

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

PHILIP T. BERKLEY trading as BERKLEY ASSOCIATES

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8673. Complaint, Dec. 7, 1965—Decision, May 5, 1966

Consent order requiring a San Diego, Calif., commodity futures analyst, to cease making false claims regarding his advisory and managed accounts services or exaggerating the profits derived from their use.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Philip T. Berkley, an individual trading as Berkley Associates, hereinafter referred to as respondent, has violated the provisions of

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said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Philip T. Berkley is an individual trading as Berkley Associates, and has his principal office and place of business located at 132 West Broadway, in the city of San Diego, State of California.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale to the public of publications in which certain "Methods" or rules of trading in commodity futures are described and of advisory and managed accounts services incident to the purchase and sale of commodity futures.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, said publications and materials in connection with said advisory and managed accounts services, when sold, to be sent by United States mail from his place of business in the State of California to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, and for the purpose of inducing the purchase of said publications and advisory and managed accounts services, respondent has made and published and caused to be published certain statements, claims and representations in newspapers, circulars, booklets, and other materials distributed by him.

Among and typical of the foregoing, but not all inclusive thereof, are the following:

During the past fifteen years the Berkley Soybeans Seasonal No. 1 Method has shown net profits in every year. During this long period of time there was only one single loss of 2¢ per bushel which was more than offset by a profit of 4¢ per bushel on another trade.

Here is an Advisory Service that promises to be the most profitable ever offered on Chicago Grain Futures—An Advisory Service that is based on all our successful Seasonal and Spread Methods for Soybeans, Wheat, Rye, Corn, Oats and Soybean Meal. These Methods have shown the following results from 1948 through 1963.

Soybeans: 118 profits averaging 20¼¢ per bushel; 6 losses averaging 4¢ per bushel.

PROFITS IN COMMODITIES—describes the most successful Methods on Soybeans, Soybean Meal, Wheat, Rye, Corn, and Oats futures with a 92% profit ratio during the past fifteen years. Berkley Associates offer an Introductory Advisory Service based on these Methods, for one month, at \$3.00.

MANAGED ACCOUNTS

For those who prefer to have trading handled for them, we offer a personally supervised management service based on the above mentioned Methods at no extra charge.

PAR. 5. Through the use of the aforesaid statements, claims and representations and others similar thereto, but not specifically set out herein, respondent has represented, directly or by implication:

a. That the validity of his "Methods" or rules for trading in commodity futures contracts is demonstrated by past experience where application of respondent's "Methods" or rules resulted in profits in many transactions through sustained periods, in some instances, as long as fifteen years.

b. That the represented profits or earnings were typical and could be expected generally by persons who employ said "Methods," rules or services in the future.

c. That the application of his "Methods" or rules in the managed accounts service resulted in higher profits for customers than would be ordinarily realized.

PAR. 6. In truth and in fact:

a. Most of respondent's "Methods" or rules were not in existence for as long as fifteen years but were first published after 1960. The validity of respondent's "Methods" or rules is not demonstrated by respondent's listing of past transactions going back to 1948 in which application of the "Methods" or rules would have resulted in profits because they had not been established and were not available for use at the time of these transactions. The devising of a method or rules that would enable one to anticipate and take advantage of future market fluctuations is substantially different from the devising of a method or rules that adequately accounts for fluctuations that have occurred in the past and are completely known.

b. The represented profits or earnings were not typical nor could they be expected generally by persons employing such "Methods," rules or services in the future.

c. The application of respondent's "Methods" or rules in the managed accounts service did not result in higher profits for customers than would be ordinarily realized.

Therefore, the statements, claims and representations set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the conduct of his business, and at all times mentioned herein, respondent has been in substantial competition in commerce, with corporations, firms and individuals in the sale of merchandise and services of the same general kind and nature.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, claims and representations, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements, claims and representations were and are true and into the purchase of substantial quantities of respondent's said publications and advisory and managed accounts services by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on December 7, 1965, charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint; and

The Commission having duly determined upon a motion certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provision of Section 2.4(d) of its Rules that the consent order procedure shall not be available after issuance of complaint; and

The respondent and counsel for the Commission having executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's Rules; and

The Commission having considered the aforesaid agreement

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and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Philip T. Berkley is an individual trading as Berkley Associates and has his office and principal place of business located at 132 West Broadway, San Diego, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Philip T. Berkley, an individual trading as Berkley Associates, or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of publications on "Methods" or rules for dealing in commodity futures, or of advisory and managed accounts services for dealing in commodity futures, or of any similar or related publications or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. Representing, directly or indirectly, that respondent's "Methods" or rules have been in existence for as long as fifteen years; or misrepresenting the extent, if any, to which past experience suggests or demonstrates the validity of respondent's "Methods" or rules.

b. Representing, directly or indirectly, that any stated profits or earnings resulted from actual trades based on respondent's "Methods" or rules, or that they could have been predicted on the basis of said "Methods" or rules, or were typical or could be expected generally by persons employing said "Methods," rules or services in the future.

c. Representing, directly or indirectly, that the application of respondent's "Methods" or rules in the managed accounts service results in higher profits for customers than would be ordinarily realized.

d. Misrepresenting in any manner, or by any means, the profits or earnings derived by persons making use of respondent's "Methods" or rules for dealing in commodity futures or of respondent's advisory service or managed accounts service.

It is further ordered, That the respondent herein shall, within

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sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.
