UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

JEROME H. TAUB	:	
	:	CFTC Docket No. 00-R001
v.	:	
	:	OPINION AND ORDER
LIND-WALDOCK & COMPANY	:	

Respondent Lind-Waldock & Company ("Lind-Waldock") appeals from the Judgment Officer's decision awarding complainant Jerome H. Taub ("Taub") his out-of-pocket loss of $1,547.70 plus prejudgment interest and costs. Lind-Waldock challenges the Judgment Officer's legal analysis as contrary to Commission Rule 166.2 and argues that the record does not support his finding that its personnel failed to comply with Taub's trading instructions. Taub's *pro se* response urges the Commission to affirm the Judgment Officer's award.

For the reasons explained below, we vacate the Judgment Officer's decision and dismiss the complaint for a failure of proof.

BACKGROUND

I.

In October 1999, Taub filed a complaint against Lind-Waldock seeking damages of $1,547.70 for Lind-Waldock's alleged failure to follow his trading instructions. He submitted the following factual statement in support of this claim:

> I was doing business with Lind-Plus at Lind Waldock where I dealt with experienced brokers. These trades were not placed electronically. There was no power of attorney granted. On Thursday, May 20, 1999 I sold short one June 1999 S&P E-mini contract at 1348.25. The broker,

Burt, was given explicit instructions about a profit objective at 1343.00 and a stop loss at 1354.00.

He repeated these instructions. I did not tell him to cancel one order if the other was filled. I assumed that since I was dealing with an experienced broker he would do that. About 30 minutes after the order was placed the price went up to 1355.50 and my position should have been stopped out at a loss. (For some reason the Lind-Waldock computer did not pick up the stop-loss at 1354 on my account, but kept me in the position until it had reached the profit objective of 1343.) I assumed that the stop-loss had been triggered, as it had several times before and that the trade was over, and went to Washington, DC for the weekend on family business.

On Friday, May 21, Neill Mall, Burt's associate called and left a message on my answering machine stating that I had an open position at 1354 and what did I want to do about it. I did not check the machine and hear the message until Friday evening. I called Neill on Monday morning about 11:00 AM on my return and was told that the price was then 1323.75. Neill asked if I would take responsibility for the trade. I told him I would not since it should have been concluded on May 20. Neill replied that he would sell the position and we would have to straighten it out later. This was done, resulting in a loss and debit to my account of $1547.70, including commissions.

I feel strongly that Lind-Waldock should reimburse me for the loss on this trade since the broker was given explicit profit and loss positions, [sic] I refused to take responsibility for the trade on Monday, May 24, at which point Neill sold out the position, which could have been done at any time, with very small monetary loss, when their computer error was realized.

I have requested this adjustment from Lind-Waldock, but it has been refused.

In addition to filing the Commission's reparations complaint form and his factual statement,[1] Taub submitted the May 24, 1999 daily account statement that he had received from Lind-Waldock. The account statement showed that Lind-Waldock charged

[1] Commission Rule 12.13 describes the formal elements of a reparations complaint, including "[a] description of all relevant facts concerning each and every act or omission which it is claimed violated the Act." The Commission has developed a form to aid *pro se* parties in meeting the requirements of Rule 12.13. As to the facts, the form directs complainants to "[d]escribe in detail, giving names, dates, and the facts which will show how the Commodity Exchange Act was violated and how you were injured by that violation. You must set forth this information on supplementary sheets which you must attach to this complaint form."

Taub's account $1,547.70 when it liquidated a one-contract long S&P E-mini futures position. The statement indicated that this long position had been established on May 20, 1999.

The Commission's Office of Proceedings ("Proceedings") served Taub's complaint on Lind-Waldock in October 1999.[2] In its answer Lind-Waldock asserted that its personnel entered Taub's May 20, 1999 orders as instructed, that the orders were filled in a timely manner, and that the fills were diligently reported to Taub. Lind-Waldock specifically denied that it caused any damages suffered by Taub, made an error in the placement or transmittal of Taub's orders to an exchange, or made a computer error. In addition, Lind Waldock denied all of Taub's allegations that were not specifically admitted.

