



**U.S. COMMODITY FUTURES TRADING COMMISSION**

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JOHN J. DRISCOLL and  
ISAAC OSTROVSKY,  
Complainants,

v.

KEVIN RICHARD OSAR and  
LFG, L.L.C.,  
Respondents,

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CFTC Docket No. 99-R093

**INITIAL DECISION**

This dispute arises from the purchase of four January soybean futures contracts for complainants, joint non-discretionary account. On the date of this purchase, the account had three short May soybean futures contracts and one short November soybean futures contract that had been on margin call for four days. Respondents assert that complainants' account executive Kevin Osar notified Driscoll of the margin call; that Osar advised Driscoll that LFG would permit the margin call to go unmet for no more than four days; and that on the fourth day, after the market failed to correct, Osar advised Driscoll that he had three choices: one, liquidate the short beans; two, post more margin; or three, "spread up" the short November and May beans by going long the January beans. According to respondents, Driscoll then elected the third choice and expressly approved the purchase of the January beans. In contrast, complainants allege that they never received notice of the margin call; that they never authorized the purchase of four January

soybean futures contracts; and that they did not "discover" the purchase of four January soybean futures contracts for several weeks because they had not read a series of several account statements that reported the open long position.

The findings and conclusions below are based on the parties' documentary evidence and oral testimony, and reflect the determination of the undersigned that the testimony of Osar was generally more plausible and convincing than the testimony of Driscoll, whose testimony was undermined by internal inconsistencies and by a lack of recollection of specific significant events and conversations. Thus, it has been concluded that complainants have not established violations by respondents.

### ***Factual Findings***

#### ***Background***

1. John J. Driscoll is a resident of Westborough, Massachusetts; and Isaac Ostrovsky is a resident of Wellesley, Massachusetts. At the relevant time, Driscoll worked for Massachusetts Bay Community College as director of institutional research; and Ostrovsky worked for Boston Scientific Corporation as a medical device engineer. On the account application, Driscoll indicated that his annual income was between \$50,000 and \$100,000, and that his liquid net worth was less than \$15,000; and Ostrovsky indicated that his annual income also was between \$50,000 and \$100,000, but did not indicate his liquid net worth. Before opening their account with LFG, Driscoll and Ostrovsky had maintained an account at Jack Carl Futures for about two years. Driscoll was primarily responsible for placing orders and making the trading decisions for both the LFG and the Jack Carl accounts. During the life of the LFG account, Driscoll closely tracked his

positions via his personal computer, and "updated the prices regularly throughout the day." [Page 14 of hearing transcript.] Driscoll also regularly monitored market reports on cable television, and subscribed to daily and weekly financial publications. [See pages 6-10, 31-32, and 34-38 of hearing transcript; and account application (Exhibit A to Answer).]

At the hearing, Driscoll showed himself to be forthright, well-informed, and very intelligent.

2. LFG, LLC is a registered futures commission merchant, with its principal place of business in Chicago, Illinois. Kevin Richard Osar, a registered associated person with LFG, acted as complainants' account executive.

3. Driscoll and Ostrovsky opened a joint non-discretionary account at LFG on March 30, 1996. The customer contract obligated Driscoll and Ostrovsky to maintain adequate margin and to meet margin calls, and gave LFG wide discretion to set margin requirements and to liquidate open positions if Driscoll and Ostrovsky failed to meet a margin call. The contract also provided that "confirmation of trades...shall be binding on Customer, unless Customer calls any error therein to LFG's attention in writing...prior to the start of business on the business day next following notification." [Paragraphs 9,10 and 15 of customer contract (Exhibit A to Answer); and pages 10-13, and 45 of hearing transcript.]

4. In 1996, Driscoll made about 32 trades, many of them soybean futures. Trading in futures that year realized total losses of about \$6,700, and trading in options realized total losses of about \$1,240. For January through October 1997, Driscoll made about 20 trades, again many of them soybean futures. Trading in futures for the first ten months of 1997

realized total profits of about \$16,230, and trading in options realized total profits of about \$2,840.

Driscoll used his own spread sheet to keep track of his trades, but seldom reviewed the written confirmation statements or monthly account statements. Driscoll also routinely spoke to Osar almost every day, but never informed Osar that he was disregarding the written account statements. Driscoll testified that in a single unspecified instance—sometime before the disputed trades—he had liquidated an open position subject to a margin call, and that in another prior unspecified instance Osar had permitted a margin call to go unmet for several days. [See pages 11-18, 31-34, 41 and 46 of hearing transcript.]

