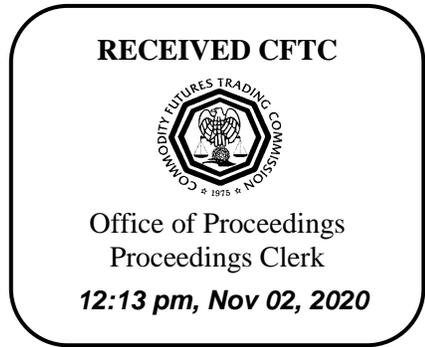




U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of Proceedings



Wesley M. Jarrell, II,	*	
	*	CFTC Dkt. No. 18-R027
	*	
Complainant,	*	Served electronically
	*	
v.	*	
	*	
Robert Lee Spears, Jr., and	*	
Lakefront Futures & Options LLC,	*	
	*	
Respondents.	*	
	*	

INITIAL DECISION

Before: Kavita Kumar Puri, Judgment Officer
Commodity Futures Trading Commission
Washington, D.C.

Appearances: James R. Cummins, Esq.
Maxwell J. Hopkins, Esq.
Cummins Law, LLC
Cincinnati, OH
For Complainant

William J. Bolotin, Esq.
Funkhouse Vegosen Liebman & Dunn Ltd.
Chicago, IL
For Respondent

On June 12, 2018, Wesley M. Jarrell, II, brought a reparations complaint against Brian Miller, Robert Lee Spears, Jr., Optimized Trading, LLC (Optimized), Striker Securities, Inc. (Striker), Lakefront Futures & Options LLC (Lakefront),

and R.J. O'Brien & Assocs., LLC (R.J. O'Brien) for fraudulent solicitation of Jarrell's investment and unauthorized trading in his account. Jarrell originally sought to recover \$65,887.16 in damages (plus legal fees, costs and interest) against those named above. However, the only remaining claim is for fraudulent solicitation against Spears and Lakefront, and the damages at issue are \$45,606.77. For the reasons discussed below, I find that Spears did, as an agent and co-owner of non-party Optimized, fraudulently solicit Jarrell's investment. However, because Optimized is not registered and falls outside this Court's jurisdiction, I find this Court lacks jurisdiction over Spears for this misconduct.

I. Procedural History

Jarrell brought his complaint against the Respondents described above on June 12, 2018. On July 5, 2018, this Office sent a deficiency letter with respect to the Complaint, informing Jarrell that neither Optimized nor Miller were registered, and that there was no direct relationship alleged between Complainant and either R.J. O'Brien or Striker with respect to the wrongdoing. In response, on August 2, 2018, Jarrell dropped his claims against Striker, R.J. O'Brien, and Miller, but retained his claims against Lakefront, Spears and Optimized. The Respondents served their Answers, and this case was forwarded to my docket for adjudication on December 20, 2018.

During discovery, Complainant filed several motions to compel on July 26, 2019. To dispose of these motions expeditiously, I scheduled a telephonic discovery hearing for September 6, 2019. During that hearing, the parties agreed to meet and

confer with respect to their outstanding discovery disputes. In addition, I ordered briefing on the issue of whether this Office has jurisdiction over Optimized, which has never registered with the Commission. That jurisdictional briefing was completed, and on November 1, 2019, I dismissed Optimized as a Respondent in the case because, although there were compelling allegations suggesting that Optimized should have registered as a CTA, Optimized was not registered and I therefore did not have jurisdiction over it pursuant to 7 U.S.C. § 18(a)(1). Order (Nov. 1, 2019).

Discovery concluded and the parties submitted their prehearing memoranda and the affirmative testimony of the following witnesses to be made available for cross-examination during the hearing: (1) Complainant Jarrell; (2) Respondent Spears; (3) Johnathan L. Marcus, President of Respondent Lakefront; (4) Brian Miller, Manager of Optimized; and (5) Walter B. Gallwas, President of Striker. During the February 7, 2020 prehearing conference, we went over hearing procedures, including the sequestering of certain witnesses from the Respondents.

