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UNITED STATES OF A MERICA
before the
COMMODITY FUTURES TRADING COMMISSION

RDS Group, Inc., Complainant, v. Executive Commodity Corporation, Don Dwight Campbell, Mark Jeffrey Dym, and Thomas Courtland Kennedy, Respondents.	*	CFTC Docket No. 04-R076

INITIAL DECISION

Appearances:

On behalf of Complainant RDS Group, Inc.
Dedrick Straghn, Esq.
26 S.W. 5th Ave.
Delray Beach, Fl. 33444

On behalf of Respondents Executive Commodity Corporation, Don Dwight Campbell, Mark Jeffrey Dym, and Thomas Courtland Kennedy
Francisco O. Sanchez, Esq.
HomerBonner
1441 Brickell Avenue
Suite 1200
Miami, Florida 33131

Opinion of Painter, Administrative Law Judge

PROCEDURAL HISTORY

On July 28, 2004, Complainant RDS Group, Inc., filed a complaint against Respondents Executive Commodity Corporation, an introducing broker, its Associated Person, Don Dwight Campbell, and its Principals, Mark Jeffrey Dym and Thomas Courtland Kennedy. Complainant alleges that Respondents defrauded RDS by soliciting its account with misrepresentations about the selection of positions traded by Executive on its own behalf, and by the churning of its account, generating commissions of $51,250 (142 percent of the $36,094.80 invested) in a mere six weeks. Complainant alleges that Respondents' conduct violated Section 4b(a) of the Commodities Exchange Act ("CEA"), 7 U.S.C. § 6b(a), Section 4c(b) of the CEA, 7 U.S.C. § 6c(b), and Section 33.10(a) and (c) of the Commission's Regulations, 17 C.F.R. § 33.10 (a) and (c), and resulted in damages in the amount of $51,250 (the commissions charged) and attorney's fees and litigation costs.

Respondents' Answers deny all allegations of wrongdoing. In addition, Respondent Dym asserts that he was not registered during the relevant time period, and consequently cannot properly be made a subject of this reparations proceeding. The trial took place in Miami, Florida on January 30, 2006, Parties thereafter filed post-hearing briefs, and Complainant filed a post-hearing reply brief as well. The matter is ready for decision

The findings and conclusions below are based on the parties' reliable documentary submissions and testimony,[1] and reflect the conclusion that RDS was credible in its allegation of total reliance on Respondent's trading choices. The testimony and record establish conclusively

[1] The principal documents and items in the evidentiary record include, but are not limited to RSD's Complaint, Respondents' Answers, Transcript of the January 30, 2006 Hearing before this Court, the Expert Report of Douglas Campbell and the NFA BASIC details for Respondents. The court has reviewed and carefully considered the initial, answering and reply briefs.

that Respondents had *de facto* control over the account at all times and intentionally divested RDS of funds by churning Complainant's account.

Factual Findings

The parties

1. RDS Group, Inc., ("RDS") is a corporation organized under Florida law and located at 26 SouthWest 5th Avenue, Delray Beach, Florida 33444. RDS was formed in 2001-2 for investments in stock and real estate. (Transcript ("Tr.") page 7). RDS' President and Principal Officer is Randy Darnel Straghn ("Straghn"). (Tr. 5). Straghn, the manager of Straghn and Sons Funeral Home, handled the corporation's investments, and had largely invested in stocks and real estate. (Tr. 6). Straghn had twice previously been involved with the trading of commodities, at a very limited level, using visible online accounts with Main Street and Great Pacific Trading Company. (Tr. 7-9). In trading both accounts, Straghn followed the progress in his account online, and appears to have followed broker recommendations. (Tr. 7-9).[2]

2. Ian Betty ("Betty") was a friend of Straghn's brother, playing on the same baseball team (Tr. 12), and had been Straghn's acquaintance for over fifteen years. (Tr. 49). Prior to beginning employment with Executive in July 2003, Betty worked at Enterprise Car Rental. (Tr. 13). Straghn renewed his acquaintance with Betty at Enterprise Car Rental while involved in matters for his primary business, the Funeral Home. (Tr.13).

