UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

COMMODITY FUTURES TRADING COMMISSION	)	
Plaintiff,	)	Case No. 05-80592 CIV-Hurley
v.	)	
CHRISTOPHER SMITHERS, PROSPERITY CONSULTANTS, INC., and JACK SMITHERS,	)	
Defendants	)	

~~(Proposed~~) Final Judgment of Permanent Injunction

On June 29, 2005, the Commodity Futures Trading Commission ("Commission") filed a complaint in this matter alleging *inter alia*, that Defendants engaged in fraud in violation of §4*o*(1)(A) & (B) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 13a-1 (2002). Based upon Defendants' failure to file an Answer in this Action, the Court entered a Final Default Judgment on the issue of liability against all Defendants on October 2, 2006.

The Court has carefully considered the Complaint, the allegations of which are well-pleaded and hereby taken as true, the Application and other written submissions of the Commission filed with the Court, and all oppositions thereto, and being fully advised in the premises, hereby

ENTERS findings of fact and conclusions of law finding Defendants liable as to all violations as alleged in the Complaint. Accordingly, the Court now issues the following Final Judgment of Permanent Injunction against Defendants.

I. FINDINGS OF FACT

A. The Parties

Plaintiff Commission is an independent federal regulatory agency charged with the administration and enforcement of the Act, 7 U.S.C. §§ 1 et seq., and the regulations promulgated thereunder.

Defendant Christopher Smithers resides in Florida. Christopher Smithers was registered with the Commission as an Associated Person of nine different introducing brokers between 1994 and 2001. Christopher Smithers has not been registered in any capacity since 2001 and is barred from registration by a Final Judgment and Order of Permanent Injunction and Equitable Relief entered by the U.S. District Court for the Southern District of Florida in Commodity Futures Trading Commission v. Matrix Trading Group, Inc., David Wedeen, and Christopher Smithers, Civil Action No. 00-8880-CIV-ZLOCH (S.D. Fla. Oct. 3, 2002) (the "2002 Order").

Defendant Jack Smithers is believed to reside at 13 Lochwick Rd., Palm Beach Gardens, Florida 33418. Jack Smithers was registered with the Commission as an Associated Person of three different firms for part of 2000, part of 2001, and from 2003-2004. Jack Smithers is the father of Chris Smithers.

Defendant Prosperity Consultants, Inc. ("PCI") was incorporated in the State of Florida on June 10, 2002. Its principal place of business was located at 11380 Prosperity Farms Rd., Palm Beach Gardens, Suite 110B, Florida. Incorporation documents identify Christopher Smithers as a director of the company. PCI was dissolved on September 19, 2003.

B. A Previous Court Order Prohibits Christopher Smithers from Engaging In Any Commodity-Related Activity

On October 3, 2002, the United States District Court for the Southern District of Florida issued a Final Judgment and Order of Permanent Injunction and Equitable Relief against Chris Smithers and others. In the 2002 Order, Christopher Smithers was found to have fraudulently solicited clients in violation of certain provisions of the Act and Regulations. Specifically, the court found that Christopher Smithers committed fraud by making misleading statements in his telephone sales solicitations which: (a) misrepresented the likelihood of profiting from the purchase of commodity options; (b) failed to adequately disclose the risk inherent in the purchase of commodity options; and (c) misrepresented and overstated the performance record of Smithers' firm to clients. In addition, the court found that Christopher Smithers committed similar violations at a firm where he was previously employed.

The 2002 Order, among other things, permanently enjoined Christopher Smithers from engaging in any commodity-related activity, including the solicitation of new clients, and from trading commodity futures and options on futures on behalf of any other person or entity.

C. Chris Smithers Has Continued To Solicit Clients, Trade Client Funds, and Engage In Commodity-Related Activity in Violation of the 2002 Order

Solicitation and Trading Activity at PCI

From June 2002 through July 2003, Defendant Christopher Smithers solicited approximately fifteen clients to invest in commodity futures through PCI, a consulting firm that Christopher Smithers claimed to own with his father, Jack Smithers. During this time, Christopher and Jack worked at PCI's principal office at 11380 Prosperity Farms Rd., Suite 110B, in Palm Beach Gardens, Florida. From June 2002 until October 2002, clients deposited $149,800.61 with PCI for investing in commodity futures.

