorney about his concerns about V-Tek. She told him that on September 8, 2004, the Commodity Futures Trading Commission had filed lawsuits against V-Tek, its principal, and all related entities, resulting in the freezing two days later of all of the defendants' assets. When complainant queried respondent about this lawsuit, she gave him a copy of an email from Lind-Waldock's in-house counsel, wherein customers were referred to the NFA and CFTC websites for information.

Complainant contends that respondent's failure to give him correct information when he talked to her in the spring of 2005 is very suspicious in light of the government's lawsuit filed half a year earlier in September 2004. He claims he never would have deposited his money in any new accounts with Lind-Waldock if he had known that they had been associated with an unscrupulous CTA, and contends that respondent and Lind-Waldock "stonewalled" him by concealing the information they did have about V-Tek from him when he made inquiries in late 2004 and early 2005. He also contends that respondent used her position to pressure him in order to raise funds for the CTAs in Lind-Waldock's CTA program. Unsurprisingly, complainant seeks a return of all the money he lost with Lind-Waldock from the beginning.[4]

There is simply no evidence in support of the misuse of position allegation. The narrative presented by complainant actually paints a picture of a customer whom respondent attempted to protect, who continually made recommendations based on her experience and her evaluation of the results he was experiencing. Complainant wanted a managed account, and there is simply no evidence supporting his charge that respondent did anything except carry out his wishes to make recommendations to him.

Likewise, the facts complainant discovered in April 2005 about a CFTC-initiated lawsuit filed in September 2004 do not support even a flimsy inference that respondent was aware of and concealed adverse information about V-Tek all the way back in December 2003 through April 2004, when respondent took affirmative action to protect complainant from V-Tek's trading. While respondent might – *might* – have had negative information about V-Tek that she did not disclose to him in September 2004, complainant has not demonstrated that the failure to disclose this information involved a failure to provide material information in relation to any funds then under management. That complainant claims he would have disassociated himself from Lind-Waldock because of V-Tek's activities long before the lawsuit is of no consequence to his attempt to seek damages here. Had he still been trading under V-Tek's management, and had she failed to tell him while the account was being traded by V-Tek about any negative information he claims she knew in September 2004, he might have at least an arguable case. He does not have one here.

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[4] Complainant does not separately itemize the amount of damages allegedly occurring because he continued trading Lind-Waldock-recommended CTA-managed accounts after September 2004. Accordingly, it is hard to treat that as a serious claim. In addition, a number of claims discussed in the complaint were directed only against the now-dismissed respondent Lind-Waldock and therefore are not considered in this decision, which deals only with issues relating to respondent's personal liability.

Essentially complainant is attempting to make respondent into a guarantor of the CTA she recommended to complainant when he was looking to open a managed account, and to hold her accountable because the CTA later turned out to be "dirty." The Commission has always refused to second-guess trading recommendations made in good faith by commodity professionals to their customers; there is no reason to use a different standard in assessing the legitimacy of referrals to and recommendations of other professionals.

For the reasons stated above, the complaint is DISMISSED.

Dated: August 11, 2006

Joel R. Maillie

JOEL R. MAILLIE
Judgment Officer