



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, N.W., Washington, DC 20581

Office of Proceedings

MULTI GROUP TRANSIT,)
Complainant)
v.) CFTC Docket
CLEARVIEW CAPITAL MANAGEMENT, INC.,) No. 03-R033
Respondent)
_____)

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INITIAL DECISION¹

Multi Group Transit (MGT), the complainant in this matter, is a Georgia-based partnership whose managing partner, Mr. Jones, decided to open an account to engage in foreign currency exchange (forex) transactions. He engaged the services of Clearview Capital Management, Inc., a registered commodity trading advisor and commodity pool operator.² Employees of that firm helped him open a forex account with a London futures commission merchant, IFX. MGT's \$25,000 account was to be directed by Clearview pursuant to a power of attorney granted by Mr. Jones, for which Clearview charged a 15% management fee.

Complainant MGT, represented by Mr. Jones, contends that respondent Clearview agreed to limit the "drawdown" (which MGT defines as the maximum amount of money at risk, and thus the maximum that could be lost) to 25% of the initial \$25,000 deposited. After being informed of the 25% drawdown, however, Mr. Jones decided to continue trading, this time under an alleged agreement with Clearview to limit MGT's losses to a 40% drawdown. According to the complaint, when the losses reached this level, Mr. Jones closed the account. Thereafter, MGT received a check for \$5,882.28 and seeks reparations in the amount of the difference between that sum and the

¹ The facts recited in this decision are taken from the complaint and from the answer filed by respondent, and documents attached to both pleadings. Neither party took discovery or submitted a verified statement. Since the facts necessary to the resolution of this matter are undisputed, there was no need to convene an oral hearing to assess credibility.

² Respondent has not disputed reparations subject matter jurisdiction over its activities. Numerous account documents and the discussions among the participants tend to refer to "trading" in the account as if transactions were occurring on complainant's behalf on an actual commodity exchange. In addition, respondent held itself out to Mr. Jones as CFTC registered and regulated, and required Mr. Jones to sign a document presented as a "required" CFTC risk disclosure document, which, of course, would only be required for transactions subject to CFTC jurisdiction.

\$15,000 that Mr. Jones alleges should have remained at the 40% level “agreed” to by Clearview. The amount of damages MGT seeks is thus \$9,117.72.

The complaint arguably sets out three allegations of wrongdoing: (1) improper inducement to enter into the agreement through a false promise to limit losses to 25%; (2) violation of the 25% agreement when losses exceeded that amount; and (3) violation of the subsequent agreement to limit losses to 40%. All three allegations have no basis in the evidence.

Whether Clearview broke any promises is resolved by determining exactly what promises were made. In this regard, MGT characterizes the 25% and 40% “promises” as agreements to limit losses to that predetermined level. Promises to limit losses would, of course, be illegal in futures-styled instruments where a customer’s total exposure could exceed the minimum funds reserved as a margin requirement. Here, no such promises were made and it is clear that MGT has mischaracterized what Clearview actually represented it would do. The letters and trading agreement submitted with the complaint demonstrate that Clearview promised only to stop trading when the predetermined level had been exceeded during a trading day and thereupon to seek further instructions. Clearview’s fulfillment of that promise is demonstrated by Mr. Jones’ own statement that after being informed of the 25% loss he then decided to keep trading, raising his desired “drawdown” figure to 40%.

Furthermore, the complaint does not tell the entire picture. Respondent’s answer includes emails omitted from the complaint revealing that Mr. Jones determined to continue trading *after* being informed of MGT’s losses beyond 40%, and he even selected a new trading advisor to do so. That action, rather than any breach of promise by Clearview, led to MGT’s additional losses beyond the 40% level. Mr. Jones’ failure to mention his decision to trade beyond 40% suggests an intentional and self-serving attempt to distort the record.

As this discussion reveals, after each drawdown level had been reached, there is no evidence that MGT failed to fulfill promises to suspend trading and to inform MGT. And in each case, Clearview was entitled to follow MGT’s “further instructions” to continue trading. Accordingly, there is no merit to the charges of breached promises to limit losses.

The fraudulent solicitation allegation essentially presents a claim that Clearview had no intent to fulfill its promises. Although, as just discussed, the evidence demonstrates that no breach occurred, that alone would not be enough for MGT to recover damages (assuming that the promise was not illegal). The Commodity Exchange Act does not provide remedies to investors and customers for simple breach of contract, only for “fraudulent breach of contract” – meaning a contractual promise made with no intent to perform. *Wills v. First Financial Corp.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,605 (CFTC May 31, 1985). In this case, there is a dearth of evidence that Clearview had no intent to fulfill its promise to keep MGT informed or any other illegal intent when it entered into its agreements with MGT.

For the reasons stated, no violations having been proven, the complaint is DISMISSED.

May 27, 2004

Joel R. Maillie
JOEL R. MAILLIE
Judgment Officer