



respond to the messages left for him about the margin call. When he had not contacted Lind-Waldock by the close, the market-on-close orders were executed.

Lind-Waldock incorrectly argues that the customer agreement signed by complainant establishes the propriety of the liquidation (Answer, page 3). However, the complaint does not allege a contract violation but instead alleges improper liquidation, which the Commission has recognized as a cause of action arising under Sections 4d and 4b of the Commodity Exchange Act.<sup>2</sup> Under that analysis, this case nevertheless presents a simple issue: whether respondent Lind-Waldock made a good-faith effort to contact complainant Chan regarding the margin deficit in his account prior to liquidating his positions.<sup>3</sup>

In an affidavit submitted in response to an Order directing respondent to explain certain notes attached as Exhibit D to the Answer, a Lind-Waldock supervisor averred that he had knowledge of the Chan account and the circumstances leading to its liquidation (*see* Kunst Affidavit, received January 27, 2000). That affidavit is substantially consistent with the documents in the written record, and with a tape recording of calls attached to it and identified as having been made to Chan's office, and is generally believed to be credible.<sup>4</sup> The affidavit and the tape establish that Lind-Waldock left a message with an unidentified woman answering Chan's office telephone. The message asked Chan to call Lind-Waldock, and was followed by a second attempt later in the morning. During the second attempt, the caller identified himself as from Lind-Waldock and requested an alternate telephone number for Chan; the woman answering the phone said she did not have one (*id.* at ¶ 5).<sup>5</sup> Thereafter, according to the affidavit, an attempt was made to contact Chan at an alternate phone number previously used to call him but that number was disconnected.

Chan asserts that he was absent from work on August 19 until 1:00 in the afternoon. According to him, while he was absent the people in his office (identified only as a "manageress"

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<sup>2</sup> See *Theodore Tak-Lung Lee v. Lind-Waldock & Co.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,173 at note 13 (CFTC June 29, 2000).

<sup>3</sup> Lind-Waldock is perhaps fortunate that its actions are not judged solely by reference to the customer agreement. The portion of the customer agreement cited by Lind-Waldock essentially would allow Lind-Waldock to liquidate positions whenever it was unable to contact its customer (Answer, Exhibit A at ¶ 5). It is noted that the cited provision authorizes Lind-Waldock only to liquidate *immediately* at the current market price. The provision would not have allowed, by its terms, the stop orders or market-on-close orders placed in mid-morning here. The orders placed by Lind-Waldock would have allowed Chan additional time to meet the margin call had he responded to the messages left for him during the trading day.

<sup>4</sup> Chan did not file responses to Lind-Waldock's discovery requests, nor did he take discovery of his own. Neither side submitted final verified statements.

<sup>5</sup> The affidavit is incorrect in one respect inasmuch as it states, as do the written notes, that another message for Chan to call Lind-Waldock was left during the second call. No message was left in the second call for Chan to call back, although the caller did identify himself as from Lind-Waldock as he had in the first call. The second call is alleged to have occurred less than half an hour after the first call. Since a message was left the first time, the discrepancy as to whether an explicit message was left to return the call is not considered significant. The caller could have intended his identification to reinforce his recent message.

and “an administrative assistant”) did not receive any messages for him from Lind-Waldock and he did not have any messages on his home answering machine (*see* Chan affidavit dated January 18, 2000).

Resolution of this dispute ultimately depends upon the reliability of the evidence submitted by the respondent. All the persons involved in the alleged attempts to contact complainant have been identified and were subject to cross-examination had complainant chosen to request an oral hearing.<sup>6</sup> Furthermore, the tape-recording establishes that Lind-Waldock did attempt to contact Chan at least twice. Chan has not disputed the accuracy of the tape. His story, on the other hand, depends on the accuracy of statements made solely to him by unidentified office personnel, whose affidavits he could have taken and submitted but did not. If the tape-recording was falsified or from a different date, Chan could have submitted – but did not – the affidavit of the woman who answered his phone. On such a minimal record, the conclusion is virtually inevitable that complainant has not met his burden of proving that respondent Lind-Waldock failed to try in good faith to provide him notice of his margin call in time to take action to preserve his positions.<sup>7</sup>

For the reasons stated above, the complaint is DISMISSED.

Dated: October 31, 2000



JOEL R. MAILLIE  
Judgment Officer

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<sup>6</sup> Neither side requested an oral hearing, and the undersigned independently has determined that there is no conflict in the parties’ submissions necessitating an evaluation of witness credibility. Complainant’s story that he did not receive any messages could be entirely true, but that would not address whether respondent did in fact attempt in good faith both to notify him of the margin call and did leave him at least one message. Even the most trustworthy testimony from Chan that he did not receive messages does not mean no messages were left.

<sup>7</sup> Complainant has based his claim solely on the alleged failure of Lind-Waldock to contact him on August 19. As discussed in the text, that claim is rejected upon a finding that Lind-Waldock made good-faith attempts to contact him on that date. He has not alleged, it must be noted, and the parties have not litigated the issue of, whether Lind-Waldock acted improperly by liquidating the positions at the end of the day when Chan failed to respond to the margin call.