UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

WALTER E. LEYLAND and NYDIA I. SANTIAGO	:	
	:	CFTC Docket No. 00-R117
v.	:	
	:	OPINION AND ORDER
BARKLEY FINANCIAL CORP. and ELAINE GELLER	:	

Complainants Walter Leyland and Nydia Santiago appeal from an Initial Decision granting respondents' motion to dismiss. The Judgment Officer held that complainants had been made whole because respondents tendered a payment, that, in his view, represented the most that complainants could recover under the theories raised in their complaint. In these circumstances, the Judgment Officer concluded that a hearing on the merits of complainants' claims was unnecessary.

Complainants emphasize that they did not agree to settle their case and did not accept the tendered payment. They contend that the Judgment Officer improperly denied them a hearing on their claim for profits allegedly lost through respondents' misconduct. In opposing complainants' appeal, respondents argue that the Judgment Officer correctly ruled that complainants failed to provide a reliable, good faith calculation of the alleged lost profits.

Our review of the record shows that the Judgment Officer erred by resolving complainants' claims without a telephonic hearing. Consequently, we vacate the Judgment Officer's decision and remand for further proceedings.

BACKGROUND[1]

I.

On September 1, 2000, Walter Leyland ("Leyland") and Nydia Santiago ("Santiago") filed a complaint against respondents Barkley Financial Corp. ("Barkley"), a registered introducing broker, and Elaine Geller ("Geller"). They alleged misrepresentation, churning, breach of fiduciary duty and failure to supervise and sought $6,000 in out-of-pocket and punitive damages.[2]

Complainants stated that, during the winter of 1998, they saw a television advertisement that described Barkley as "a full service company" providing individualized attention. When complainants contacted Barkley, they were referred to Gail Schachter, an associated person at the firm. After about a year of discussions with Schachter, complainants opened their joint account on December 7, 1999, depositing $3,000.[3]

Schachter purchased three heating oil call options for complainants, the value of which began to decline almost immediately. Complainants maintained their position and monitored it closely. They spoke at least once with Schachter, who encouraged them to keep the position open. On January 7, 2001, complainants tried to contact Schachter and were informed that she had left the firm and that their account had been transferred to another broker, Elaine Geller.

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[1] The facts we describe are drawn from the Complaint, the Answer, and the parties' written submissions in response to the Judgment Officer's discovery orders. Where material facts are in dispute, both parties' versions are set forth.

[2] On October 3, 2000, Leyland and Santiago submitted an amendment to their complaint that reduced the amount of damages sought to their out-of-pocket loss—$2,831.63.

[3]Complainants submitted a copy of their account opening application with their complaint. It showed that Leyland and Santiago had no previous experience trading securities or futures. Leyland listed his occupation as "self-employed," and Santiago listed hers as "University of Puerto Rico Associate Professor." Complainants listed their gross annual income as $52,000 and net worth (exclusive of residence) as $100,000.

According to complainants, during their initial conversation, Geller informed them that the value of their options "would soon hit zero" and urged them to liquidate the heating oil position. She also recommended that complainants submit additional funds so they could purchase Swiss franc call options. According to complainants, Geller misrepresented the likelihood of earning a profit on Swiss francs:

> [S]he went on to say that the week before when the Stock Market had fallen some clients of hers had bought Swiss Franc [contracts] and had made money . . . . She was waiting for a pop at any moment and that if we bought the Swiss [franc options] she would need to be in constant contact with us because it would pop up any moment and we would need to exercise the options on the spot.

(Complaint at 3.)

Complainants initially decided to maintain their heating oil position. Later in the day, however, they called Geller and informed her that they had decided to liquidate their heating oil position to mitigate further losses. Complainants used the $1,008 in proceeds from the sale to purchase one March Swiss franc call option. According to complainants, Geller became rude and dismissive when they said they would not invest additional funds.

The value of complainants' March heating oil call options rebounded within two weeks of the date they liquidated their position. If they had kept the position, complainants could have offset at a profit at any time between January 21 and February 17.[4] Complainants' Swiss franc position expired worthless on March 3, 2000. They closed their account and subsequently received a check for their balance of $168.37.

In November 2000, respondents timely filed a joint answer to the complaint, denying all allegations of misconduct. Respondents argued that complainants were properly informed of the inherent risks of options trading. In denying the churning claim, respondents asserted that

[4] The value of the options peaked on January 21. Liquidation at that time would have earned complainants a profit of about $10,000 on their $3,000 investment.

complainants maintained control over the trading in their account throughout its existence and that Geller's recommendations were based on market research rather than a desire to generate commissions. Respondents raised the affirmative defenses of waiver, estoppel, and ratification.

