



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

Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581

Office of Proceedings

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**JAMES E. BUCHANAN,**  
Complainant,

v.

**FOX, INCORPORATED, and**  
**KEVIN JOSEPH van TRUMP,**  
Respondents.

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CFTC Docket No. 00-R118

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**INITIAL DECISION**

James Buchanan alleges that he did not authorize any of the transactions in his account – a total of twelve buys and sells over four weeks -- and seeks to recover his \$5,000 investment. In reply, respondents assert that Buchanan’s account executive, Kevin van Trump, initiated all of the trades pursuant to Buchanan’s specific authorization, and that van Trump liquidated the trades consistent with Buchanan’s instructions. Respondents also assert that Buchanan is estopped from recovery because he did not promptly protest any of the allegedly unauthorized trades upon receipt of the confirmation statements. In this connection, Buchanan admitted that he chose “to wait and give [van Trump] enough rope to redeem or hang himself.”<sup>1</sup>

The findings and conclusions below are based on the parties’ documentary submissions, and their oral testimony at the hearing held on March 7, 2002. Neither Buchanan’s nor van Trump’s version of events was particularly compelling. As for Buchanan, his own actions manifested a belief that he had actually approved each of the

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<sup>1</sup> ¶ 2c of Buchanan’s reply to *sua sponte* discovery order.

trades placed by van Trump – before he spoke to van Trump, Buchanan had already deposited \$5,000, and after he spoke to van Trump and van Trump had placed the trades, Buchanan never objected to any of the trades until his account became depleted. Buchanan also underscored the *post hoc* quality of his complaint, and in the process undermined his general credibility, and by pressing implausible and unsubstantiated allegations that respondents had fabricated phone records and order tickets. As for van Trump, during his initial, seven-minute, conversation with Buchanan, van Trump somehow managed to ascertain Buchanan’s trading objectives and to obtain Buchanan’s authorization for the entry and exit of several trades. Van Trump also delegated to Bacca the responsibility to provide Buchanan with ongoing advice, and did not make any prompt and concerted effort to contact Buchanan after the account became undermargined and Bacca reported that he had been unable to contact Buchanan. In any event, the defects in Buchanan’s story were greater, and his testimony was not sufficiently convincing to preclude a finding that his conduct had been more consistent with authorized trading than with unauthorized trading. Thus, it has been concluded that Buchanan has failed to establish by a preponderance of the evidence any violations causing damages.

### **Factual Findings**

#### *The parties*

1. James Buchanan, a resident of Santa Maria, California, was 76 years old when he opened his account with respondents. On his account application, he listed his liquid net worth at \$20,000, and his annual income at \$52,200. He had previously traded a self-directed commodity account with First American Discount Corporation, and

subscribed to the “McMaster” trading newsletter. Buchanan has Bachelor’s and Master’s degrees in business. After retiring from the Air Force in 1970, he worked part-time as a real estate broker. He retired completely in 1984 “due to age and infirmity.”

[Buchanan’s reply to respondents’ interrogatory 19.] Buchanan’s oral testimony, and his aggressive motion practice throughout this proceeding, support the conclusion that he is alert and capable of assertively and persistently defending what he considers to be his best interests, and thus that he was not only capable of understanding when he signed the customer contract that he had agreed to protest any unauthorized trades, but also capable of raising such a protest when necessary. [See pages 7-11, 36-40, and 46-48 of the hearing transcript; and Buchanan’s replies to respondents’ interrogatories 3, 4 and 5.].

2. Fox, Incorporated is the registered introducing broker that introduced Buchanan’s account to ED&F Man International, Incorporated. [NFA records.]

Kevin Joseph van Trump, during the relevant time, was registered as an associated person with Fox’s branch office, which at the relevant time was located in Peculiar, Missouri, just outside Kansas City.<sup>2</sup> Van Trump acted as Buchanan’s account executive. In that capacity, he spoke to Buchanan on just two occasions: on or about May 22, 2000, when van Trump wrote up the orders for the disputed trades; and on or about July 11, 2000, when Buchanan called van Trump to object -- for the first time -- that he had not authorized any of trades. [See Van Trump Declaration; and pages 17-21, 34-35, 41-42, 65-68, 110-114, and 123-126 of the hearing transcript.]

