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MICHELE J. SHEHEE and JENNIE B. SHEHEE, Complainants	)	
v.	)	CFTC Docket No. 03-R021
IRA EPSTEIN & COMPANY and MAN FINANCIAL, INC., Respondents	)	

INITIAL DECISION

Complainants here are seeking damages because they feel that two of their options orders were treated improperly by respondents. Had the orders been treated correctly, complainants contend, they would have avoided some $1,700 in losses that they seek to recover in reparations. All facts discussed in this opinion are taken from the complainants' own submissions except where noted.

The dispute begins with a trade that did not occur and that is not directly at issue, but is discussed here to demonstrate why the orders at issue were placed as they were. On November 16, 2001, complainants attempted to enter the Chicago Mercantile Exchange S & P 500 Index market by placing an online order in their self-directed Ira Epstein account. The order, initiated by Michele Shehee (who is here referred to as "Ms. Shehee" since she did all of the trading), was to buy 3 December 2001 S & P puts (1115 strike) at a price of 235 or better, good until cancelled. Ms. Shehee received a notice generated by Ira Epstein's online system indicating that the order was "approved" and assigned order number 68807. Later that day, Ms. Shehee attempted to sell when the price was much higher, but she was informed that her order could not be executed because it was improperly placed (Exhibit B to complaint).

Several weeks thereafter, on December 10, 2001, Ms. Shehee again placed an online order, and her narrative shows that a degree of insecurity and confusion caused by her November mistake caused problems in her trading:

> On December 10, 2001[,] I placed a second order online (B 3 SPZ1 1190C 300 O OB *Good til Cancel/day session) and received order number 69586 [ ] which gave me the auto

> approved & sent to exchange msg. I went back online to cancel this order because of being unsure if I did it correct[ly]. I repeated this process[ ] twice[,] gaining 3 order numbers *69586, *69587 and 69598. The first two order[s] *69586 and *69587 both were canceled within 5 mins of entry with 69588 being the finalized order of entry. I received a[ ] msg for both *69586 and *69587 both had been canceled with an order type code of CXL. The following day I was informed that my acct. was in the "red" due to the two approved [executed] orders of 69586 and 69588.

(Exhibit A to complaint.)

Complainants' orders ended up causing them to have twice as many calls as intended. After deciding to cancel the first order, Ms. Shehee received a notification that the cancellation was accepted, and therefore she re-entered her order a second, and then (after a second cancellation) a third time. It appears from the record that only the second cancellation (of order number 69587) was actually effective.

Distilled to its essence, the Shehees' complaint sets forth the logical, and ultimately in the unique circumstances of this case convincing, argument that because the online order system notified Ms. Shehee that the cancellation of order 69586 was accepted and given the CXL code, her trade based on that order should not have occurred.[1]

Respondents contend that the complainants were not entitled to a fill in November because the market never traded that day, with no attempt to discuss whether the order was properly placed; they submit a CME Time and Sales listing documenting this contention (Answer at 4, and Exhibit A). As for the December trades, respondents assert that the market was trading at complainants' order price and therefore the first order was executed before the cancellation was received in the pit (Exhibit B to Answer). They deny that the "accepted and approved" notification generated by the online system meant that a particular order would be executed, and also deny that this same notice regarding an attempt to cancel guaranteed that a cancellation actually would occur. To support their contentions, respondents reference the "Internet Electronic Trading Addendum" found in page 18 of the Shehees' customer agreement. Respondents' answer does not independently offer any analysis of the December attempt to cancel, but instead references Mr. Ira Epstein's post-trade letter to Ms. Shehee in which, among other things, he rejected her effort to disavow the double fill:

> You placed your orders electronically. Each order you placed was given an order number and confirmation that it had in fact been placed. This confirmation is not a guarantee that what you order instructs us to do will in fact be done. Rather, market conditions dictate such. One of the key areas you are mistaken in has to do with what "order confirmation" is. The confirmation you are talking about in your complaint, is not confirmation that your order had been cancelled, but rather is a confirmation that the order entry system had taken your cancellation order and forwarded it on for action. This is exactly what took place.....

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[1] In an alternative argument, the complainants suggest that since it took so long to reject the November order, the cancellation of order 69586 immediately after it was placed should have been effective. This argument compares two entirely dissimilar orders and trading circumstances and is unconvincing.

> Your allegation that you received confirmation that your order was cancelled is simply not true. You could have instructed our order entry system for a "Cancel/Confirm Out" but you did not. Rather, you and you alone decided that since you had placed a cancel on the original order, that the cancel was complete, even though quotes on both Commodity-Fone or IraTrade, our quote system, would have shown the market trading at your 300 price…..
>
> On December 11th, [we] tried to explain all of this to you, but you would not listen to the facts. Rather, you focused on the fact that you had placed an order to cancel your original order and had received confirmation of that. We agree you received an order confirmation, a confirmation that you were trying to cancel your original order. That is all you received at that time. The reality is that we sent an instruction to the filling broker to cancel the original order, if it was not already filled….

(Appendix B to Answer.)

The "Internet Electronic Trading Addendum" to the Shehees' customer agreement, cited by respondents as their authority for rejecting the Shehees' claim, contains in pertinent part:

> [Paragraph 2.] All orders that you initiate are not considered to be received by our Company until such time as you receive notification through the Internet that your order has been either accepted or rejected for placement. You must cause any notification from our Company to be printed and retained as hard copy evidence of the same. Unless you receive notification from our Company, through the Internet in the form of a confirmation number, you must not assume that the order has been accepted by our Company for placement.