Betty became an AP with Executive in July 2003 and continued the association through November 2005, and also was associated with Majestic Commodity Corporation from January

[2] In approximately 2001, before opening the Main Street account, Straghn reviewed commodities trading materials by Ken Roberts. (Tr. 57).

2005 to March 2006. Although Betty solicited RDS' trading account from Straghn, Complainant did not name Betty as a Respondent.

3. Executive Commodity Corporation ("Executive") was registered with the National Futures Association ("NFA") as an Introducing Broker ("IB") from February 1999 until June 20, 2006, with NFA ID 0292976, and a business address of 1100 Park Central Boulevard South, Suite 3750, Pompano Beach, Florida 33064. Executive introduced its business to the futures commission merchant ("FCM") International Commodity Clearing, L.L.C., and/or National Commodities Corp. Executive's Principals included Don Dwight Campbell (hereinafter "DDC"), Mark Jeffrey Dym ("Dym"), and Thomas Courtland Kennedy ('Kennedy"), each of whom was also an Associated Person ("AP") with the IB.[3]

On June 20, 2006, the NFA terminated Executive's membership and ordered Executive never again to apply. The NFA had brought two separate actions against Executive – one in 2002, resulting in a 2003 decision, and one in 2004, resulting in the 2006 decision. The NFA brought the actions as a result of Executive's use of deceptive and misleading promotional material, failure to properly classify non-current assets, failure to maintain required minimum net capital, failure to meet anti-money laundering requirements, failure to diligently supervise employees and agents in the conduct of business, failure to uphold high standards of commercial honor and just and equitable principles of trade, for making deceptive and misleading sales solicitations, using a high-pressure approach, and falsification of personal financial information. As a result of the first NFA action, Executive consented to joint and several liability for a $60,000 fine and to entry into the NFA surveillance program. In addition, Executive has been the subject of at least fourteen reparations actions. (NFA BASIC records).

[3] Although Dym withdrew as Executive's Associated Person prior to the relevant time period, he remained a Principal of the company throughout the relevant time period, until he withdrew on December 29, 2005.

4. Don Dwight Campbell during all relevant time periods was an AP and Principal of Executive. His NFA ID was 0301959. Prior to his involvement with Executive, DDC was an AP with American Financial Trading Corp. (April through December 2000). During his tenure with Executive, DDC also was an AP with Majestic Commodity Corp. (October 2004 through December 2005).

On November 12, 2004, the NFA issued its complaint against Executive and its personnel, including DDC. Ultimately, the NFA found DDC responsible for misleading sales solicitations and for a high-pressure approach and ordered him not to apply for NFA membership, associate membership or principal status with any NFA Member until he paid a $12,500 fine. In addition, the NFA required him to tape record all conversations with customers or prospective customers, and to record all APs under his supervision for a six month period. DDC is the subject of at least three reparations actions. (NFA BASIC records).

5. Mark Jeffrey Dym ("Dym"), NFA ID 0286606, during all relevant time periods was a Principal with Executive (February 1999 through December 2005). Simultaneously, Dym was associated with American Financial Trading Corp. (April 1998 through February 1999), Barkley Financial Corp. (October 1998 through January 1999), Barrons Commodity Corp. (AP and Principal) (January 2001 through January 2006), Investors Trading Group LC (June 1998), Majestic Commodity Corp. (AP and Principal) (August 2004 through December 2005), and Worldnet Financial Corp. (March through April 2001).