I also asked Jarrell to clarify his damages calculation with respect to his unauthorized trading claim, because the evidence in the record tended to show that the unauthorized trading saved Complainant from large losses, and no damages accrued to him as a result. Feb. 7, 2012 Tr. at 8:21-11:12. Jarrell conceded at the prehearing there was no evidence that he was actually damaged by the purportedly unauthorized trades. *Id.* However, to give Jarrell additional time to consider the issue, I ordered Jarrell to file a submission either abandoning the unauthorized trading claim or supporting his theory of damages for that claim. In a statement

filed February 12, 2020, Jarrell abandoned the unauthorized trading claim. That left only the issue of fraudulent solicitation to be tried at the merits hearing.

The hearing occurred on February 20, 2020 and only Messrs. Jarrell, Spears and Marcus were cross-examined. Complainant waived his opportunity to cross examine Messrs. Miller and Gallwas (neither of whom was a party to the proceeding). The parties filed post-hearing briefs on April 3, 2020.

On July 17, 2020, I ordered additional briefing on whether, if I found that Spears fraudulent induced Jarrell's investment solely as co-owner of non-party Optimized and not as an AP of Lakefront, I could hold either Spears or Lakefront liable in this reparations proceeding. That briefing was completed on September 18, 2020. Through discovery, regular procedural hearings, and the merits hearing, there is a substantial record containing documentary and testimonial evidence, as well as legal argument. I have carefully considered all of that evidence and those arguments in rendering this decision.

II. Summary of Facts

The relevant parties and non-parties are as follows:

Complainant Wesley M. Jarrell: Complainant Jarrell resides in Cincinnati, Ohio. He attended law school and was employed as an attorney, but now works as a real estate investor. LinkedIn Message from Jarrell to Miller (Optimized Answer (Sept. 13, 2018), Ex. A). He invested a total of \$78,074 between June 2017 and January 2018 in an account held at R.J. O'Brien (a Futures Commission Merchant), introduced by Lakefront (an Introducing Broker). That account's transactions were

entered by Striker Securities, an Introducing Broker, pursuant to a letter of direction Jarrell signed for Striker to implement the trades recommended by Optimized's OPT_ES_Multi_Model_V3 trading system (Trading Program). At the time Jarrell opened his account, his annual income was between \$50,000 and \$100,000 and he had a net worth of \$100,000-\$500,000. R.J. O'Brien Account Application [Lakefront 0041].¹ He opened this account with a "speculative" trading objective. *Id.* [Lakefront 0042].

Respondent Robert Spears. Spears is a named Respondent, who resides in Charleston, West Virginia. He has been registered as an Associated Person (AP) and Associate Member of Lakefront from December 30, 2015 to present day, and also served as its Branch Manager. *See* Answers to Compl. Requests for Admissions (RFAs) 1-3 (Mar 31, 2019); *see also* NFA Basic, available at <https://www.nfa.futures.org/BasicNet/basic-profile.aspx?nfaid=upvL8%2BClf88%3D>. He also owns 40% of Optimized. Spears received compensation for Jarrell's Optimized and Lakefront accounts. Lakefront & Spears Answer at 2 (Sept. 12, 2018).

Lakefront. Lakefront is a named Respondent, and a registered Introducing Broker (IB) in Chicago, Illinois. It is co-owned by Jonathan Marcus and Nick Leblebajian. Lakefront supervised Spears within the scope of Spears's employment, and Spears acted as its agent. Answers to Compl. RFAs 4, 5, 7 (Mar. 21, 2019).

¹ Lakefront produced documents bates stamped Lakefront 0001 through 0122 on March 20, 2019 as part of its initial responses to Jarrell's requests for production. All production bates numbers are cited in this Initial Decision in brackets.

Lakefront compensates its APs, including Spears, by paying commissions. Answers to Compl. Interrogatory 9 (Oct. 15, 2019).

Striker Securities is a non-party, residing in Elmhurst, Illinois. It acts as an intermediary between investors and systems developers, and has been a registered IB since April 24, 1997. In this case, Striker executed orders pursuant to a Letter of Direction for Jarrell's account.