Jeff Bacca was a registered associated person with Fox at the relevant time. Buchanan did not allege any violations by Bacca; and neither side produced, or sought, Bacca’s written or oral testimony. According to Buchanan, he and Bacca spoke several

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<sup>2</sup> Van Trump was also registered as a commodity trading advisor.

times before Buchanan decided to open the account. During these conversations, Bacca and Buchanan principally discussed the grain markets, especially the corn market. After Buchanan opened the account, Bacca introduced Buchanan to his account executive, van Trump. As discussed below, Buchanan asserts that he never spoke to Bacca again, and that Bacca never left any voice messages on his phone. In contrast, van Trump asserts that he instructed Bacca to call Buchanan to report fills and margin calls.<sup>3</sup> [See Van Trump Declaration; Buchanan's reply to respondents' interrogatory 10; and pages 10-17, 45, 67-69, 84-85, 102-103, and 135-136 of the hearing transcript.]

*Summary of telephone calls*

3. Respondents produced Fox's itemized long-distance phone bill, which established conversations on the following dates.

<i>Date</i>	<i>Number of calls</i>	<i>Total minutes</i>
May 11	3	23
May 12	3	22
May 15	2	10
May 22	3	10
May 24	2	5
May 31	1	1
June 12	1	5
July 11	1	5

[Produced January 31, 2002.] Buchanan initiated two of these calls: one of the calls on May 22, and the call on July 11.

Respondents do not dispute Buchanan's assertion that the conversations on May 11, 12 and 13, and the first two conversations on May 22 (three total minutes), were

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<sup>3</sup> Other than Fox's phone bill, respondents did not produce any documentary evidence, such as broker notes, concerning Bacca's actions.

between Bacca and Buchanan, and principally involved discussions about the account-opening process and about the corn market.

4. The phone bill only partially supports respondents' assertion that Bacca attempted to contact Buchanan, or left messages on Buchanan's phone, to report fill prices for the trades that were executed on May 24, 25 and 31, and June 1, 6, 15 and 26, and to report a margin call on June 12.<sup>4</sup> Respondents' phone bill did establish the existence of a few calls: on May 24 and 31, and June 12.<sup>5</sup> However, respondents' phone bill did not establish the existence of numerous other calls corresponding to trades on May 25, and June 1, 6, and 15. In other words, respondents' evidence establishes that Bacca and van Trump did not speak to Buchanan, or leave any messages, between May 31 and June 12, which was a period of significant trading activity. [See pages 84-89, 102-106, 118-119, 128-129, and 135-136 of hearing transcript; and ¶ 7 of Van Trump Declaration.]

#### *Order tickets*

5. Respondents produced a set of order tickets for all of the trades, except for the corn spread which was initiated on June 6. [See pages 75-84, 93-107, and 127-131 of hearing transcript.] Each order ticket was time-stamped at May 22, at 3:28 or 3:29 p.m.,

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<sup>4</sup>Buchanan claimed that he was "home-bound" and never received any calls or messages from respondents after May 22 and before July 11, and argued that the portion of the phone bill showing calls on May 24 and 31, and June 12, thus must have been fabricated. However, Buchanan has not offered any evidence, or any convincing or plausible explanation, in support of that particular allegation. [See pages 6, 48-51, and 62-64 of hearing transcript; Buchanan's Motion for Default (filed February 22, 2002); ¶ 2c of Buchanan's reply to *sua sponte* discovery order; and ¶ 7 of Van Trump Declaration.]

<sup>5</sup> Van Trump asserted that he had instructed Bacca to call Buchanan about a margin call on the corn futures trade. However, respondents have not produced any evidence, such as equity runs, that establish when the corn futures became under-margined, and otherwise have not produced any evidence tying the June 12<sup>th</sup> conversation to the margin call. [See pages 89, 102-106, 118-119, and 128-129 of hearing transcript.]

which corresponds to van Trump's seven-minute phone conversation on May 22, at 3:28 p.m.<sup>6</sup>

*Buchanan opens the account and van Trump places the orders*

6. On May 11, 12, 15 and 22, Buchanan and Bacca spoke about opening an account. According to Buchanan, they discussed the corn market, and Bacca told Buchanan that van Trump had considerable experience with the grain markets and would be acting as Buchanan's account executive. Bacca also faxed a nine-page report on the effect of drought conditions on corn, soybean and wheat prices.

7. On or about May 12, after Bacca and Buchanan had negotiated a commission rate,<sup>7</sup> Bacca faxed the account-opening documents, including the customer agreement and a risk disclosure statement. Buchanan quickly signed and faxed back the documents, and soon afterwards deposited \$5,000. Buchanan neither carefully reviewed, nor copied, the documents, because he did not consider the documents to be "essential" at the time. [See Buchanan's reply to interrogatory 10, and pages 10-18, and 46-48 of hearing transcript.]

Paragraph 9 of the customer contract provided in pertinent part:

Reports of executions of orders sent by us to you shall be binding and conclusive on you, unless . . . you object in writing prior to the opening of trading on the business day following the day you have received the report.