After October 2002, when the 2002 Order was issued, and through July 2003, Chris Smithers continued to solicit clients to invest in commodity futures through PCI. All the while, Jack Smithers participated with Christopher Smithers in managing the client accounts and soliciting clients' funds. Christopher and Jack Smithers held themselves out to clients as a team in which Jack provided much of the financial analysis to assist Christopher Smithers with trading decisions and managing client accounts. Christopher Smithers told at least one client that because he lost his license, Christopher had to trade through Jack Smithers using an on-line account in Jack's name.

Additional Solicitation and Trading Activity by Christopher and Jack Smithers

In addition, from May 2003 until March 2004, Defendant Christopher Smithers solicited at least 22 clients to invest in commodity futures contracts by opening trading accounts that he would trade and manage personally. Christopher Smithers solicited at least one client through the local chapter of Alcoholics Anonymous ("AA"). Christopher Smithers earned the trust of this client by serving as his "sponsor" in the AA program.

During the May 2003 to March 2004 time period, Christopher Smithers solicited at least $191,793.75 in funds from the aforementioned 22 clients, two of whom were also clients of PCI, for the purpose of trading futures.

In addition to the $191,793.75 solicited by Christopher Smithers to be traded by him, at least one client was encouraged to open an account with an FCM under his own name that Christopher Smithers, along with Jack Smithers, would manage. Between May and December 2003, this client deposited $170,000 in accounts under his name at two FCMs. Believing that Christopher and Jack Smithers were trading on his behalf and in his best interest, the client shared his on-line passwords with them. Christopher and Jack Smithers accessed, traded, and managed the account on-line. Christopher Smithers occasionally called the FCM, pretending to be the client, to inquire about particular trades.

Christopher Smithers charged one or more clients a 50% commission fee on profits only. In addition, Christopher Smithers told one or more clients that for $300 per week, Jack Smithers would serve as a financial consultant and assist in managing the client's account. One or more clients paid Jack Smithers a consulting fee of $300 per week.

D. Christopher Smithers Misappropriated Client Funds

During the June 2002 through July 2003 time period, Christopher Smithers told most clients to send funds directly to PCI. Christopher Smithers purported to use these funds for S&P e-mini and gold futures contracts. Once received, however, the funds were not used as promised. Instead, client funds were deposited into an ordinary checking account in the name of Prosperity Consultants, Inc. During this time period, PCI bank records indicate that clients deposited $149,800.61 to invest in commodity futures. Of the funds deposited, $113,500 were traded in PCI accounts at a registered FCM, but only between June 2002 and October 2002. The remaining funds were used for either business or personal expenses, meals, or issued in check payments to Christopher Smithers, Jack Smithers or other individuals, or withdrawn as cash.

As a signatory on the PCI account, Christopher Smithers was responsible for the management and movement of funds.

Trading records indicate that aside from the initial month's profit of $1,426 in June 2002, PCI consistently lost money and eventually depleted its account in October 2002. Despite these losses, however, PCI wired $48,083.02 in funds from its trading account to its bank account and distributed only $9,170 to clients as supposed profits or returns on their investment.

During the May 2003 to March 2004 time period, clients were told to send funds directly to Christopher Smithers. Like before, Christopher Smithers purported to use these funds for the purchase and/or sale of S&P e-mini futures contracts. Once received, these funds were deposited into an ordinary joint checking account shared by Christopher Smithers ("Smithers Account"). Of the $191,793.75 in funds received from at least twenty-two clients, only $28,000 was wired to a FCM account in the name of one client. The remaining funds were spent on personal items, meals, gambling, or directed to the defendants. Christopher Smithers withdrew $105,230 in cash and issued payments to Jack Smithers and Camille Smithers, Jack's wife. Some funds totaling $40,975 were returned to clients.