Dym was explicitly named in both NFA actions against Executive for his general conduct, failure to maintain high commercial standards, and failure to supervise. As a result of the first action, Dym agreed to be jointly and severally liable for a $60,000 fine. In the second action, the NFA alleged that Dym was the primary cause. On June 19, 2006, in the second action,

Dym was dismissed as a Cause Respondent because he was not registered as an AP with Executive during the relevant time period.[4]

In the present action, Dym does not dispute that he was an Executive Principal for the relevant period, but attempts to attribute sole supervisory responsibility to Kennedy. (Respondents' Amended Answer, page 14). Other than the bare assertion that he was not registered during the relevant time period, Respondents have provided no extrinsic evidence that Dym had diminished supervisory responsibilities at Executive.

6. Thomas Courtland Kennedy ("Kennedy"), NFA ID 0259073, was Principal and AP of Executive during the relevant period. He had been Executive AP and Principal since 1999, and left Executive only when permanently barred from trading in June 2006. Previously, Kennedy was associated with Commonwealth Financial Group (September 1994 to March 1995), First Investors Group of Palm Beaches, Inc. (April 1995 to January 1996), Cromwell Financial Services (January 1996 to August 1996), Cambridge Financial Corporation (August 1996 to December 1996), Hartford Financial Group (November 1996 to November 1997), FSG International, Inc. (April 1997 to May 1997), Barkley Financial Corp. (January 1997 to June 1998), American Financial Trading Corp. (December 1996 to February 1999), Concorde Trading Group (June 1998 to September 1998), and as a Principal and AP with Majestic Commodity Corporation (December 2005 until Kennedy was barred from registration and trading pursuant to the NFA's second action in June 2006).

Like the other Respondents, the NFA named Kennedy in both Executive actions. In the 2002 action, the NFA found Kennedy had failed to supervise and ordered the payment of a

[4] Evidently the NFA determined that since Dym was not registered as an AP during the relevant time period, there was not a basis for charging him. It appears that the NFA failed to note Dym's status as a registered Principal during the period of the charged conduct. *See In the Matter of Executive Commodity Corp. et al,* NFA Case No. 04-BCC-015 (decision dated June 20, 2006).

$60,000.00 fine for which Kennedy was jointly and severally liable. In 2006, the NFA again found that Kennedy had failed to supervise and also failed to maintain high standards of commercial honor, and ordered Kennedy: to terminate his NFA membership and pending Principal status, never to apply for NFA membership, and never to act in a supervisory capacity for any NFA member. (NFA BASIC records).

Solicitation and Account Opening

7. Ian Betty, Straghn's old acquaintance, solicited the RDS account. Betty visited Straghn's office, located in Straghn and Sons Funeral Home, for the first time in November 2003, after Betty became an Executive AP. Betty informed Straghn that he was no longer with Enterprise. From November 2003 to the time the RDS account was opened, Betty made telephone calls to Straghn and visited his office on occasion for the purpose of soliciting him to open an account with Executive. Straghn opened the RDS account in April 2004. (Tr. 15-16).

8. Straghn explained that he had little experience with commodity trading. (Tr. 20). In response to Straghn's concern, Betty recommended that RDS trade crude oil options (Tr. 16) on the grounds that Executive had assessed the market and was buying identical crude oil options for its own account, so that Betty knew it would be a good trade for his clients. (Tr.18). In the belief the Executive was risking its money in connection with the same recommendation (Tr. 19, 46), RDS invested $3,000 for three contracts.

9. When filling out the account opening documents, Straghn left sections blank. (Tr. 25). Executive personnel filled in the blanks, and inaccurately overstated Straghn's trading experience and income. (Tr. 25).

The Trades

10. The RDS account was opened on April 14, 2004, with the initial deposit of $3,000 for the proposed crude oil options trade. (Tr.18; Douglas L. Campbell ("Campbell") Preliminary Consulting Report ("Campbell Testimony")).[5] Straghn was aware at the time of the first trade that the commission would be $250 per contract. He requested a reduced commission. Although Straghn and DDC testified that he did receive a reduced commission on one trade, the account statements demonstrate the commissions were not reduced.[6] There is no merit to Straghn's claim that RDS was misled as to the commission charges.