According to respondents, when Geller first spoke with complainants, the value of complainants' heating oil position had fallen 50 percent and Barkley's market research indicated that there was an overproduction of heating oil. On this basis, Geller recommended that complainants salvage the position's remaining value by liquidating and using the proceeds to purchase Swiss franc call options. Respondents insisted that Geller called complainants frequently and that they were aware of the decreasing value of their Swiss franc position at all times.

Respondents acknowledged that on January 19, 2000 complainants told Geller that, in view of the market rebound, they were upset about the liquidation of their heating oil position. According to respondents, Geller advised complainants that hindsight was always 20/20 and reminded them of the unfavorable market conditions at the time of liquidation.

After the Office of Proceedings forwarded the case for adjudication, the presiding Judgment Officer directed both parties to submit information pursuant to Commission Rule 12.34 (governing discovery on the presiding officer's own motion). In a partial response, complainants summarized their conversations with Schachter, stating that, "[t]he trend we were observing was moving in our direction. We could probably be able to stay in the trade up to the middle or end of February because we were buying that time . . . ." (Complainants' Notice of Compliance dated January 19, 2001.) Respondents submitted research reports, explaining the support for their trading recommendations, and other documents.

On March 6, 2001, the Judgment Officer issued an order requiring both parties to complete their responses to his discovery requests and address whether complainants were entitled to damages that exceeded their alleged out-of-pocket loss.[5] On the same day, respondents filed a motion to dismiss the complaint pursuant to Commission Rule 12.17.[6] Respondents stated that they had tendered a check to complainants for $3,200—the amount of their initial investment plus filing fees—and that this act should be deemed satisfaction of the complaint.

Complainants responded to the Judgment Officer's March 6 order by submitting a statement seeking an award of $10,266, plus filing fees and prejudgment interest.[7] (Complainants' April 2, 2001 Statement Addressing Issue of Damage Calculation at 10.) Complainants claimed that at the time they established their heating oil call option position, their "specific short term objective" was to "get their feet wet" in a conservative manner with a minimum of risk. Their long term objective, according to complainants, would "depend on the outcome of their [experiment.]" At other points in their statement, complainants acknowledged that they "never agreed to holding the options for a specific amount of time," but intended to "hold [their] heating oil options until they made a reasonable profit," "be it in January or

[5]In this regard, the Judgment Officer noted that complainants had said in one of their pleadings that they were planning to hold their heating oil options until the middle or end of February. He suggested that if this statement were credited, complainants would be entitled only to $3,462 in lost profits.

[6] According to Commission Rule 12.17, a respondent may satisfy the complaint (a) by paying to the complainant either the amount to which the complainant claims to be entitled . . . or such other amount as the complainant will accept in satisfaction of his claim; and (b) by submitting to the Commission notice of satisfaction and withdrawal of the complaint, duly executed by the complainant and the respondent.

[7]Complainants opposed respondents' motion to dismiss in earlier correspondence. They informed the Judgment Officer that they had received respondents' check but did not accept it as satisfaction of their complaint. (Complainants' Notification Letter, filed March 13, 2001.) The Judgment Officer instructed them to keep the check until he resolved their claims.

February [2000]." Complainants also indicated that their trading objective was to "stay in the trade up to the middle or end of February."

Respondents' submission argued that complainants were not entitled to any award because the record did not support their misrepresentation or churning claim. (Respondents' March 15, 2001 Statement Addressing Issue of Damage Calculation at 5-6.) In the alternative, they argued that complainants' out-of-pocket loss would be the maximum that complainants could recover under either a misrepresentation or churning claim. Complainants' claim for lost profits was speculative and based on a hindsight analysis of trading results, respondents argued. (*Id.* at 6.)

In April 2001, the Judgment Officer issued his decision dismissing the complaint. *Leyland v. Barkley Financial Corp.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,497 (April 6, 2001) ("I.D."). He held that complainants received "ample opportunity" to produce evidence in support of their claim for lost profits, but failed either to quantify the approximate amount of their lost profit or specifically describe their strategy for trading their heating oil position. I.D. at 51,703. In addition, he noted that both complainants and Schachter acknowledged that they did not specifically recall their relevant conversations. On this basis, the Judgment Officer found that it was "most unlikely" that complainants would ever be able to provide "a reliable, good faith calculation" of their lost profits. *Id.*

In view of this conclusion, the Judgment Officer found that respondents extinguished the parties' underlying financial dispute by tendering an amount that represented "the most that complainants could recover." *Id.* at 51,704. On this basis, he granted respondents' motion to dismiss the complaint.