As a signatory on the Smithers Account, Christopher Smithers was responsible for the management and movement of funds.

E. The Defendants Fraudulently Solicited Clients To Purchase Futures Contracts

Misrepresentations and Material Omissions Regarding Past Trading Performance

In his solicitation of prospective clients both at PCI and individually, Christopher Smithers informed clients that he was a trader by profession and that he had been very successful trading commodities in the past, both for himself and for others. Christopher Smithers promised earnings of up to $100,000 per year by investing in S&P e-mini and gold futures contracts and spoke of a trading system he had that guaranteed 80-90% returns.

Christopher Smithers represented to clients that he managed the accounts along with Jack Smithers. Jack Smithers assisted Christopher Smithers in managing client accounts, sometimes holding himself out as a consultant to clients. Jack Smithers routinely provided trading analysis and advice to Christopher Smithers. Jack and Christopher Smithers held themselves out to clients as a team committed to successfully managing client funds.

These representations were false in that:

a. PCI's trading records indicate that aside from one month's profit of $1,426, PCI consistently lost money during the time it traded between June and October 2002;

b. Of the $191,793.75 directly invested with Christopher Smithers between May 2003 until March 2004, only $28,000 was traded and only for the benefit of one client, resulting in a total trading loss.

c. After October 2002, Chris Smithers was prohibited by the 2002 Order from trading commodities or soliciting clients to trade on their behalf because he was found to have committed fraud.

d. Prior to October 2002, Chris Smithers worked for a number of IBs, including Matrix Trading Group, where he was a Principal, Vice President, and Compliance Officer. During the period from July 1998 to July 2000, ninety-two percent of all Matrix accounts lost money, resulting in approximately $3.2 million in client losses.

Christopher Smithers knew the representations set forth above were false or was reckless with regard to their truthfulness.

After October 2002, Christopher Smithers did not disclose that he had been sued by the Commission for fraud, was subject to a permanent injunction prohibiting him from engaging in any commodity related activity either for himself or on behalf of others pursuant to the 2002 Order, and most of his clients at Matrix Trading Group lost money.

To the contrary, Christopher Smithers informed one or more clients that due to a "trading infraction imposed by the CFTC," Christopher Smithers was unable to open an account in his own name, but instructed the client instead to open an account in the client's name that Christopher and Jack Smithers could manage. Consequently, Christopher Smithers knew or was reckless in failing to disclose to his clients the material information set forth above.

Misrepresentations Regarding Existence and Performance of Client Accounts

After clients initially provided funds, Christopher and Jack Smithers, in an effort to conceal the fraud, told clients that their accounts were making money and fabricated trades to indicate trading activity that resulted in large profits. Although Christopher Smithers told clients that they could only sustain minimal losses, Christopher Smithers' trading activity resulted in consistent losses both for PCI trading accounts and the one client account that he managed along with Jack Smithers.

In an effort to prevent clients from learning the truth about their account performance, Christopher and Jack Smithers lied about the clients' ability to access account activity on-line and blamed mismanagement of funds on the FCMs. Christopher and Jack Smithers used trading losses as an opportunity to solicit additional funds by promising the clients they would make-up the loss.

These representations regarding the Smithers' clients' trading accounts were false in that:

a. The Smithers' clients were not making money. Instead any trading that did occur resulted in overall losses. Moreover, the account into which the client funds were deposited was not a trading account, but an ordinary checking account at a Florida bank branch of Fidelity Federal Bank & Trust. Only a portion of client funds were sent to any bank, financial institution, or other facility that would indicate the existence of trading, and those limited funds were sent only on behalf of one client.

b. Fabricated trades are not actual trades, and as such cannot result in large profits. Thus, because the vast majority of client funds were not traded, but were spent on personal living expenses, meals, gambling, or withdrawn in cash, the fabricated trades concealed from the Smithers' clients the actual use of their funds. Some of the funds were also returned to clients as purported returns on investments or a partial withdrawal of funds, in a manner akin to a "ponzi scheme."