11. The RDS account was active for only six weeks and closed on May 28, 2005. (Campbell Testimony). In that time period the account bought and sold "put" options in Crude Oil, and in addition to the original trading strategy, bought and sold put options in Japanese Yen, Gold, U.S. Treasury Bonds, U.S. Treasury Notes and Euro FX commodities (Campbell Testimony).

12. RDS invested a total of $36,094.80 in the trading account. (Campbell Testimony). Excluding commissions, the profit on the trading in the account was $13,067.50. The commissions charged for the RDS account trading were $51, 250.00. (Campbell Testimony).

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[5] Complainant's expert Douglas Campbell previously served as the NFA Director of Investigations and Investigations/Enforcement Liaison. (Complainant's Motion to Amend the Witness List, appending Campbell resume).

[6] There were discrepancies between the parties' varying testimony and the records relating to the commissions charged by Executive. RDS initially alleged that Executive had promised a commission of $170 per trade (Tr. 22, 29), but subsequently stipulated to notice of the $250 commissions. (Tr. 67). Executive AP and Director DDC asserted that Executive had agreed to the somewhat smaller $170 commission only in the instance of one block of trades – June 03 U.S. T-bond options. (Tr. 66, 111-112). In fact, it appears that RDS was not charged less than $250 in any instance. Executive provided confirmation statements which did not reflect commissions of lower than $250, including the commissions charged on the June 03 U.S. T-bond options. (Executive Account Records).

13. Campbell testified that the life of the positions averaged eight business days. (Campbell Testimony). His testimony is supported by the account statements, and is not disputed by Respondents.

14. The trading in the account was based entirely on the recommendations of Respondent DDC. DDC acknowledged that Executive was a "full service firm" that uniformly provided research, market analysis, obtained markets, and made the recommendations for customer trading. (Tr. 104-105). DDC stated Straghn told him "This is in your hands." (Tr. 120). While claiming that "I really didn't want to make it a decision based solely on me (Tr. 120)," DDC indicated the RDS account trading was wholly and entirely in his own control. *See also* Campbell Testimony.

15. With regard to every trade, Respondents told Straghn that he was buying options identical to what Executive had selected for its own trading. (Tr. 40, 46). Straghn traded in each instance in reliance on the belief that Executive had risked its own funds on the same trades. (Tr. 40, 46). There is no evidence in the record to suggest that DDC traded the RDS account in accord with an account owned by Executive.

16. Straghn did not have online access to monitor his account on a daily basis or to see the breakdown for each trade that he had expected to view as a result of his previous experience. (Tr. 67, 153).

17. Expert Campbell testified that "In the instant case, even though the expiration dates of the options were a month away, most of the positions were liquidated within two weeks of initiation and then positions were re-established in the same or similar commodity option thereby generating a new commission on essentially the same market position." (Campbell

Testimony). Campbell testified that the constant churning of the RDS account, with the resultant excessive commissions, was the sole basis for the account's losses. (Tr. 81).

18. Expert Campbell testified that

> The market forces were helping him (RDS), but in fact the commission charges were such that he ended up a net loser.

(Tr. 81). It is undisputed that the commissions exceeded $51,000, far exceeding the $36,000 invested by RDS. (Executive account records; Campbell Testimony).

19. At trial, in explaining his continuous and short-term modification of RDS' position, DDC testified that stop losses were placed on "every single trade" in the RDS account, admitting that "our policy at the time was to place stops on these positions." (Tr. 110). DDC specifically acknowledged that the stop losses shut out RDS' positions in crude oil (Tr. 111), US bonds options (Tr. 113), and Euro currency (Tr. 118).

20. Executive Principal Kennedy testified as to the prevalence of stop orders in the RDS account, and the reason for Executive's consistent and routine practice of using stop orders:

> Also, in regard to stops, most of the options do expire worthless, and I've always said if the market is going to go against you, I'd rather have the client at least get out with half of the premium or close to half to at least have some kind of safety net instead of having options, you know, expire absolutely worthless.