Optimized is a trading systems developer that offers its trading systems to the public in exchange for a monthly leased fee. It was founded by non-party Brian Miller and Respondent Spears in 2014.

Brian Miller is the majority owner of Optimized, and was a high school friend of Complainant Jarrell.

Jarrell and Miller went to high school together, and Jarrell learned about Optimized through a LinkedIn post by Miller, which contained links to Optimized's performance data. Jarrell became interested in Optimized's OPT_ES_Multi_Model_V3 system, which trades S&P500 E-Mini futures. Jarrell believed that the Trading Program would make trading decisions "without human intervention." Jarrell Decl. ¶3 (Feb 4, 2020). Jarrell points to Optimized's website, which states: "Intelligent strategic designs often identify opportunities, which cannot be determined by discretionary strategies, and eliminates human emotion that often hampers the ability to generate consistent returns."

www.optimizedtrading.com.² Further, the Optimized website is rife with information that makes clear its trading programs use rules-based, quantitative strategies and that they do not mention human judgment or intervention. Hearing Tr. at 30:1-34:19. In addition, the OPT_ES_Multi_Model_V3 system materials on which Jarrell relied stated:

Optimized Trading is a quantitative trading firm that brings highly adaptive algorithmic trading and investing programs to both individual investors and asset managers. We provide proprietary strategies that use machine learning processes with other dynamic applications to analyze market data and identify optimal strategic models for current and projected market environments. Our multi-model programs are governed by our IMM (Intelligent Model Management). The IMM models incorporate a variety of data types including our proprietary formulas. Each model is independently evaluated and validated prior to inclusion in the program.

[Optimized 0039].

On or about May 9, 2017, Jarrell's interest in trading through Optimized's programs solidified. *See* Complainant's Exhibit 1 (filed Feb. 18, 2020) (Miller/Jarrell LinkedIn Messages); [CL-18-R0270247-255].³ Between May 5, 2017 and June 11, 2017, he and Miller spoke over LinkedIn messages about the best way to sign up for these programs. *Id.* In one of those messages, sent on May 9, 2017, Miller identified a few "distributors" offering Optimized's programs, including BTR Futures, Gain Capital and Striker. *Id.* Later that same day, Miller again messaged

² This is current language but it has not changed since the time Jarrell would have reviewed it. Feb. 20, 2020 Hearing Tr. at 29:1-30:1 (Hearing Tr.).

³ On March 21, 2019, Complainant produced documents bates stamped CL-R0270001 through R0270.

Jarrell, asking “Who is your broker & FCM? If you haven’t chosen a broker, my business partner can discount your brokerage rate.” *Id.* Miller emailed Jarrell again that same day stating that Jarrell could reach out to Spears to avail himself of certain discounts (amounting to a 50% reduction in commissions and a 20% reduction in monthly leasing fees).

Jarrell replied saying he was signing up with Striker, which “funneled [him] to ADM Investor Services,” as the broker but asking whether he should step back from this process and go through Lakefront instead. Miller replied, “OK, thank goodness you haven’t submitted yet. . . Yes, step back from that, so Robert can manage your LOD account with LakeFront.” *Id.* Jarrell had thus decided to trade through Optimized before meeting Spears and at the urging of Miller. Hearing Tr. at 12:20-12:24.

On June 2, 2017, Jarrell reached out to Spears by email, informing him that he was “working on setting up an account with Striker and ADMIS in order to invest through Optimized Trading’s Mixed-Model V3 system when Brian suggested I step back from Striker and coordinate with you to set up through Lakefront instead.” [Lakefront 0001]. Spears and Jarrell had definitely spoken by June 6, 2017. Compl. Hearing Ex. 1, Miller/Spears LinkedIn Messages. By June 6, Jarrell had initiated an application with Lakefront, and filled out an account application with R.J. O’Brien, the FCM that held Jarrell’s trading account. R.J. O’Brien Account Application (June 6, 2017) [Lakefront 0041-43]. In doing so, Jarrell also signed the R.J. O’Brien Account Agreement, in which he agreed that:

Customer further agrees that, notwithstanding anything in this Agreement to the contrary, in the event that the Account is under margined, has zero equity or is equity deficit at any time, or in the event that R.J. O'Brien is unable to contact Customer due to Customer's unavailability or due to a breakdown in electronic communications, R.J. O'Brien shall have the right to spread or liquidate all or any part of Customer's positions through any means available without prior notice to Customer.