Christopher and Jack Smithers knew that these statements were false or were reckless with regard to their truthfulness. Moreover, throughout the relevant time period, Christopher and Jack Smithers failed to disclose to clients that their funds would not be used or managed as promised or that their funds would be used in furtherance of a fraudulent scheme.

For at least one trading account opened by a client in his own name, Christopher Smithers accessed the account on-line without permission, and placed unauthorized trades. On at least one occasion, Christopher Smithers brought an account balance into the negative in a matter of hours, despite representing a positive account performance to the client.

II. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

The Commodity Exchange Act, as amended, 7 U.S.C. § 1 et. seq. (the "Act"), prohibits fraud in connection with the trading of commodity futures contracts and options and establishes a comprehensive system for regulating the purchase and sale of such futures contracts and options. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which authorizes the Commodity Futures Trading Commission to seek injunctive relief against any person whenever it shall appear that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation or order thereunder.

Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2002), in that defendants are found in, inhabit, or transact business in this district, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this district, among other places.

B. Violation of Section 4o(1) of the Act: Fraud By a Commodity Trading Advisor

Section 4*o*(1) of the Act broadly prohibits fraud and misrepresentation by CTAs. Specifically, section 4*o*(1) of the Act makes it unlawful for a CTA to (A) employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) engage in any transaction, practice or course of business that operates as a fraud or deceit upon any client or participant or prospective client or participant by use of the mails or any means or instrumentality of interstate commerce. This section applies to all CTAs whether registered, required to be registered, or exempted from registration. *See* CFTC Regulation 4.25, 17 C.F.R. § 4.25; *CFTC ex rel Kelley v. Skorupskas*, 605 F.Supp. 923, 932 (E.D. Mich. 1985).

Section 4o(1) prohibits both registered and unregistered CTAs from making material misrepresentations and omissions to their clients regarding futures and options transactions. *In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 (CFTC March 16, 1999*), aff'd in relevant part, R&W Technical Services, Ltd. v. Commodity Futures Trading Commission*, 205 F.3d 165, 170 (5th Cir. 2000) (prohibiting fraud by an unregistered CTA who sold trading systems to the public).

To establish a violation of Section 4o(1) (A), the Commission must prove that the defendant acted with scienter. *See In re Kolter*, [1994-1996 Transfer Binder] Comm. Fut. L.

Rep. (CCH) ¶ 26,262 at 42,198 (CFTC Nov. 8, 1994) (*citing Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677-79 (11th Cir. 1988)). Section 4o(1) (A) prohibits a CTA from using the mails or any means or instrumentality of interstate commerce to employ any device scheme or artifice to defraud any client or prospective client.

Unlike Section 4o(1)(A), scienter is not required to prove a violation of Section 4o(1)(B), see *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,701 at 48,315 (CFTC July 19, 1999), *aff'd in relevant part, Slusser v. CFTC, 210 F.3d 783* (7th Cir. 2000), or a violation of Section 4.41(a)(2), *Commodity Trend Serv. v. Commodity Futures Trading Commission*, 233 F.3d 981, 993 (7th Cir. 2000). To establish a violation of Section 4*o*(1)(B) of the Act, the Commission must prove that Chris and Jack Smithers each acted as a CTA, and that these actions operated as a fraud or deceit.

Section 1a(6) of the Act defines a commodity trading advisor as any person who for compensation or profit engages in the business of advising others either directly or through publications, writings, or electronic media as to the value or advisability of trading futures contracts, options on futures contracts, and leverage transactions. 7 U.S.C. § 1(a)(6)(A)(i). As discussed above, Chris and Jack Smithers acted as CTAs because they were engaged in the for-profit business of advising others as to the advisability of trading commodity futures. While acting as CTAs, they made material misrepresentations and omitted material facts including, but not limited to, the misrepresentations and omissions regarding profit guarantees and the likelihood of profiting, past success in trading, and the permanent injunction, which defrauded and operated as a fraud or deceit upon clients in violation of Section 4*o*(1)(A) & (B). In addition, Chris Smithers misappropriated client funds and failed to disclose that client funds would not be invested as promised, also in violation of Section 4*o*(1)(A) and (B). *See Skorupskas*, 605 F.Supp at 932-33.

