UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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KEVIN PHILIP KASEFF, Complainant, v. AMERICAS GLOBAL TRADERS, INC., DAVID JOHN MCINTYRE, and REFCO, INC., Respondents.	*	CFTC Docket No. 01-R031

INITIAL DECISION

Kevin Kaseff alleges that David John McIntyre and Americas Global Traders fraudulently induced him to open an account with false promises that he could paper trade for a reasonable time, and that, as soon as Kaseff opened the account, McIntyre used profit guarantees to pressure him to switch prematurely from paper trading to actual trading. Kaseff seeks to recover the $9,769 that he lost during the thirteen-month life of the account. Respondents filed answers denying any violations or liability.

As explained below, after carefully reviewing the parties' oral testimony and documentary submissions, it has been concluded that Kaseff has established violations by McIntyre and AGT causing $9,769 in damages. This conclusion is based in part on the determination that, although Kaseff (and McIntyre) could not recall the details of many conversations, Kaseff did remember the salient details of the significant conversations when McIntyre convinced him to open the account and when McIntyre decoyed and pestered him into switching from paper trading to actual trading. Also, Kaseff's testimony that McIntyre had lured him to switch prematurely from paper trading to actual trading appeared more plausible when viewed in light of the surrounding factual

circumstances, especially the blatantly false representations on AGT's website promoting its paper trading program, and the speed with which McIntyre convinced Kaseff to switch to actual trading.

Factual Findings

The parties

Kevin Kaseff, a resident of Manhattan Beach, California, is a professional real estate investor, with a Bachelors degree in economics from the University of California at Santa Barbara, and a Masters degree in business administration from Vanderbilt University. On his account application, Kaseff indicated that his annual income was over $100,000, and that his liquid net worth was over $50,000. Kaseff had previously traded stocks and stock options, and had briefly traded options on e-mini futures. [See pages 7-10 of hearing transcript.]

David John McIntyre, an associated person with Americas Global Traders at the relevant time, solicited Kaseff's account and acted as Kaseff's account executive. McIntyre was principally compensated by a $40 share of the commission charged for each option contract bought by his customers. In this connection, McIntyre received approximately $1,940 of the approximately $4,556 in commissions and fees that were charged to Kaseff's account. Before working for AGT, McIntyre had been associated with International Trading Group; Capital Commodities, Inc.; Commonwealth Financial Group; Five Fold, Inc.; Viking Financial Group, Inc.; Bachus and Stratton Commodities, Inc.; Global Futures Holdings, Inc.; American Futures Group, Inc.; American Financial Services, Inc.; and U.S. Securities and Futures Corp. McIntyre currently is not registered.

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Americas Global Traders, located in Boca Raton, Florida, was an introducing broker at the relevant time. AGT terminated its registration as an introducing broker, but remains registered as a commodity trading advisor. [NFA records.]

LFG, LLC was a registered futures commission merchant that acted as the guarantor for AGT during most of the life of Kaseff's account. LFG declared bankruptcy and is no longer registered or in business.

Refco succeeded LFG as the guarantor of AGT, at the tail end of the Kaseff account when the last remaining option positions in the account had an aggregate liquidation value of just $50. Kaseff has entered into a settlement agreement with Refco, in which he agreed to withdraw the complaint against Refco.

The account solicitation

Kaseff learned about AGT from its web site that touted AGT's paper trading program:

> Dear Prospective Futures Trader:
>
> How do you learn to trade futures? Very simple. By Trading. Proper trading tools, research and review are essential, but there is no substitute for experience. As a result, AGT is proud to offer the "Paper Trading Program."
>
> This program allows the beginner to gain practical trading experience and the professional to refine strategies in a real time environment, without risking funds. <u>All brokers are salaried to encourage learning not trading</u>, and there [is] a wealth of resources at your disposal. There are no costs associated with this program and there is no obligation to trade. . . . As a participant in the "Paper Trading Program" you receive: <u>Salaried brokers</u> to assist in paper trading. . . .