Customer acknowledges that R.J. O'Brien has no obligation to establish uniform margin requirements among products or customers, that margins required by R.J. O'Brien may exceed the minimum margin requirements of the applicable exchange or clearinghouse, and that margin requirements may be increased or decreased from time to time in R.J. O'Brien's discretion without advance notice to Customer.

R.J. O'Brien Customer Agreement at ¶ 3 [Lakefront 0044-0098]; *see id.* ¶ 5 (similar).

On June 7, 2017, Jarrell executed a Letter of Direction and Limited Power of Attorney for Customer Following a Trading Program with Striker, which is an IB not affiliated with Lakefront. Resp. Prehearing Memorandum, Resp. Ex. A (Letter of Direction). In that Letter of Direction, Jarrell authorized Striker to execute trades for his account at Lakefront, following the trade recommendations of the OPT_ES_Multi_Model_V3 trading system offered by Optimized. Letter of Direction ¶ 2. Specifically, Jarrell acknowledged that he wished "to follow trade recommendations generated by a trading system, program, or advisory service that has been developed and sold by a person outside of Lakefront Futures." Letter of Direction ¶ 1. In addition, Jarrell acknowledged that

Lakefront Futures and its associated persons reserve the right to decline to place any or all orders for Customer's account pursuant to the Trading Program whenever Lakefront Futures or the Striker Securities associated person exercising authority under this [Letter of Direction], in its, his or her discretion, determines that the exercise of

such right is necessary for Lakefront Futures's or Customer's protection.

Letter of Direction ¶ 7.

Jarrell also executed a Conflict of Interest Policy acknowledging that Spears, as a "partial owner of Optimized" and an AP of Lakefront, would receive compensation from both Optimized and Lakefront for Spears's account. Conflict of Interest Policy (June 7, 2017) [Lakefront 0104].

On June 15, 2017, Jarrell funded his account with \$20,800. [Lakefront 0003-0004]. He mailed in additional checks of \$25,000 on October 4, 2017 and \$32,274 on December 7, 2017 to deposit in his account. Thus Jarrell had invested a total of \$78,074 into his account.

On January 30, 2018, the Trading Program recommended the initiation of a long position in the S&P E-Mini contract expiring in March 2018. Since Jarrell was trading three units, three contracts were purchased for his account at 2851.25 at \$50 per contract, meaning a 1-point movement is worth \$50. [CL-18-R0270077]. On February 1, 2018, the S&P E-mini started to sell off, and continued doing so the next day. As a result, Spears called Jarrell to tell him his open trade equity was negative \$14,182. On Sunday, February 4, 2018, the market rallied, and the trading system triggered a buy order, adding three more March 2018 S&P E-mini contracts to Jarrell's account at 2757. *Id.* Jarrell was now long 6 March 2018 E-mini contracts.

The market rally was short lived. On February 5, 2018, the markets experienced extreme volatility and the S&P 500 Index, upon which Jarrell's

investments were based, decreased 4.1% in a single day. Despite these market declines, Optimized’s automated Trading Program never generated any kind of stop loss order. Instead, Spears and Miller as co-owners of Optimized made the decision to manually communicate stop orders from the Trading Program to protect against further losses. Jarrell Decl. ¶¶ 21,25 (Feb. 4, 2020). This is over Jarrell’s direction not to sell with high losses. Jarrell Notes (Feb. 6, 2018) [CL-18-R0270206]. This resulted in selling the 6 contracts at 2586.308139, creating a \$65,345.06 loss to Jarrell. [CL-18-R0270077].