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<sup>6</sup>Buchanan also alleged that all of the order tickets produced by respondents were fabricated, based principally on the fact that two tickets had been time-stamped "May 32." However, this allegation of document falsification also has proved, at best, to be based on mere suspicion, and thus more weight has been accorded to respondents' reasonable explanation that those tickets relate to orders that were filled on June 1, and that the timestamp machine had printed out "May 32" instead of "June 1," because Fox office personnel had forgotten to "rollover" the time-stamp machine to the month of June, after the markets had closed on May 31. [See pages 106 and 123 of hearing transcript; page 2 of Buchanan's "Motion for Rejection of Respondents' Bad Faith Motion"; and page 2 of Buchanan's Application for Interlocutory Review.]

<sup>7</sup> Buchanan would pay a total of about \$365 in commissions.

However, the contract did not identify a particular person or office, or provide any address, phone number, fax number or e-mail address, to whom any such objection should be directed. [Exhibit A to Answer.]

8. On May 22, Bacca introduced Buchanan and van Trump, who then spoke for about seven minutes, at 3:28 p.m. – after the markets had closed. Both agreed that Buchanan accepted van Trump’s advice that, since he did not want to risk more than the \$3,000 that he had committed, he should trade no more than a couple of corn contracts and should also diversify. Buchanan claims that he and van Trump discussed a specific corn trade and discussed trades in other markets, but that he did not actually authorize any trades.

[Van Trump] stated that my account had been opened and he was my broker. He said that Bacca told him of my interest in grains and he spoke a bit about grains and he said he could probably get 2 July corn at a certain price. I did not authorize such a trade, but expected van Trump to advise me when a good trade was attainable. I told him I was not married to grains and would be interested in opportunities in other markets.

[¶ 2 of Buchanan’s reply to *sua sponte* discovery order; *see also* pages 18-21 of hearing transcript; Buchanan’s reply to respondents’ interrogatory 11; page 1 of Factual Description of Complaint.]

In sharp contrast, van Trump asserts that before Bacca introduced him to Buchanan, Bacca had told van Trump that Buchanan was ready to begin trading. According to van Trump, he first discussed the corn market and confirmed that Buchanan did not want to risk more than \$5,000. Buchanan said that he wanted to buy four or five corn futures, but Van Trump advised Buchanan that, since he wanted to risk no more than \$5,000, he should buy just two corn contracts, and also consider diversifying into other markets. Van Trump said that corn “might be due for a pull back,

because it had already seen a nice rally.” Van Trump also said that he thought that soybeans were more undervalued than corn. Van Trump then recommended that they wait until corn had pulled back to \$2.36 per bushel before buying two July corns, and also recommended that Buchanan buy two Mid-Am July soybean futures. Buchanan then approved the corn trade (“ ‘Yeah, let’s get a couple of corn.’ ”), and the bean trade. Next, according to van Trump, Buchanan asked, “ ‘What else do you have going on? I am not married to the corn market. I just want to make money.’ ” Van Trump replied “so does everybody,” and then briefly described three more trades that he was recommending to his other customers: a July Chicago/Kansas City wheat spread (“I told him we were trying to work the trade at around 27 cents, . . . and that we were risking 2 cents.”); a December corn call spread (“I told him we were working the order at even money to one-half cent.”); and a long orange juice trade based on reports of brush fires and diseases affecting the supply of oranges. Buchanan quickly told van Trump to place each of these trades (“ ‘Let’s go ahead and do the trades’ ”). [Pages 68-76 of hearing transcript; and ¶¶ 2-6 of van Trump’s Declaration.]

*Buchanan “dissociates”*

9. The account statements typically took five days to arrive at Buchanan’s house. Thus, by Monday, May 29, 2000, Buchanan had received the statement confirming the first trade -- the May 23rd purchase of the July orange juice futures contract.<sup>8</sup> Subsequently, Buchanan received account statements confirming new positions on May

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<sup>8</sup> Since respondents did not produce any equity runs, the liquidation value of the account on May 29 and 30 cannot be determined on this record. However, the May monthly account statement, dated May 31, establishes that the account had a \$4,629 cash balance and that the open positions had lost an aggregatenet of \$1,578.

