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THERESA DIKE, Complainant v. MILTON CARL ARCHOLECAS, BRIAN DAVID COHEN, and WATERFORD FINANCIAL GROUP, INC., Respondents	CFTC Docket No. 00-R053

INITIAL DECISION

An oral hearing in this matter was held on January 24, 2001. Efforts to secure the participation of respondent Cohen (who also is the representative of respondent Waterford) proved unsuccessful despite messages left for Cohen with his telephone answering service, and the delivery of the hearing notice to him by private overnight delivery service, by certified first-class mail, and by regular first-class mail.[1] As he was warned in the December 19, 2000, Notice of Oral Hearing, Cohen's failure to participate in the hearing constituted waiver of the right to present testimony or to cross-examine complainant.

Summarized briefly, complainant's case is threefold: (1) that Cohen made misrepresentations when he took over her profitable options account after the departure from Waterford of respondent Archolecas (who has settled with complainant and whose conduct therefore has not been examined in this proceeding); (2) that Cohen violated promises to complainant regarding the trading, resulting eventually in her losing all the money in the account when Cohen put her in options that expired worthless; and (3) that Cohen churned her account. The facts set forth here are taken from the February 14, 2000 complaint; the March 13, 2000 addendum; and the tape-recorded oral hearing.[2]

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[1] The certified mail was returned to the CFTC Office of Proceedings marked "Refused." Neither the overnight delivery nor the regular first-class envelopes were returned, and they are presumed to have been delivered. Cohen's blatant attempt to refuse service of Court Orders in this proceeding will not be rewarded by simply entering an order of default (which might allow him to re-open the proceeding).

[2] Complainant submitted what she labelled as a "Verified Statement" that was, in fact, not verified in any fashion. As an attorney, she should be aware of the distinction, and thus the statement is considered to have been submitted in its unsworn form purposefully, and as such, has been disregarded.

Complainant's unrebutted testimony was hampered by a general disorganization and confusion about the dates of certain events. Nevertheless, complainant's testimony established the general veracity of the allegations made in the complaint as to respondent Cohen as to the first two allegations, but not as to the churning charge. Complainant testified credibly that she contacted Cohen after he took over the account in August 1999, and that Cohen misrepresented both how often he would be in contact with her and the likely profitability of the trades he was recommending to her. Later, when losses appeared in those trades, he dissuaded her from exiting the market by lulling her into believing that the options she had purchased were bound to recover. Instead, those options expired and complainant lost all of the money that had been in her account when Cohen took over the trading. Cohen's conduct violated Section 33.10 of the CFTC's regulations and Section 4c(b) of the Commodity Exchange Act, and resulted in complainant's damages in the amount of $13,504.38.[3]

The churning allegation, however, is not supported by the evidence. Complainant alleged that the volume of trading engaged in by Waterford through its employees[4] exceeded her desires. However, under extensive examination during the hearing, complainant never could explain what she believed an appropriate level of trading would have been. Neither did she articulate any believable story as to how respondents, rather than she (a law student studying for the bar examination) controlled the trading in the account. The thousands of dollars in commissions assessed during the life of the account was indeed exorbitant, but complainant has not met her burden of demonstrating that these commissions reflected trading by respondents for their benefit rather than her own. Indeed, it is noted that she testified approvingly of the trading engaged in by Archolecas and that this trading was substantially profitable -- yet Archolecas traded at a higher volume than did Cohen. Based on this record, it is concluded that the complainant was satisfied with the level of trading until market losses (not commissions) reduced her account to zero.

Violations having been found, respondents Cohen and Waterford are ORDERED to pay reparations to complainant in the amount of her losses, $13,504.38, plus prejudgment interest compounded annually on that amount at the rate of 6.025 %, plus costs in the amount of the filing fee, $125.00. LIABILITY IS JOINT AND SEVERAL AS TO COHEN AND WATERFORD.

That part of the complaint which seeks damages for alleged churning is DISMISSED as without merit. The complaint is DISMISSED WITH PREJUDICE as to respondent Archolecas.

Dated: February 27, 2001

JOEL R. MAILLIE
Judgment Officer

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[3] The damages reflect the account's highest value as shown by the August 12, 1999 statement attached to complainant's addendum to her complaint, minus the $1,000 complainant received in settlement from Archolecas.

[4] Complainant alleged churning by both Archolecas and Cohen. Despite the settlement discussed in the text between complainant and Archolecas, Waterford would still be vicariously liable for any churning by Archolecas (and damages beyond the amount of the settlement), but that possibility is mooted by the result.