On February 6, 2018, Jarrell emailed Spears, writing “Robert, this is copying the voice message I’ve just left you. Immediately cancel 2 of my contracts.” [Lakefront 014]. He followed up with an email the next day asking if there was any way to “take back” the stop loss in his account that was put in place on February 6, because he did not authorize it. [Lakefront 016].

Jarrell’s account closed with \$32,467.23 on February 6. [CL-18-R0270080]. On February 7, Jarrell cashed out at this point and received his remaining monies by ACH deposit. Jarrell Decl. ¶ 27 (Feb. 4, 2020); [CL-18-R0270076].

III. Legal Analysis

Section 4b of the Commodity Exchange Act and Rule 33.10 prohibit fraudulently soliciting customers to trade futures and options. To find fraudulent inducement, Jarrell must prove that Lakefront and Spears “(1) acted with scienter, and (2) made a misrepresentation of a material fact, that was (3) reasonably relied on by [the investor], and that (4) proximately caused the injury.” *Beck v. Jonasson*,

CFTC No. 08-R027, 2008 WL 5382300 at *2 (Dec. 24, 2008). Jarrell must further support each element by a preponderance of the evidence, and furnish sufficient “evidence to permit the court to estimate the damages proximately caused with reasonable certainty.” *Id.*

A. Misrepresentation of Fact

Although this formulation puts the scienter query first, I need not reach scienter if I do not find a misrepresentation of material fact on which Complainant reasonably relied. Determining whether a misrepresentation occurred requires “the Court to focus on ‘the common understanding of the information conveyed.’” *Modlin v. Cane*, CFTC No. 97-R083, 1998 WL 429622, at *8 (July 30, 1998) (internal citations omitted). As a result, a representation can be deceptive even if it is not actually false. *Id.*

The alleged misrepresentation at the heart of this case is whether Jarrell was ever made aware that the Trading Program, which was automated by algorithm, could be disrupted by human trading decisions. I find he was not made aware of this. The website disclosures, when read together and as a whole, conveyed a sense that the trading would be fully automated. Nothing in those disclosures ever suggested that someone from Optimized—including Spears—could elect to suspend the Trading Program. That the contracts with Lakefront and R.J. O’Brien did have provisions making clear that they or their agents could intervene and fail to execute the trading program is not at issue because neither of those entities suspended trading; the undisputed facts make clear that Miller and Spears,

as co-owners of Optimized, suspended trading and overrode the disclosed protocols governing administration of the Trading Program.

B. Materiality of Misrepresentation

Finding that there was a misrepresentation does not the end of the inquiry because that misrepresentation has to be “material” in order to be actionable. Determining materiality requires the court to consider whether a reasonable investor would have regarded the misrepresented or omitted fact as “significantly altering the total mix of information available.” *Id. Modlin*, 1998 WL 429622 at *8. Jarrell testified that he did consider this fact of utmost importance; his written and oral testimony on this point was clear, consistent and entirely credible. In fact, Optimized advertises its programs as “eliminating human emotion” from the trading decision, signaling that Optimized believes this is an important fact for reasonable investors to know. Thus I find that there was a misrepresentation of material fact.

C. Scienter of Spears

In order to hold Respondents liable for the material misrepresentation, that must have made that misrepresentation “intentionally or recklessly.” *Modlin*, 1998 WL 429622, at *14-15. This is the closest factual question of this case.

On the one hand, it was Jarrell’s connection to non-party Miller that first introduced him to Optimized and the Trading Program. Spears never reached out to Jarrell to solicit an investment. Jarrell decided to invest, and then at Miller’s urging, Jarrell himself reached out to Spears. Further, non-party Miller was clearly

the “quant” guy, as he himself stated in his LinkedIn messages to Jarrell, so Spears was a co-owner but not involved with the messages between Miller and Jarrell that clearly (and understandably) lead Jarrell to focus on the algorithmic aspect of the Trading System.

On the other hand, Spears testified that he “handled the business, the marketing and the client communications.” Hearing Tr. at 27:25-28:5. He further testified that he participated in the preparation of Optimized’s website. *Id.* at 25:6-25:20. Thus Spears was responsible for the very materials that failed to disclose there could be human intervention in the Trading Systems. On balance, Complainant has proved by a preponderance of the evidence that Spears acted with recklessness for failure to disclose in website, marketing materials, emails and other communications that human intervention by Optimized could be used to intervene in adverse market conditions.