24 and 25, and June 6, and offsets on May 31, and June 1, 15 and 26.<sup>9</sup> In addition, Baca left recorded messages with Buchanan on May 24 and 31, and June 12.<sup>10</sup>

Upon receipt of the first confirmation statement, Buchanan was “astounded” that van Trump had “seized” his account and made an unauthorized trade. However, even though he continued to receive several statements that confirmed a series of purportedly unauthorized trades, Buchanan never contacted Bacca or van Trump to discuss, let alone protest, the purportedly unauthorized trading activity. Set out below is Buchanan’s most detailed explanation for his silence:

I was astounded by the receipt of the first account statement showing the purchase of the orange juice on May 22<sup>nd</sup>. I had not authorized this trade and van Trump had given no notice of intent to make any trades. It was as if my banker had surreptitiously accessed my account – unbelievable! I deliberated on calling ED&F Man and van Trump, but procrastinated in order to pacify my blood pressure which was a prevalent problem. Also, I was allayed by the fact that that the transaction was five-days-old history and the instruction on the back reads: “Any apparent error should be immediately reported by telegraph or telephone,” but a phone number is not provided.<sup>11</sup>

Since van Trump was a professional and current on his ethical training, I assumed there must be a method in his madness and he would surely contact me with a plausible explanation. So I decided to wait and give

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<sup>9</sup> Each confirmation statement had a warning at the bottom that stated:

Please report any differences immediately. The failure to immediately exercise your right to have errors corrected will be deemed your agreement that this statement is correct and ratified.

Although the statements provided an address for Man, they did not identify a particular person or office, or provide Man’s telephone number, fax number, or e-mail address. [See pages 10-18, 21-23 and 67-70 of hearing transcript; ¶ 1 of Buchanan’s reply to *sua sponte* discovery order; Buchanan’s reply to respondents’ interrogatory 10; and ¶ 7 of Van Trump Declaration.]

<sup>10</sup> Van Trump testified that he instructed Bacca to call Buchanan to report fills when he initiated trades and when he liquidated trades. As discussed in finding 4 above, the evidence produced by respondents indicates that Bacca called Buchanan to report only four, out of seven, fills. Van Trump also testified that at some point Bacca had told him that he had experienced trouble contacting Buchanan, but that it “didn’t become an issue until the corn futures became under-margined.” See pages 102-103, and 135-136 of hearing transcript.

<sup>11</sup> Buchanan was aware that, since he knew ED&F Man’s New York City address, he could have tried to obtain ED&F Man’s phone number from directory assistance. Buchanan could not recall why he did not try to do so. [See pages 22-23 and 56-58 of hearing transcript.]

him enough rope to redeem or hang himself. As more unauthorized trading statements came in and still no word from van Trump, I continued to postpone the repugnant task of complaint and accusation, and assumed the attitude that I would completely dissociate myself from the account, which he had seized and was totally responsible for.

[¶ 2c of Buchanan's reply to *sua sponte* discovery order; see pages 21-34, 49-62, and 102 of hearing transcript; Buchanan's reply to respondents' interrogatory 21; and page 1 of Factual Description of Complaint.]

10. On May 31, the market had rallied and van Trump sold one of the soybean futures to limit Buchanan's exposure, for a loss of \$255. At this point, the account was down only \$1,000. [See pages 96-98 of hearing transcript.]

On June 1, van Trump liquidated the wheat spread for a \$301 loss, "because of the two-cent risk." [Page 101 of the hearing transcript.]

On June 15, the soybean market rallied again, and van Trump sold the remaining soybean future, for a loss of \$320. Also that day, the orange juice market reversed on news that forecast rains would suppress the brush fires in Florida, and Van Trump sold the orange juice future, for a profit of \$225. [See pages 101-102 of the hearing transcript.]

The aggregate net loss on these offsets was \$551. The evidence showing Buchanan's authorization for these offsets was weaker than the evidence showing his authorization on May 22<sup>nd</sup> to initiate the trades. However, Buchanan has neither alleged, nor produced any evidence, that his losses would have been smaller had van Trump not liquidated these trades when he did.

11. On June 26, van Trump sold the two July corn futures for a loss of \$4,152. Van Trump testified that he liquidated Buchanan at this point because he had been on

margin call for more than five days and was approaching first notice day for taking delivery. [See pages 88-89, and 91-104 of the hearing transcript.]

12. On July 11, Buchanan called van Trump to complain that he had not authorized any of the trades, and to demand the return of his entire \$5,000 investment, because. According to van Trump, he responded that Buchanan had in fact authorized each trade, and when asked why Buchanan had waited so long to object, Buchanan replied: “Well, I told you to see if you could get a couple [corn contracts]; I didn’t actually say to buy it.” [Page 90 of hearing transcript.]