(Tr. 145). Acknowledging the effect of the stop orders on RDS' account, Kennedy rationalized:

> The stop is real simple. The market just went against them. It was unfortunate but, you know, again, I'll point to the stops.

(Tr. 145).

21. There is no probative evidence in the record to suggest that Straghn was informed of the use of stop orders on his account.

22. Betty received commissions on the RDS trades that he brokered and on the trades brokered by DCC. (Tr. 88).[7] DDC testified that he received twenty two and a half percent of the commissions from the RDS course of trading. (Tr. 124).[8] DDC indicated that Betty received twenty percent of the commissions from RDS' trades. (Tr.124).

23. Expert Campbell concluded

> The account paid 142% of its net investment in commissions in only six weeks time. Based on the recommendations of the ECC (Executive) sales personnel, numerous commodities were utilized as the sales tools, and RDS followed the recommendations of the ECC sales staff. In and Out trading occurred and the average time a position was held was approximately 8 trading days before old positions were liquidated and new positions established. The indicia of churning, as stated in the precedent cases before the CFTC and NFA are present in this case.

(Campbell Testimony, Summary).

24. After hearing Respondents' characterizations of the stop orders as the operative "market forces" that caused RDS' losses, Expert Campbell rejected the characterization, testifying:

> He (Straghn/RDS) actually made money in the market, but the commission losses were, the commission charges were such that he lost a net of $36,000.....I did see that in their answer that the market forces caused the loss, and I would dispute that. I would say the commissions were the losses in the account. The market forces were helping him, but in fact the commission charges were such that he ended up a net loser.

(Tr. 80-81).

25. There is insufficient evidence on the record to find fraud in the solicitation and opening of the account.

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[7] DDC testified that Betty's share of the commissions was approximately $7,500.00. (Tr. 138).
[8] DDC testified that his own share of the commissions was approximately $9,500.00. (Tr. 125).

26. This court finds that it was the excessive commissions generated by Respondents' elected course of trading, and not market forces, which caused the RDS account to lose more than the $36,000 invested by RDS.

DISCUSSION

The cumulative credible evidence establishes that:

(A) Straghn/RSD was not a sophisticated investor capable of evaluating options data or planning an aggressive options trading strategy;

(B) In accordance with all of the credible evidence, and the testimony of all the parties, Respondents controlled the trading of the RDS account;

(C) In violation of CEA section 4c(b), 7 U.S.C. § 6c(b), and Commission Regulation 33.10, 17 C.F.R. § 33.10, Respondents churned the RDS account, using in and out positions in a short term period, in a course of trading designed to generate commissions far exceeding Complainant's investment and any possible profits to the account;

(D) Executive is liable for the conduct of DCC pursuant to Section 2(a)(1)(B) of the CEA, 7 U.S.C. § 2(a)(1)(B);

(E) As supervisors, Respondents Kennedy and Dym are controlling persons subject to Section 13(b), 17 U.S.C. § 13c(b), responsible for their oversight failures related to the churning violations.

A. Respondents' Churned the RDS Account for the Sole Purpose of Generating Commissions

Specifically relating to options, Commission regulation 33.10 provides

> 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 record thereof; (c) to deceive or attempt to deceive any other person by any means, whatsoever – in connection with an offer into, the entry into, the confirmation of, the execution of, or the maintenance of any commodity option transaction.

When a broker who controls a customer's account trades the account excessively for the purpose of generating commissions, without regard to the customer's interest, the broker has churned the customer's account. *Fields v. Cayman Associates, Ltd.,* [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,688 at 30,928 (CFTC 1985) *citing Smith v. Siegel Trading Co.,* [1980-1982 Transfer Binder] Comm. Fut. L. Rep. ¶ 21,105 at 24,452-53 (CFTC 1980). Consequently, in assessing RDS' claim, the court examines whether Respondents controlled the RDS options account, whether they traded his account excessively, whether the trading strategy or pattern of options trading was intended to generate commissions, and whether the strategy legitimately served RDS' trading objectives.