Defendant PCI, through its agent Christopher Smithers, accepted more than $149,800.61 from at least fifteen clients for the purported purpose of trading in commodity futures. Instead of trading all of the funds, Chris Smithers only traded a small portion and used the remaining funds on personal living expenses, meals, gambling, payments to himself or Jack Smithers, or cash withdrawals. Each fraudulent misappropriation of client funds was knowingly conducted by Chris Smithers, who is a signatory on the PCI Account. Chris Smithers authorized each transaction that resulted in the fraudulent misappropriation of client funds. As a principal, PCI is vicariously liable for Chris Smithers' violation of Section 4o(1)(A) & (B) of the Act pursuant to Section 2(a)(1)(B) of the Act. *See CFTC v. RJ Fitzgerald*, 310 F.3d 1321, 1335 (11th Cir. 2002).

C. Violation of the District Court Order and Section 6c of the Act

As described above, since October 2002, Christopher Smithers has violated and continues to violate provisions of the 2002 Order. Section 6c of the Act, 7 U.S.C. §13a-1 (2002), provides that whenever it shall appear to the Commission that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act, rule, regulation, or order thereunder, the Commission may bring an action in the proper district court of the United States. By virtue of Christopher Smithers' violation of the Order, he has also violated Section 6c of the Act.

D. Violations of Section 4.30 of the Regulations

During the relevant time period, Defendant Christopher Smithers, as a CTA, solicited, accepted and received funds from existing and prospective clients in his own name for the purpose of investing in commodity futures in violation of Section 4.30 of the Regulations, 17 C.F.R. § 4.30.

III. FINAL JUDGMENT OF PERMANENT INJUNCTION

Based on the foregoing the Court finds that unless restrained and enjoined by this Court, the Defendants are likely to continue to engage in the acts and practices set forth in this order that violate the Act and Regulations, and similar acts and practices. Therefore,

IT IS HEREBY ORDERED that:

A. Defendant Christopher Smithers and any other person or entity associated with him, including any successor thereof, shall be permanently enjoined from:

1. engaging in conduct in violation of the 2002 Order, Sections 4o(1) and 6c of the Act, 7 U.S.C. §§ 6o(1) and 13a-1 (2002), and Regulation 4.30, 17 C.F.R. § 4.30 (2004);

2. engaging in any commodity-related activity, including soliciting new clients.

B. Defendant Jack Smithers and any other person or entity associated with him, including any successor thereof, shall be permanently enjoined from:

1. engaging in conduct in violation of Section 4o(1) of the Act, 7 U.S.C. §§ 6o(1) (2002);

2. engaging in any commodity-related activity, including soliciting new clients.

C. Defendant PCI and any other person or entity associated with it, including any successor thereof, shall be permanently enjoined from:

Case 9:05-cv-80592-DTKH Document 39 Filed 10/11/2006 Page 14 of 15

1. engaging in conduct in violation of Section 4o(1) of the Act, 7 U.S.C. §§ 6o(1) (2002);

2. engaging in any commodity-related activity, including soliciting new clients.

SO ORDERED, at West Palm Beach, Florida on this 3rd day of Nov., 2006, at 8:30 a.m./~~p.m.~~

Honorable Daniel T.K. Hurley
UNITED STATES DISTRICT JUDGE

Presented by:

John W. Dunfee
Bar #A5500947
Commodity Futures Trading Commission
Division of Enforcement
1155 21st Street, N.W.
Washington, D.C. 20581
(202) 418-5396
(202) 418-5531 (fax)
jdunfee@cftc.gov

cc. John Dunfee, Esq.
Christopher Smithers, pro se
Jack Smithers, pro se
Prosperity Consultants, Inc.
c/o Christopher Smithers