Complainants filed a timely appeal, arguing that the Judgment Officer erred by dismissing the complaint despite their refusal to accept respondents' check. Complainants claim that they offered a thorough explanation of their trading strategy and that the Judgment Officer should have given them a hearing. Respondents argue that dismissal was consistent with the overall purpose of Commission Rule 12.17 and emphasize that complainants' lost profits claim is undefined, unsubstantiated and based solely on hypothetical trading results.

DISCUSSION

Although the Judgment Officer disposed of this case under Rule 12.17, he acknowledged that the circumstances of this case do not meet the literal requirements of the rule, which establishes two steps for satisfying a complaint:

> (a) respondent's payment to complainant of either the amount which complainant (1) *claims to be entitled* or (2) *will accept* in satisfaction of his claim; and
>
> (b) the filing of a notice of satisfaction and withdrawal of the complaint, *duly executed by complainant and respondent*.

Because neither requirement has been fulfilled, dismissal of the complaint was not warranted under Rule 12.17.

The Commission, however, has permitted presiding officers to dismiss complaints that were settled without the formalities of Rule 12.17 in cases where there was a reliable basis for finding that the parties entered into either an express or implied agreement to settle. *See Bowden v. Alaron Trading Corp.*, CFTC Docket No. 97-R079 (March 23, 1999) (Order of Summary Affirmance).[8] Here, however, there is no evidence of an express settlement agreement and it is

[8] An agreement to settle may be implied in the circumstances of an accord and satisfaction, *i.e*., (1) a bona-fide dispute over an unliquidated claim exists; (2) respondent tenders a check in full settlement of the claimed amount; and (3) complainant knowingly accepts the payment. *Valley Asphalt v. Stimpel-Wiebelhaus Assoc.,* 2001 U.S. App. LEXIS 1707 (10th Cir. 2001); *Malave v. Carney Hospital,* 170 F.3d 217 (1st Cir. 1999); *Cadle Co. v. Hayes,* 116 F.3d 957 (1st Cir. 1997).

undisputed that complainants neither accepted nor negotiated respondents' check. In these circumstances, there was no basis for dismissing the complaint as settled.

Commission Rule 12.207(c) and (d) authorizes a presiding officer to grant summary disposition of a dispute on his own motion. That rule, however, imposes both procedural and substantive limitations on the exercise of this authority.[9] Here, the Judgment Officer failed to comply with the applicable procedural requirements; and even if this procedural error is overlooked, the record does not establish the substantive criteria described in the rule. There must be (1) no genuine issue as to any material fact; (2) no necessity that further facts be developed in the record; and (3) entitlement to a decision in one party's favor as a matter of law. In interpreting this standard, the Commission has held, "[i]f there is any significant doubt that the parties' dispute can be reliably resolved without a hearing, summary disposition is simply not appropriate." *Human v. Alaron Trading Corp.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,806 at 44,292 (CFTC Oct. 17, 1996).

Complainants allege that Geller deceived them into liquidating their heating oil position. Complainants also claim that Geller committed fraud by giving them false and incomplete information about the profitability of Swiss franc position. Respondents contend that Geller made her recommendation in good faith based on a decline in the position's value and a report that OPEC was overproducing. They did not explain, however, the sharp contrast between Schachter's December advice to keep the position in the face of losses and Geller's January advice to do the opposite. We believe development of the record on these issues would be useful in resolving the parties' dispute about the *bona fides* of Geller's advice.

[9] The rule requires the Judgment Officer to permit the parties to submit papers in support of and in opposition to summary disposition.

As to damages, we agree with the Judgment Officer that complainants have yet to articulate a consistent, logical theory regarding the causal link between the alleged wrongdoing and their alleged lost profits. This concern, however, essentially bears on an evaluation of the parties' credibility and reliability. The holding period necessary to generate a profit was quite short – two weeks – and complainants may have held on that long rather than liquidating at a loss. Given this possibility, we think that the proper way to resolve doubts about this issue is to give complainants an opportunity to tell their story at a telephonic hearing.

Accordingly, the Initial Decision granting respondents' motion to dismiss is vacated and this matter is remanded for further proceedings as set forth herein.

IT IS SO ORDERED.

By the Commission (Chairman NEWSOME and Commissioners HOLUM and ERICKSON).

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Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: May 9, 2002