In support of its claim that Taub's May 20, 1999 orders were entered consistent with his instructions, Lind-Waldock alleged that Taub gave instructions to place three orders: (1) an order to sell one June S&P E-mini contract at the market; (2) a limit order to buy one June S&P E-mini contract at 1343; and (3) a stop order to buy one June S&P E-mini contract at 1354. Lind-Waldock acknowledged that it filled each of the orders and agreed that, when Taub entered the latter two orders, he did not instruct Lind-Waldock to cancel one of them if the other were executed.

Lind-Waldock emphasized that on May 20, 1999, its personnel tried to contact Taub by telephone several times after he placed the three orders at issue. It alleged that, prior to 10:15 am, its personnel left a message on Taub's telephone answering machine reporting the fill of his stop order and requesting instructions about the outstanding limit

[2] Before forwarding the complaint, Proceedings wrote a letter to Taub asking whether he wanted to name the two individuals mentioned in his factual statement as respondents. By letter dated October 18, 1999, Taub indicated that he did not want to name the individuals as respondents.

order. Lind-Waldock noted that Taub did not respond to its call during the four hours that passed between the time Taub's stop and limit orders were filled. It also indicated that due to Taub's absence, its personnel left additional phone messages for him on May 20 and May 21, 1999.

Lind-Waldock alleged that Taub did not contact its personnel until May 24, 1999, and noted that its personnel took immediate steps to liquidate the open long position when Taub repudiated it. In light of these circumstances, Lind-Waldock argued that it had followed Taub's instructions and had taken reasonable steps to keep him informed of the status of his orders. It claimed that Taub's loss resulted from his unwarranted assumption that Lind-Waldock would cancel an order without a specific instruction to do so, and his failure to stay in contact while he had open orders pending.[3]

In December 1999, the Commission's Proceedings Clerk assigned this matter to a Judgment Officer and provided the parties with notice of the procedures available for obtaining discovery of relevant information and submitting proof in support of a claim or defense.[4] Neither party sought discovery, requested a telephonic hearing, or filed verified statements of fact to supplement the allegations raised in the initial pleadings. Consequently, the Judgment Officer resolved the parties' dispute based solely on Taub's complaint and Lind-Waldock's answer.

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[3] Lind-Waldock submitted several documents in support of its version of the events at issue. These included: (1) account-opening documents executed by Taub, and (2) order tickets relating to the fill of Taub's buy orders on May 20, 1999 and Lind-Waldock's sell order on May 24, 1999.

[4] The order indicated that discovery "allows each party to obtain information from other parties and, if a subpoena is obtained, from persons who have evidence or are not parties." It also explained each party's obligation to respond to discovery requests and described how to calculate the deadline for taking discovery.

The order also noted that, after the close of discovery, the parties "may submit any evidence not already in the record that they want the Judgment Officer to consider." After providing several examples of the type of evidence a party might submit, the order explained that, "[e]ach party is responsible for proving its own case; the Judgment Officer will *not* litigate the case for any party."

II.

In his Initial Decision the Judgment Officer concluded that Taub's loss was proximately caused by Lind-Waldock's execution of an order that should have been cancelled. *Taub v. Lind-Waldock & Co.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,174 (June 30, 2000) ("I.D."). In reaching this conclusion, the Judgment Officer held that Lind-Waldock's emphasis on Taub's admission that he did not explicitly instruct his broker to cancel one buy order when the other was executed was misplaced, because Taub's complaint included a "strong and unrebutted averment … that he expressly informed his broker of his desire to limit loss *or* capture a profit through the simultaneous placement of his limit and stop orders." I.D. at 50,162. In light of this averment, the Judgment Officer found that Taub expressed a clear intent to "offset, rather than reverse his position" and "left *no* room for any misunderstanding as to what his goal was in placing the orders." *Id.* In this regard, he emphasized that Taub's statement of intent was made "in conjunction with specific orders at specific prices set to accomplish the tactical goals being expressed." *Id.* The Judgment Officer found further that Lind-Waldock's attempt to contact Taub about his open limit order after his stop order was filled on May 20, 1999, tended "to confirm that Lind-Waldock knew that Taub's orders both were intended to accomplish offset, not reversal," and that Lind-Waldock could not "recklessly ignore facts that it already knows and thereafter avoid the consequences for its ignorance by making a clearly unnecessary attempt to seek additional instructions." *Id.*