[Underlining added for emphasis; reply to Refco's request for production of

Kaseff credibly testified that he called AGT and told McIntyre that he was primarily interested in paper trading T-Bond options for a while until he felt completely comfortable with McIntyre's trading strategies, and that McIntyre assured him that AGT encouraged paper trading. McIntyre then sent Kaseff the LFG account-opening package, which included standard futures and options risk disclosure statements, and a customer contract.[2] And Kaseff promptly reviewed and signed the account-opening documents.

AGT phone records established 18 calls between AGT and Kaseff over the next 15 days. Half of these calls were less than one minute, and all but three were under three minutes.

The first lengthy conversation occurred just after respondents had received the signed account-opening package. During this conversation, McIntyre advised Kaseff for the first time that he should deposit $10,000, so that he would begin actual trading as soon as he became comfortable. Kaseff was not pleased, because AGT had stated that no costs were associated with paper trading, but nonetheless Kaseff agreed to deposit the $10,000.

Pestering and paper trading

The second lengthy call took place soon after respondents had received the $10,000 (about five days after they had received the signed account-opening documents). During this conversation, McIntyre made his first of many attempts to urge Kaseff to skip paper trading and begin actual trading, but Kaseff declined.

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[2] The LFG customer contract contained the sort of exculpatory clause that has been found void and unenforceable. *See First American Discount Corp. v. CFTC*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,227, at 50,424-50,426 (D.C. Cir. 2000).

Kaseff and McIntyre disagree about the number of paper trades discussed by McIntyre, but they essentially agree that McIntyre reported most of the trades as profitable, and also agree that the paper trades were either day trades or short-term trades. In contrast, the actual trades that would be recommended by McIntyre would be of substantially longer duration. Had McIntyre's paper trades more closely resembled the actual trades, the paper trading would have lasted several more weeks and permitted a more meaningful evaluation of that trading.

Kaseff credibly testified that during the entire, albeit brief, period of paper trading, McIntyre repeatedly urged Kaseff to begin trading, because he "was missing out on profits." [Pages 22-23 of hearing transcript.] Finally, during the third lengthy conversation – just fourteen days after respondents had received the account-opening documents -- Kaseff agreed to switch from paper trading to actual trading.

Actual trading

Kaseff approved the first trade, the purchase of one July corn futures contract, which would be stopped out a few days later at a loss of $653. Over the next two months, McIntyre would recommend a series of five Treasury bond option trades. The first two would be the only profitable trades in the account, and would realize a total net profit of $2,089. However, the subsequent T-Bond losses far outweighed the initial profits. As a result, after two months, the trading in Kaseff's account had realized aggregate net losses of $6,023, and generated $3,071 in commissions and fees.

McIntyre then confidently assured Kaseff that he would recoup the corn and T-bond losses by shifting to soybean and currency spreads. Unfortunately, the soybean and currency trades were all losers. When he had closed the account after a little over a year

of trading, Kaseff had lost a total of $9,769, and paid a total of $4,556 in commissions and fees.

Conclusions

Misrepresentations and omissions

The preponderance of the evidence establishes that, in violation of Section 4b(a) and Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10,[3] Americas Global Traders and David McIntyre used a combination of blatantly false and deceptive misrepresentations and omissions to create the false impression that Kaseff would be able to paper trade for a significant amount of time before switching to actual trades. AGT falsely represented that its Paper Trading Program was designed to encourage learning not trading, and falsely represented that its brokers were salaried. AGT's representation that it permitted extensive paper trading by compensating its brokers by salary, rather than commissions, was blatantly false and concealed the reality that AGT compensated its brokers with shares of commissions and thus provided the motivation to minimize paper trading and maximize actual trading. Since McIntyre's commission-based compensation created incentives strongly at odds with the advertised objectives of the AGT paper-trading program to "encourage learning and not trading," the false and deceptive misrepresentation that AGT's broker were salaried was patently material.