(Exhibit C to Answer at 18.)

In this case, whether Ms. Shehee received confirmation is not in dispute ("We agree you received an order confirmation…."). Thus, the only issue is whether the confirmation Ms. Shehee received was sufficient to give legal effect to her cancellation attempt.

Preliminarily, it must be noted that the Epstein letter reflects a distorted view of the respective duties of the company and its customers and a rather disingenuous misrepresentation regarding "confirmation" of orders. The Internet trading addendum references the need for a confirmation number before a customer may conclude that an order has been "accepted…for placement," but the addendum does not indicate what type of confirmation number is envisioned. The Shehees do not contend that they received a separate confirmation number, but only that they received a "CXL" code on their original order number, 69586, which as noted is not disputed by respondents. Neither side indicates that the CXL code was sent to Ms. Shehee with any reservation whatsoever, such as that the cancellation order was merely "working" – or would somehow be subject to later rejection until some new confirmation number was issued.

Respondents' argument in Mr. Epstein's original letter suggests that the Shehees' were obligated to place a different type of cancellation order if they wanted a confirmation ("You could have placed a Cancel/Confirm Out….but you did not.") But the Internet trading addendum does not distinguish between orders or cancellation orders, and at no point does it require a separate

confirmation order to be placed by the ***customer*** if the customer wishes confirmation. Instead, the addendum says only that no order will be considered "accepted" by the company until a confirmation number has been issued. Mr. Epstein's letter suggests, but the record in this case is silent whether it is in fact true, that accepted industry practice requires a separate confirmation order to be placed with a cancellation order. If the company signals its customers with a CXL code applied to the original confirmation number, which Mr. Epstein himself admits to be a "confirmation," a reasonable customer may assume that the order has been accepted and Mr. Epstein's disavowal of his own company's contract reaches too far.

The secondary argument of Ira Epstein & Company, stating that the market was already trading at complainants' price and therefore the cancellation was too late, is unsupported by any evidence whatsoever in the record. Such an argument requires at a minimum the production of some evidence regarding the time of the trade; respondents have not submitted trading tickets, time and sales registers, order tickets, or affidavits in support of this contention. Since a mere assertion in an answer is not evidence, it will not be considered here.[2] It is also noted that this particular argument by Ira Epstein & Company ignores the second order, 69587, where the exact same sequence of events resulted in an effective cancellation.[3]

Having chosen to reference Mr. Epstein's letter as its answer to the December allegations, respondents are charged with the implications of both its admissions and omissions. Certainly complainants ***could have*** placed a different type of order, but the question here is whether they were obligated to; the customer agreement suggests otherwise and Mr. Epstein's admission of a confirmation dispels further doubt – regardless of his effort to embellish that confirmation with undisclosed reservations and hidden meanings. A company seeking to disavow a CXL "confirmation" had better be able to establish with some degree of certainty that the customer has been adequately notified exactly what hoops must be jumped through before being justified in believing that the "confirmation" means what it appears to say. Furthermore, it is entirely ***possible*** that trading conditions resulted in an immediate execution of the order and prevented a timely cancellation, but to conclude that the trade ***actually*** happened at that particular time would be based on speculation alone. The evidentiary record firmly establishes only that an order was placed; that a cancellation was confirmed; and that the original order was executed despite the cancellation. Under such circumstances, it is up to respondents to demonstrate precisely why the executed order had not been cancelled as confirmed.

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[2] Having chosen to reference Mr. Epstein's letter as its answer to the December allegations, respondents are charged with the implications of both its admissions and omissions. Certainly complainants ***could have*** placed a different type of order, but the question here is whether they were obligated to; the customer agreement establishes that they were not. A company seeking to disavow a CXL "confirmation" had better be able to establish with some degree of certainty that the customer has been adequately notified exactly what hoops must be jumped through before being justified in believing that the "confirmation" means what it appears to say. Furthermore, it is entirely ***possible*** that trading conditions resulted in an immediate execution of the order and prevented a timely cancellation, but to conclude that the trade ***actually*** happened at that particular time would be based on speculation alone. The evidentiary record firmly establishes only that an order was placed; that a cancellation was confirmed; and that the original order was executed despite the cancellation. Under such circumstances, it is up to respondents to demonstrate precisely why the executed order had not been cancelled as confirmed.

[3] Actually, Ira Epstein & Company ignores that order entirely throughout its Answer.

For the reasons stated, it is concluded that respondents[4] improperly executed an order that had been cancelled, and subsequently charged complainants' account with the resulting (and thus unauthorized) trade, violating CFTC Rule 33.10 prohibiting fraud in connection with commodity futures options transactions.[5] The violation proximately caused complainants' claimed damages of $1,700.00.

Accordingly, respondents Ira Epstein & Company and Man Financial, Inc., are ORDERED to pay reparations to complainants in the amount of $1,700.00, plus prejudgment interest compounded annually at the rate of 2.16 % from December 10, 2001, to the date of payment, plus complainants' filing fee of $125.00.

Dated: June 30, 2004

Joel R. Maillie

JOEL R. MAILLIE
Judgment Officer

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[4] Respondent Man Financial is liable for the actions of Ira Epstein & Company as the latter's guaranteeing futures commission merchant.

[5] Alternatively, Ira Epstein could be considered to have falsely confirmed to complainants that their order was cancelled when in fact it was not and when Ira Epstein knew or should have known that the cancellation was not effective, resulting in complainants' mistaken placement of a new order. That finding would not require revision of the provision violated because the antifraud provision of rule 33.10 of the CFTC's futures options rules covers both false reporting and other types of fraud.