*The margin call and the disputed soybean trades during the week of November 3<sup>rd</sup>*

5. On Monday, November 3, 1997, the one short November soybean futures contract and the three short May soybean futures contracts became under-margined, and would remain under-margined all week.<sup>1</sup>

6. Osar credibly testified that either on Monday, November 3<sup>rd</sup> or on Tuesday November 4<sup>th</sup>, he advised Driscoll that the account was subject to a \$2,950 margin call, and that Driscoll asked if he could hold the short bean positions without posting more margin. Osar assented, but advised Driscoll that, if the market did not favorably correct by the end of the week, he must either post more margin or liquidate. [See pages 41-43 of hearing transcript.]

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<sup>1</sup> Driscoll could not recall the underlying strategy for these trades (see page 19 of hearing transcript). On November 3, the account was also long four December corn futures contracts.

7. On Thursday, November 6, the November bean closed at 725, and the May bean would close at 733 ½. Thus, the account remained on margin call for \$2,950.

8. On Friday, November 7<sup>th</sup>, the market had failed to rebound in Driscoll's favor: the November bean opened at 725 ½, and the May bean opened at 733 ½. Osar credibly testified that before the market open, he told Driscoll that he now must either post more margin or liquidate. Driscoll replied that he believed he was still "right the market," and thus wanted to hold the short beans, but without adding more funds. Osar told Driscoll that his only choice then would be to "spread up" the short positions, by going long the January beans. Osar also warned Driscoll that he did not advise spreading up, because it would "not necessarily improve the account." Despite Osar's cautionary advice, Driscoll decided to spread up, and explicitly authorized the purchase of the January beans. [See pages 43-44 of hearing transcript.]

In contrast, Driscoll testified that he never spoke to Osar during the entire week of November 3<sup>rd</sup>, and thus never knew about the margin call or the purchase of the January beans. Nonetheless, Driscoll conceded that he was aware that the soybean contracts had lost value and "suspected" that they were under-margined. [Page 20 of hearing transcript.] When asked to explain why he had abruptly abandoned his usual practice of calling Osar every day – especially when he knew that the short beans were likely under-margined – Driscoll explained:

Well, I believe I was very busy at work, and I think Kevin did try to call me, several times, I assume. He usually would have in that situation, and I may have been out of the office. And I probably was just, didn't want to face the music. So, I was kind of hoping that the market would turn our way.

[Emphasis added, pages 22-23 of hearing transcript; see pages 18-21, 31, and 38-41 of hearing transcript.]

### *Aftermath*

9. The next week, the soybean market continued to go against Driscoll. On Tuesday, November 11, the November bean closed at 7.37  $\frac{3}{4}$ , and the May bean closed at 7.43  $\frac{3}{4}$ .<sup>2</sup>

10. The soybean market continued to worsen for Driscoll, and on November 18, Driscoll instructed Osar to offset the short November soybean, which was bought back at 7.39  $\frac{1}{4}$ .

Also on November 18, one long January bean was bought back at 7.39, and the May bean closed at 7.45  $\frac{1}{4}$ .

11. LFG generated and mailed to Driscoll confirmation statements dated November 7, 11, 18 and 26, as well as the monthly account statements dated November 28.<sup>3</sup> Each of these statements reported the open long January bean position. According to Driscoll, he never opened any of these account statements, and thus remained unaware of the open long January bean position.

Driscoll has made a series of conflicting assertions about when he eventually "discovered" the long bean position in the account. In Driscoll's letter to LFG, dated October 15, 1998, Driscoll stated that: "We did not discover the trade until weeks after it

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<sup>2</sup> On November 11, Driscoll instructed Osar to offset one December corn contract; and on November 26, Driscoll would instruct Osar to offset the remaining December corn contracts.

<sup>3</sup> This series of account statements reported that the November contract continued to deteriorate until it was bought back on November 18; and that the May contract deteriorated until November 18, and then rebounded slightly, but still well below the break-even price.

had occurred, at which time we had a negative balance.”<sup>4</sup> [Emphasis added.] In the complaint, complainants assert that: “We did not discovery the purchase until early December when one of us called Osar for trading advice.” [Emphasis added.] Then at the hearing, Driscoll testified that he first discovered the purchase of the January beans in mid-November. [Emphasis added, page 24 of transcript; see Osar’s memo to Jim Green memo dated July 24, 1998 (“Mid-December was the first time he mentioned about the other Jan. soybean position.”).] When asked to describe the conversation when he first discussed the long January bean trade Driscoll testified:

No, I don’t really recall it, other than that I was surprised, and I said you know, we didn’t make those trades. And we’re kind of wondering what happened. And he said he would look into it. And that’s about it. And I believe we – I forget exactly – but we did some trades [on November 18] to affect the account somehow.

.....

Well, every subsequent call, I just would ask, you know, “what’s the status?” And Kevin would said they were “still looking into it, trying to reconstruct the trades.”