[3] Section 4b(a) provides that: "It shall be unlawful . . . for any person, in or in connection with any order to make, or in the making of, any contract of sale of any commodity for future delivery . . . (i) to cheat or defraud or attempt to cheat or defraud such other person; and (ii) willfully to make or cause to be made to such other person any false report or statement. Section 4c(b) provides that: "No person shall . . . enter into or confirm the execution of any transaction involving any . . . option . . . contrary to any . . . regulation of the Commission." CFTC rule 33.10 provides that: "It shall be unlawful for any person directly or indirectly -- (a) to cheat or defraud or attempt to cheat or defraud any other person; (b) to make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof; (c) to deceive or attempt to deceive any other person by any means whatsoever -- in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction."

McIntyre perpetuated this material deception first when he assured Kaseff that he could paper trade until he was comfortable, and second when he inveigled Kaseff into approving actual trades by repeatedly urging that he was missing out on certain profits. The conclusion that McIntyre fraudulently convinced Kaseff to open the account without any intention of honoring his promise to allow Kaseff to paper trade for a reasonable amount of time is amply supported by the totality of respondents' conduct: the fact that AGT disseminated a blatantly false and deceptive statement that AGT's compensation scheme was structured to encourage paper trading; the fact that McIntyre pushed Kaseff to send in $10,000; the fact that, within a few days of the account-opening, McIntyre began pestering Kaseff to begin actual trades with urgent representations that he was missing out on certain profits; the fact that McIntyre reported almost all of the paper trades as profitable; and the fact that the paper trading period was much too short to provide a meaningful opportunity for Kaseff to evaluate McIntyre's trading strategies, because the paper trades used by McIntyre had much shorter durations than did the actual trades that McIntyre would recommend. *See Wills v. First Financial Corporation of America*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,605 (CFTC 1985) (bad faith promise to perform coupled with a breach of the agreement is fraudulent). The intentional nature of McIntyre's fraud is underscored by his deliberate disregard of Kaseff's intention to paper trade for a reasonable time, as well as the speed and persistence with which he urged Kaseff to abandon paper trading.

Kaseff's reliance on AGT's and McIntyre's fraud was established by Kaseff's credible testimony that he told McIntyre that he wanted to paper trade for a reasonable period until he was comfortable with McIntyre's trading style. Kaseff's intelligence,

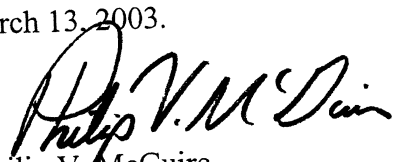
education, and work and investment experience do not bar finding that he reasonably relied on respondents' misrepresentations and omissions to his detriment, especially where McIntyre had assured him that he would not be pressured to abandon paper trading, and where the first two T-Bond trades had been profitable. *See Ricci v. Commonwealth Financial Group, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,917 (CFTC 1996). McIntyre's fraudulent guarantee that he would recoup Kaseff's corn and T-bond losses precludes finding an interruption in the proximate causation of damages from the fraudulent solicitation, and thus the proper measure of damages for Kaseff's fraudulent solicitation is Kaseff's total out of pocket losses: $9,769.

ORDER

Kevin Kaseff has established that David McIntyre and Americas Global Traders violated Section 4b and 4c(B) of the Commodity Exchange Act, and CFTC rule 33.10, that these violations caused $9,769 in damages, and that Americas Global Traders is liable for McIntyre's' violations pursuant to Section 2a(1)(A) of the Act. Accordingly, David McIntyre and Americas Global Traders are ORDERED to pay to Kevin Kaseff reparations of $9,769, plus interest on that amount at 1.22%, compounded annually from May 28, 2000, to the date of payment, plus $50 in costs for the filing fee. Liability is joint and several.

Pursuant to the stipulation of dismissal, the complaint against Refco is DISMISSED.

Dated March 13, 2003.



Philip V. McGuire,
Judgment Officer