Buchanan and van Trump could not reach any accommodation, and concluded their conversation with Buchanan instructing van Trump “to leave his account alone.” As a result, the only remaining trade – the corn spread -- would expire on November 18, for a net loss of \$199. [Page 102 of hearing transcript.] On December 13, the \$21 balance was returned to Buchanan. [See pages 35, 84, 89-93 of hearing transcript; Buchanan’s reply to respondents’ interrogatory 12; ¶ 2c of Buchanan’s reply to *sua sponte* discovery order; and ¶ 8 of Van Trump Declaration.]

### **Conclusions**

The totality of Buchanan’s conduct – depositing \$5,000 before he spoke to van Trump, telling van Trump that he was ready to begin trading and “let’s buy a couple,” not objecting to any trades after receiving the confirmation statements, and then waiting several weeks until his investment had been wiped out before objecting – supports the conclusion that Buchanan from the beginning had intended to adopt the disputed trades, and thus bars recovery of any damages. This conclusion was underscored by the *post*

*hoc* nature of Buchanan's allegations, including his rash and implausible charge that respondents had produced false documents, and by his generally unconvincing testimony.

In the alternative, even when the evidence is viewed most favorably to Buchanan, the most he can show is that van Trump was mistaken in believing that he had obtained Buchanan's authority. Both sides agree that, going into his first conversation with van Trump, Buchanan had indicated that he was ready to trade and that he was principally interested in, but "not married" exclusively to, corn. Van Trump asserts that not only was Buchanan ready to trade, but that he readily accepted van Trump's advice and approved in short order five trades recommended by van Trump. In contrast, Buchanan asserts that while he may have conveyed a willingness to begin trading, he was not yet completely and unreservedly ready to risk his funds, and thus thought that he and van Trump had been merely discussing likely trading strategies. Buchanan's belief was not totally unreasonable in light of the fact that this had been his introductory conversation with van Trump; that the discussion had progressed pretty quickly for van Trump and Buchanan to get to know each other and to discuss and approve five trades; and that van Trump himself never made any follow-up calls. Moreover, with the benefit of hindsight, it is reasonable to conclude that van Trump could well have prevented or detected Buchanan's confusion or disapproval if he had spent a little more time during their initial conversation, or made follow-up calls himself in late May and early June, or made a truly concerted effort to contact Buchanan by any available means as soon as Bacca had told him of the difficulties contacting Buchanan.<sup>12</sup> However, while such efforts may have been the better practice, the fact that van Trump did not make these efforts does not

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<sup>12</sup>The fact that the ED&F Man confirmation statements did not identify the office, or provide the phone number, fax number or e-mail address for customer protests also contributed to the unfortunate outcome.

establish that it was unreasonable for him to believe that he had properly obtained Buchanan's authority for the disputed trades, especially where Buchanan had deposited his funds, had expressed his willingness to begin trading with expressions like "let's buy a couple" and "let's do the trades," and then had acted as if he approved the trades by remaining silent. In these circumstances, if Buchanan actually believed that the first trade, and each subsequent trade, had been erroneous, once he received the first confirmation statement, he was not free to refrain from notifying van Trump of his apparent mistake.

Under Commission precedent, a customer will be barred, or estopped, from recovering the full measure of damages for allegedly unauthorized trades, if his delay in objecting to the trades is unreasonable. The Commission has stated that if it is to place "ultimate legal and financial responsibility" for an unauthorized trade upon brokers, the customer must complain "at the first reasonable opportunity" to afford the broker an opportunity to correct any bona fide errors or to assert control over the trades and exit from the market. *Sherwood v. Madda Trading Co.*, [1977-1980 Transfer Binder] Commodity Fut. L. Rep. (CCH) ¶ 20,728 at 23,021-23,022 (CFTC 1979). Here, Buchanan admitted that he had contemplated complaining to van Trump but chose not to do so because he found the task "distasteful" and stressful. This and the other excuses put forth by Buchanan for not contacting van Trump were neither reasonable nor sufficient to justify his failure to provide a timely and meaningful objection. The fact that the price had changed during the interim that the confirmation statement had been in the mail underscored the need for immediate action, rather than total inaction. Because Buchanan deliberately chose to conceal his intention to play the market without risk by dissociating

from any losing trades, van Trump continued to fill orders that he believed to be authorized, liquidated trades in a manner that he believed was consistent with Buchanan's wishes, and was denied an opportunity to assert unfettered control over the trades and extricate respondents from the market at the first reasonable opportunity. In these circumstances, Buchanan is estopped from recovery of any damages incurred after May 31, 2000.

**ORDER**

No violations causing damages having been shown, the complaint in this matter is DISMISSED.

Dated May 14, 2002

A handwritten signature in black ink, appearing to read "P. McGuire". The signature is written in a cursive, somewhat stylized font.

Philip V. McGuire,  
Judgment Officer