[Pages 25-26 of hearing transcript; see pages 21-27 of transcript.]

12. Osar denies that Driscoll ever told him that he had never discussed or approved the purchase of the January contracts, and Osar denies that he ever told Driscoll “not to worry,” or that he was “looking into” or “reconstructing” the trade. Also, Osar credibly testified that in late December he left a phone message with Driscoll to call him about the imminent delivery date on the January contracts, but that Driscoll never returned this call.

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<sup>4</sup> On this record, it cannot be determined exactly when the account balance became negative. The November monthly account statement reported a positive \$430 account balance and a negative \$12,088 open trade equity; and the December monthly account statement reported a negative \$545 account balance and a negative \$16,175 open trade equity.

On January 2, 1998, the account was delivered on beans which were re-tendered on the next day. Also the day, the short May contracts were bought back at 6.79. The losses on the delivery/re-tender/liquidation totaled about \$14,500. [See pages 27-31, 44, and 47-49 of hearing transcript; and confirmation statements dated January 2, 5 and 6, 1998 (Exhibit C to Answer).]

13. On January 15, 1998, Driscoll and Ostrovsky sent to LFG a letter protesting for the first time that they had never authorized the purchase of the January contracts.

### ***Conclusions***

Initial and maintenance margin provides a means for futures commission merchants to assure their financial integrity and contribute to the financial integrity of the entire marketplace. For this reason, the Commission has consistently upheld the right of a broker to liquidate a customer account when the account is under-margined or the broker otherwise deems liquidation necessary to protect itself or the customer, based upon its own good-faith business judgment. *Baker v. Edward D. Jones & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 21,167 (CFTC 1981); see also *Gelderman v. Lane Processing, Inc.*, 527 F2d 571 (8<sup>th</sup> Cir. 1975). In *Baker*, the Commission stated that "in those market situations where a prompt response is required, a futures commission merchant is free to exercise its power to demand the deposit of additional funds by its customer and to liquidate an account without hesitation if the demand is not met." *Id.* Therefore, in order to establish wrongdoing by respondents, Driscoll and Ostrovsky must show by a preponderance of the evidence that respondents misled them about their margin policy or that they acted in bad faith by permitting the short positions to go under-margined for four days and then advising Driscoll

on the fourth day either to post more margin, to liquidate, or to spread up. However, Driscoll and Ostrovsky have failed to make such a showing.

Here, the customer contract obligated Driscoll and Ostrovsky to maintain adequate margin and to meet margin calls, and gave LFG wide discretion to set margin requirements and to liquidate open positions if Driscoll and Ostrovsky failed to meet a margin call. Driscoll was a bright, experienced commodities trader, who controlled the account, selected the trades, closely tracked his positions via his personal computer, updated the prices regularly throughout the day, and regularly monitored market reports on cable television. Thus, Driscoll knew that the market had moved against the November and May soybean contracts, and knew that they were likely under-margined. Yet, Driscoll unconvincingly asserted that he abruptly abandoned his normal practice of calling Osar each day, and remained incommunicado for an entire week. In contrast, Osar credibly testified that he informed Driscoll that the short November and May soybean contracts were on margin call, and that LFG would allow him to wait four days, but not beyond the end of the week, to decide whether to post more margin or liquidate. Osar also credibly testified that on the fourth day, when the market had failed to correct favorably, that he only advised Driscoll to spread up after Driscoll had rejected his advice to liquidate or post more margin, and that Driscoll then specifically authorized the purchase of the January beans. The fact that the market continued to go against the short positions the next week only underscores the reasonableness of Osar's advice. Thus, in these circumstances, complainants have failed to show any violations during the week of November 3, 1997, concerning the margin call.

Although Driscoll's testimony that he never called Osar the entire week of November 3rd was implausible and unconvincing, his explanation for his purported behavior that week – that he "was afraid to face the music" – helps to explain his subsequent behavior: specifically, his decision to hold the soybean spread, "hoping" for a profitable rebound; as well as his refusal to return Osar's call just before the delivery date. However, Driscoll never informed Osar that he was ignoring the account statements, and Driscoll never informed Osar that he was waiting for LFG to take some unspecified action that would take him off the hook for the soybean spread. Thus, Driscoll was merely imputing his own expectations to respondents, and could not reasonably shift to respondents his responsibilities to monitor the account, to protest any errors, to provide adequate margin on demand, and to stay in contract when he knew that delivery was imminent. See *Grist v. Shearson Lehman Brothers, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,379, at page 25,831, n.7 (CFTC 1982).

#### ORDER

No violations having been established, the complaint is DISMISSED.

Dated April 4, 2000.

  
Philip V. McGuire,  
Judgment Officer