The credible evidence demonstrates that Respondents excessively traded the RDS options account, generating more than $51,000 in commissions on a $36,000 investment in substantially less than two months. As accurately assessed by Complainant's expert, "The indicia of churning, as stated in the precedent cases before the CFTC.....are present in this case." Campbell Testimony.

1. RDS was not a Sophisticated Commodities Trader

Respondents have attempted to paint RDS as a sophisticated commodity trader by virtue of Straghn's very modest prior trading commodities trading experiences. The court does not agree that this limited experience rendered RDS "sophisticated."

Both of RDS' prior trading experiences provided online daily account analysis and monitoring and at least one of the accounts was traded entirely pursuant to broker direction. (Tr. 8, 9-10, 11, 45, 48-49). Straghn described his inadequate knowledge of commodities trading:

> I know what a call and put is for instance, you know, but as far as the other, how you calculate contracts, you know, I don't have no knowledge of that.

Tr. 7.

The court finds the Funeral Home director's testimony concerning his absence of relevant knowledge to be credible, and does not find that his limited previous online trading experiences pursuant to the advice of brokers rendered him "sophisticated" within any meaning of the word. Straghn/RDS was "not a sophisticated investor, irrespective of his limited trading experience in commodities." *Skinner v. Gombos International,* 2000 W.L. 155993.[9]

2. It is Undisputed that Respondents Controlled the Trading for the RDS Account

Respondent DDC explicitly acknowledged that he controlled all the trading in the RDS account, affirming that he made all the recommendations and that Straghn accepted them without further discussion. While DDC claimed that he didn't want to make every decision based "solely

[9] *Cf. Violette and Violette v. Kaiser, Nimerov, Lake Futures, Ltd., Stellaris Futures L.P. and Lit Division of First Options of Chicago, Inc.,* 1996 W.L. 729303 ("he had been trading commodity contracts for over a year, which supports the conclusion that he was a relatively experienced and sophisticated investor.").

on me,"[10] he acknowledged that in fact the decisions were made wholly on his say so. Moreover, he admitted that since Executive was a "full service firm," his advisory services and recommendations were offered in every instance, with each Executive customer. (Tr. 105).

A finding of control is "not dependent on the account being formally labeled discretionary but is based rather on who in fact was making the decisions." *Siegel Trading Co., supra, citing Newberger, Loeb & Co., Inc. v. Gross,* 365 F. Supp. 1364, 1371 (S.D.N.Y. 1973), citing *Hecht v. Harris, Upham & Co.,* 283 F. Supp. 417, 432-33 (N.D. Cal, 1968), *mod. as to damages,* 430 F. 2d 1202 (9th Cir. 1970). There is no dispute that, in this instance, Respondents made all the decisions, and RDS deferred to the Respondents' choices.

The absence of a written control agreement doesn't foreclose the finding that Respondents' controlled the account. *Siegel Trading Co., supra.* Instead, the assessment of control is based on (1) a lack of customer sophistication; (2) a lack of commodity trading experience on the part of the customer and a minimum of time devoted by him to his account; (3) a high degree of trust and confidence reposed in the associated person by the customer; (4) a large percentage of transactions entered into by the customer upon the AP's recommendation; (5) the absence of prior customer approval for transactions; and (6) customer approval for transactions that is based on inaccurate or misleading information provided by the AP. *Siegel Trading Co., supra, citing Carras v. Burns,* 526 F, 2d 251 (4th Cir. 1975). Based on the high degree of trust Straghn placed in his Executive brokers, his lack of sophistication with regard to trading commodities, and the admissions of DDC and Kennedy, there can be no question but that Respondents had *de facto* control of the trading in the RDS account.

