



U.S. COMMODITY FUTURES TRADING COMMISSION

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THOMAS PETTY,
Complainant,

v.

INFINITY FUTURES, INCORPORATED d/b/a
INFINITY BROKERAGE SERVICES, INC.,
Respondents.

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CFTC Docket No. 09-R007

INITIAL DECISION

Thomas Petty's principal claim is that respondents did not exercise due diligence in permitting him to open a non-discretionary account:

I am a mentally disabled individual that does not understand the risks associated with futures trading and does not have mental capacity to trade them. [Respondents] did not use such lookout or verification as a person of ordinary prudence would have used under the same or similar circumstances by allowing a mentally disabled person to open a future trading account. . . .¹

Petty also claims that he told an Infinity employee before he opened the account that he was disabled.² Petty seeks \$4,915 in damages. In reply, respondents assert that Petty never mentioned any disability, never advised them that he suffered from any mental incapacity and never gave them reason to inquire further whether he was fit to trade or required additional disclosure. Respondents further assert that even if he had clearly disclosed his disability, it was not necessarily the sort of disability that would have disqualified him from trading, because he

¹ Thomas Petty's description of complaint.

² Petty's addendum to complaint.

had not been adjudged incompetent by any court, he had not been subject to any type of guardianship or incompetency proceeding, and otherwise he had not shown that he had “been unable to manage his own affairs.” Respondents otherwise deny any violations. As explained below, after carefully reviewing the parties’ documentary submissions, it has been concluded that Petty has failed to establish any violations.

Factual findings

1. Infinity Futures, Incorporated is a registered introducing broker located in Chicago, Illinois. Infinity specializes in offering on-line trading with discounted commissions. Apex Futures is a registered assumed name and business division of Infinity.

Craig Ross, a registered associated person with Infinity at the relevant time, was responsible for handling and servicing Petty’s account. Ross spoke briefly with Petty one time to assist Petty with the account opening. All other communications were by e-mail.

2. Thomas Petty, a resident of Royse City, Texas, was 49 years old when he opened his account with respondents. Petty dropped out of high school in the ninth grade, but subsequently received a high school diploma. He received an Associate of Arts degree in drafting and design from Eastfield College in Mesquite, Texas. When he opened his account, he was attending Texas A&M at Commerce with an intended major in business administration, and a GPA between 2.0 and 2.3.

Petty is divorced with three children who visit him on weekends, and lives by himself in a small home. Throughout his adult life, Petty has worked at a series of humble jobs at various firms, principally as a truck driver, none of which lasted very long. His income has always been modest. He had no previous experience trading derivatives before he opened his account.

3. The documents that Petty has produced in connection with his disabled status include: a “fully favorable” decision finding him mentally impaired,” dated February 23, 2007, by an administrative law judge with the Office of Disability Adjudication and Review of the Social Security Administration;³ a summary of a neuropsychological evaluation, on April 22, 2003, by a licensed psychologist finding him not impaired;⁴ and a summary of a 90-day evaluation conducted in 1979 by a State of Texas psychiatrist which found that he was not impaired.⁵

The 1979 report stated that Petty had been admitted to the hospital after being charged with a misdemeanor for resisting arrest, and stated that during the examination “[Petty] was very friendly and cooperative, but somewhat withdrawn,” that his “affect is normal, and affective response is appropriate,” that “there is no evidence of depression,” that he “does not have any evidence of thought disorder,” but that “insight and judgment are somewhat impaired.” The report diagnosed a “schizoid personality, not psychotic,” and concluded that he was “competent to stand trial.”

In the 2003 report, the psychiatrist concluded that Petty did not have a severe mental impairment. She indicated that Petty had approached the Texas Rehabilitation Commission (“TRC”) in connection with his efforts to obtain additional student loans, and that the TRC in turn had referred Petty to the psychologist. The psychologist stated that Petty recalled suffering a serious closed-head injury when he was eight years old, recalled that he had repeated ninth grade and then left school, stated that his emotional issues were limited to occasional problems with anger control and fatigue, and stated that his cognitive issues were limited to a life-long difficulty with short-term memory loss. The psychologist observed:

³ Pages 1-11, Attachment 1 to complaint.

⁴ Pages 13-19, Attachment 1 to complaint.

⁵ Page 12, Attachment 1 to complaint.

[Petty] presented a neat and adequately groomed appearance. He was ambulatory, and his gait was normal. . . . His hearing was normal. He was cooperative during testing, but rapport was somewhat difficult to establish. He was relatively quiet and made little to no eye contact. His affect was flat. He had no word-finding difficulty in casual conversation. His attention to task appeared to be good. . . . He was persistent on tasks, and his motivation to perform well appeared to be at a fairly high level.

In the February 2007 decision, the administrative law judge concluded that Petty was disabled under sections 216(i) and 223(d) of the Social Security Act. Under that Act, disability is defined, in pertinent part, as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, that can be expected to last for a continuous period of at least 12 months. The ALJ relied on: one, the written report by another expert, based on an evaluation in April 2003; a second evaluative report dated May 2006; as well as the oral testimony of a medical expert who testified that Petty's ability to perform basic work functions was significantly limited as the result of cognitive disorder, personality disorder, and paranoid personality disorder.

4. In February 2008, Petty contacted Infinity through its Apex website. Petty represented in the on-line application that his liquid net worth was between \$50,000 and \$100,000, that he was self-employed in "finance," that he had been trading commodities for a year, and that he had two active securities accounts with a balance of \$21,000. He did not indicate that his sole source of income was disability income or that he was receiving social security disability payments. Because he stated that his income was under \$20,000, Infinity provided an additional risk disclosure statement. Craig Ross spoke briefly with Petty before Petty began trading. Ross did not recall Petty making any notable statements, or manifesting unusual behavior, which may have raised red flags about his mental or financial capacity.

Similarly, in all of the subsequent communications, which were exclusively by e-mail, Petty did not mention or manifest any mental disability.

5. Petty traded the account for about a month, and ceased when he had depleted most of his funds.

Conclusions

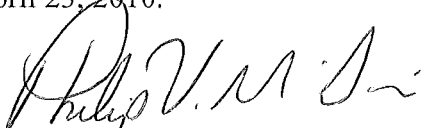
Generally, commodity brokers are only required to ascertain a prospective customer's investment experience, risk tolerance, and estimated annual income and net worth, before determining the proper disclosure to give the customer. In appropriate circumstances, mental disability will be a relevant factor in assessing the nature and extent of a broker's disclosure obligations. *See Fermin v. First Commodity Corporation of Boston*, Comm. Fut. L. Rep.

¶ 23,905 (CFTC 1987). However, here Petty has produced no reliable evidence that he made respondents aware of the nature and extent of his mental disability during the account opening or any other point in the life of the account. Thus, respondents were under no obligation to inquire further into his suitability to trade, to refuse to open the account, or to stop trading. In these circumstances, Petty's claim must fail.

ORDER

No violations causing damages having been shown, the complaint in this matter is dismissed.

Dated April 23, 2010.


Philip V. McGuire,
Judgment Officer