D. Scienter of Lakefront

There is no evidence tying Lakefront to any of the conduct at issue. First, Spears, in unchallenged testimony, stated that his “primary business is working on behalf of Optimized.” Spears Decl. ¶ 4 (Attached as Exhibit to Resp. Prehearing Br. (Jan. 30, 2020)).

Second, the marketing materials, decision to override the Trading Program, and communications were all handled by Spears and Miller. *See, e.g.*, Jarrell Decl. ¶¶ 21-25. Marcus, the President and co-founder of Lakefront, confirmed this with unchallenged testimony that a stop order in Jarrell’s account was “entered at

Striker in accordance with Optimized’s instructions.” Marcus Decl. ¶ 15 (Attached as Exhibit to Resp. Prehearing Br. (Jan. 30, 2020)).

Third, Jarrell, an attorney, had no reasonable expectation that Spears was acting as an agent of Lakefront at all times. Jarrell signed a Conflict of Waiver form, making clear that he understood Spears was wearing two different hats. And he acknowledged that “Lakefront Futures makes no representations or warranties concerning the past or future performance of the Trading Program” and that “Lakefront Futures is not responsible for statements made in any material prepared by the developers or sellers of the trading program.” Letter of Direction ¶¶ 5-6. In other words, the documents make clear there was daylight between Spears as an AP of Lakefront and Spears as co-owner of the relevant Trading Program, Optimized.

Fourth, although Jarrell contends Lakefront failed to supervise Spears with respect to his account, Jarrell must prove it did so with respect to the misconduct at issue—that is fraudulent solicitation. But the timeline makes clear that Lakefront as the IB was not involved in the solicitation—Lakefront’s involvement began after Jarrell had already decided to invest. Lakefront could not have failed to supervise the account with respect to a solicitation in which it was not involved.

Fifth, Jarrell’s argument that Lakefront must be held vicariously liable for all of Spears’s excuses Jarrell’s own failure of proof. Jarrell contends that “[t]here is no evidence in the record that Spears was ever acting ‘solely’ as an agent of Optimized – not even when he was creating and reviewing the Optimized website.” Compl.

Post-Hearing Br. at 2 (Aug. 14, 2020). But Jarrell reverses the burden here. Jarrell needed to prove by a preponderance of the evidence that either Spears was wearing a Lakefront hat when he oversaw the creation of Optimized’s website or that Lakefront participated in its creation. Jarrell has not done so, and cannot create an unsubstantiated presumption to fill the evidentiary void.

Sixth, Jarrell’s argument that Lakefront is vicariously liable for Spears’s actions, regardless of whether they were associated with Lakefront, ignores key language in the Commission’s statute governing the liability of a principal for its agent—that the actions be “within the scope of [the agent’s] employment or office.” *See* 7 U.S.C. § 2(a)(1)(B); 17 C.F.R. § 1.2. And this is the central legal problem of this matter. I find as a matter of fact that Spears did not engage in any wrongdoing in his capacity as an Associated Person of Lakefront; rather, he engaged in wrongdoing in his capacity as a Co-Owner of Optimized, which is not registered and which does not fall within the jurisdiction of this Court.⁴ The CFTC Reparations Program cannot, by statute or the current state of the law, redress any wrongs committed by persons not registered by the Commission. It may be that Spears, Miller and Optimized should be held liable for fraudulent solicitation, but that cannot be litigated or adjudicated in this Reparations forum.

⁴ This Initial Decision takes no position on the relative wrongdoing of Spears, Miller, and Optimized, since those latter two were not parties to this proceeding.

CONCLUSION

Lakefront played no role in the fraudulent solicitation at issue. And because this Office does not have jurisdiction to hold Spears liable for activities undertaken within the scope of his employment at non-registered Optimized, this Complaint is DISMISSED.

Dated: November 2, 2020

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Judgment Officer