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[10] *See* Tr. 120.

3. Respondents Traded the RDS Account Excessively for the Sole Purpose of Generating Commissions

In the context of futures trading, the indicia of churning include high commission to equity ratios; high percentages of day trades, a broker's departure from a previously agreed upon trading strategy, trading in an under-margined account, and reestablishment of a previously liquidated position in the same or a related futures contract without any apparent trading strategy. *In the Matter of Murlas Commodities, Inc., et al.,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,485 (CFTC 1995) *citing In re Lincolnwood Commodities, Inc.,* [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 at 28,251. Proof of all the listed indicators is not required to make a finding of excessiveness. *Ibid.*

When analyzing options contracts, the precedents for identifying excessive trading may differ. *Hinch v. Commonwealth Financial Group, Inc.,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,056 (CFTC 1997), *citing Johnson v. Don Charles & Company,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,986 at 27,624 n.5 (CFTC 1991). In the context of options contracts, the Commission has focused particularly on the level of commissions charged, particularly once the commissions amount to approximately forty percent of the total investment, demonstrating "facially excessive trading." *Hinch, supra.* At a commission to equity ration of 142 percent, Respondents' churning of the RDS account far surpasses the excessive trading ratio identified in *Hinch.*

Although not dispositive, a monthly commission to equity ratio in excess of 18 percent also may be indicative of churning. *In re Vaughn,* 2002 WL 272210, *citing In re Lincolnwood Commodities, Inc., of California,* [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH)

¶ 21,986 (CFTC Jan. 31, 1984).[11] In the present case, the monthly commission to equity ratio is approximately 100 percent. In other words, Respondents elected a course of trading that would have required RDS to make the unattainable profit of 100 percent in each month in order to pay for the related commissions.

Complainant's expert Campbell has concisely made the core analysis in this case. As previously cited,

> The account paid 142% of its net investment in commissions in only six weeks time. Based on the recommendations of the ECC (Executive) sales personnel, numerous commodities were utilized as the sales tools, and RDS followed the recommendations of the ECC sales staff. In and Out trading occurred and the average time a position was held was approximately 8 trading days before old positions were liquidated and new positions established. The indicia of churning, as stated in the precedent cases before the CFTC and NFA are present in this case.

(Campbell Testimony, Summary). (Emphases added). The trading of the RDS account, with 142% of the investment paid in commissions, decision-making placed entirely in Respondents' hands, and the short term establishment and re-establishment of related positions, meets all the requirements for this court's finding of excessive trading.

Respondents' defense that Complainant allegedly authorized "stop orders" is contradicted by the more credible Complainant, and unsupported by any credible evidence on the record. In any event, the record does not clearly document either the imposition or effect of stops. In this case, Respondents' admittedly customary "protective" practice of imposing stop orders – if applied at all -- appears to be no more than a methodology for generating commissions -- the quintessential function of churning.

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[11] The court is not electing a "bright line approach" to the 18 percent indicator, but instead finding that however Respondents may allege that they viewed Complainant's trading objectives, they had wholly turned their backs on their customer's financial interests. *See In re Murlas, supra, citing Fields, supra, at 30,929. See also Gatens v. International Precious Metals Corp.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,636 at 30,709 (CFTC June 18, 1985).

3. Executive is Responsible for the Acts of its APs

DDC, and, indeed, Ian Betty, were APs acting within the scope of their employment when they solicited RDS' account and churned it, entering and exiting positions on an almost weekly basis, and generating commissions of 142 percent of Complainant's investment. Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), provides that the "act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment shall be deemed the act, omission or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person." Consequently, Executive is liable for the full scope of its employees' conduct.