In light of his analysis, the Judgment Officer concluded that Lind-Waldock violated Commission Rule 166.2 by trading Taub's account in an unauthorized manner,

and Section 4d of the Act by charging Taub's account for a trade that was not his. On this basis, he ordered Lind-Waldock to pay Taub $1,547.70 plus prejudgment interest and costs.

DISCUSSION

On appeal, Lind-Waldock argues that the record does not support the Judgment Officer's conclusion that it violated its duties under Section 4d of the Act and Commission Rule 166.2. It emphasizes Taub's acknowledgement that he did not expressly instruct his order taker to cancel one of the buy orders when the other was filled.

A complainant has the burden of establishing the facts material to a respondent's liability by the weight of the evidence. *Krueger v. Sage Group, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,566 (CFTC Dec. 14, 1989). In the context of assessing the facial validity of a reparations complaint, we have favored a holistic approach to interpreting allegations. This approach recognizes the limitations that often affect submissions by *pro se* complainants and focuses on whether the complaint provides respondents with "fair notice of the nature of [complainants'] claims." *Hall v. Diversified Trading Systems, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,131 at 41,751 (CFTC July 7, 1994). We have also noted, however, that prior to basing fact-finding on a *pro se* complainant's version of events, a presiding officer must assess its reliability in light of the record as a whole. *Krueger*, ¶ 24,566 at 36,432. Such an assessment is appropriate "even if respondents cannot directly refute complainant's allegation[s]." *Id*. Lack of specificity in a complainant's allegations may undermine the weight properly attributable to them. *Id.* Reliability may also be

questioned when a complainant's version of events fails to distinguish between his subjective understanding of events and the events themselves. *Harman v. Murlas Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,323 at 39,044 (CFTC July 2, 1992).

For reasons not explained on the record, Taub sought to meet his burden of proof based solely on the statement of facts he attached to his complaint. While the statement of facts was sufficient to meet the liberal notice standard we established in *Hall*, it hardly was a model of clarity and completeness. For example, Taub contended that his loss was a product of a computer error that kept him in the market until his limit order was filled at 1343. Taub did not, however, explain his basis for alleging that there was a computer error. Even after Lind-Waldock flatly denied that a computer error affected Taub's trades, Taub failed to either seek discovery of relevant records or to elaborate on his allegation by submitting a verified statement.

Taub contends, and the Judgment Officer found, that his order taker must have known that one of his orders should have been cancelled upon filling the other. However, only two sentences in his statement of facts address his communication with the order taker. In one sentence, Taub states that the order taker "was given explicit instructions about a profit objective at 1343.00 *and* a stop loss at 1354.00" (emphasis added). In another, Taub claims that Lind-Waldock's order taker "was given explicit profit *and* loss positions" (emphasis added).

Taub's statement of facts does not describe his conversation with the order taker in any detail. Moreover, the two sentences that Taub includes about his communication with the order taker appear to reflect a subjective understanding of his communication

rather than a recollection of the words he actually used. Because the factual statement does not include a sufficient description of the underlying conversation to permit a reliable determination of what was said, let alone how clearly it expressed Taub's wishes, the Judgment Officer's findings on these issues are, at best, speculative.

CONCLUSION

In light of this analysis, we conclude that the weight of the evidence does not show that Lind-Waldock failed to follow Taub's instructions when it filled his limit order on May 20, 1999. Accordingly, we vacate the Initial Decision and dismiss the complaint for a failure of proof.

IT IS SO ORDERED.[5]

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

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

Dated: May 30, 2001

[5] Under Sections 6(c) and 14(e) of the Commodity Exchange Act, 7 U.S.C. §§ 9 and 18(e)(1994), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing was held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the court a bond equal to double the amount of any reparation award.