4. Executive's Principals Kennedy and Dym Failed to Adequately Supervise their Employees in Violation of CEA Section 13c(b)

Respondent Kennedy acknowledged that he had supervisory responsibility for the trading at Executive's customers (Tr. 141), and that the imposition of the stop orders improperly used in this case was Executive's unvarying practice. (Tr. 145). Dym, on the other hand, suggests that he had no supervisory responsibilities at Executive despite his status as Principal. (Respondents' Amended Answer, page 2). However, there is nothing on the record to support Dym's claim that he had no authority to supervise Executive's employees or practices, and his uninterrupted status as Executive's Principal would indicate that he had the authority he disavows.

A controlling person may be held liable pursuant to CEA Section 13(b), 7 U.S.C. § 13c(b), either when he has failed to act in good faith or has knowingly induced the violations. *In*

the Matter of GNP Commodities, Inc., Greenspon, Furlett and Monieson, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,216 (CFTC 1992), *aff'd in part and modified sub nom. Monieson v. CFTC,* 996 F. 2d 852 (7th Cir. 1993), *citing In re Spiegel,* [1997-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103 at 34,766 (CFTC 1988). A fundamental purpose of Section 13(b) is to allow the Commission to reach the controlling individuals of the corporation and to impose responsibility for violations of the Act. *In re JCC, Inc.,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,578, *affirmed, JCC, Inc. v. Commodity Futures Trading Commission,* 63 F. 3d 1557 (11th Cir. 1995).

To support a finding that a controlling person knowingly induced conduct which violates the Act, "the Division must show that the controlling person had actual or constructive knowledge of the core activities that constitute the violations at issue and allowed them to continue." *JCC, Inc., v. Commodity Futures Trading Commission, supra,* 63 F. 3d at 1568. Executive's unvarying and congenital practice of imposing stop orders reflects "constructive knowledge" of the "core activities that constitute the violations at issue," since it is Executive's routinely mandated stop orders that Respondents themselves claim caused the unquestionable and unsupervised churning that occurred in this case. Thus, Respondents Kennedy and Dym may be held liable for inducing the violative conduct in question as well as for their failure to provide the good faith supervision required.

CONCLUSIONS OF LAW

The credible evidence of record, described in the Findings of Fact and Discussion, above, mandates the following conclusions of law:

(1) Respondent DDC churned the RDS account in violation of Section 4c(b) of the CEA, 7 U.S.C. § 4c(b), and Commission Regulation 33.10(a), 17 C.F.R. § 33.10(a);

(2) Respondent Executive is liable pursuant to Section 2(a)(1)(B) of the Act for the acts of its agents acting within the scope of their employment; and

(3) Executive Principals Kennedy and Dym are liable as "controlling persons" with regard to the violations reviewed here pursuant to Section 13(b) of the CEA.

The "usual measure" for damages in consequence of churning violations is commissions and fees charged. *See Hinch v. Commonwealth Financial Group,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,056 (CFTC 1997). *See also Pacific Trading Group v. Global Futures & Forex, Ltd.* 2004 WL 2591468. Respondents charged commissions of $51,250. (Campbell Testimony). Consequently, Complainant is entitled to judgment in that amount.

Complainant requests attorney's fees and costs. Respondents' counsel did not demonstrate bad faith or vexatious conduct during the course of the hearing in this matter, in which Respondents sought to defend their conduct of the RDS account solicitation and trading. Consequently, attorney's fees will not be awarded. *See, e.g., Sherwood v. Madda Trading Co.,* [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,728 at 23,023 (CFTC Jan. 5, 1979); *Brooks v. Carr Investments, Inc.,* [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,027 at 53,457 (CFTC May 9, 2002). Complainant is entitled to the cost of initiating the proceeding.

ORDER

Respondents are ordered to pay RDS $51,250.00, the commissions charged on Complainant's churned account, plus interest at the rate of 1.30% per annum from May 28, 2004 until this award is paid in full, and the $250.00 filing fee. Respondents are jointly and severally liable for payment of this judgment.

Issued this 26th day of July 2006,

George H. Painter
Administrative Law Judge

Judith Hutchison
Attorney-Advisor