

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

Kenneth D. Christman,

Complainant,

v.

First American Discount Corp.,

Respondent.

CFTC Docket No. 97-R067

FILED

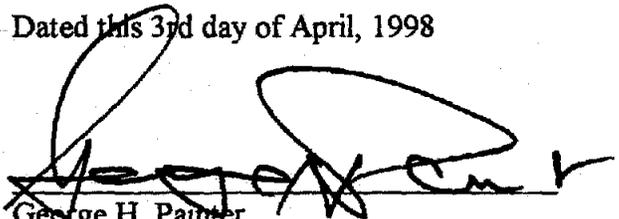
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OFFICE OF PROCEEDINGS
PROCEEDINGS CLERK

Notice of Correction

The Initial Decision of March 30, 1998 incorrectly stated that the hearing in this matter took place on January 13, 1998. The hearing in this matter actually took place on December 30, 1997. In all other respects, the Initial Decision stands.

Dated this 3rd day of April, 1998


George H. Painter
Administrative Law Judge

The trial of this matter took place in Dayton, Ohio, on January 13, 1998. The parties have filed post-trial initial and answering briefs. Accordingly, this matter is ready for decision.

Findings of Fact:

1. Complainant is a medical doctor, and a sophisticated individual. He opened an account with Respondent on May 14, 1993. (Ex.R-3) He was, at all relevant times, able to read and understand transactions on his account, and as early as December 15, 1993, wrote a letter of complaint to Respondent concerning a fill on an order to sell 30 silver contracts. (Ex. C-1)
2. Complainant was acutely aware in May 1995 that the silver market was extremely volatile. He testified that he realized a profit of \$398,000 trading silver futures in April 1995. (Tr. 46)
3. On May 2, 1995, Complainant purchased forty July silver contracts at 588, and sixty July silver contracts at 592. (Ex.R-4) The position showed a profit on May 8, 1995. (Tr. 10; Ex.R-4)
4. Robert Parks Durrett, Table Supervisor with Respondent First American Discount Corporation (FADC), testified that he was the supervisor of Complainant's account, and that his duties included notifying Complainant of margin calls. (Tr. 50-53)
5. Durrett testified that at 8:33 a.m. on May 9 he spoke with Complainant and informed him of a margin call of \$127,886. (Tr. 56; Ex. R-4) Complainant told Durrett he could wire in \$75,000. Durrett informed Complainant that he would have to wire in additional funds or liquidate positions if the silver market did not recover before the close. (Tr. 57-58; Ex. R-5)
6. Durrett testified that at about 12:10 on May 9 he attempted to contact Complainant as the market had declined to about 562, resulting in a \$100,000 loss on the account in a mere 5 minute time span. (Tr. 63-65)
7. At 12:17 on May 9 Durrett was informed by a clerk that Complainant was on the phone. Durrett instructed the clerk to get a stop order from Complainant. However, Complainant did not enter a stop order, and instead entered a limit order to

sell the 100 contracts at 561 or better. Durrett then directed his risk manager to amend the Complainant's 561 sell order to include "OCO (one cancels the other) 5.47 stop." (Tr. 63-69; Ex. R-7) The amended order was entered at 12:20. The 561 limit order was reported as "unable." The 547 stop was hit. Three contracts were sold at 5.47 and ninety-seven were sold at 5.46. (Tr. 69-70; Ex. R-7)

8. Complainant testified that when he was told that FADC was going to enter a stop order on his account, he asked that it not be done. He conceded, however, that on May 9, 1995, he did not have time to get additional money into the account before the close, and that he did not enter a stop or market order. (Tr. 12-17)
9. On August 5, 1997 Complainant, for the first time, alleged that on completing the account opening documents in May 1993, he had altered and modified the customer agreement to provide him with 24 hours to meet any margin calls. (Tr. 26) On cross-examination, Complainant was asked if he had crossed out and modified the customer agreement in multiple places to ensure that he would have 24 hours to meet a call. Complainant could not recall. (Tr. 30-38)
10. Complainant testified that he mailed the altered account opening documents to FADC, but that he did not keep a copy of the papers for his own file. Complainant further testified that at no time did he receive back from FADC any letter or other acknowledgment that FADC had accepted his purported modifications. (Tr. 39-40)
11. The customer agreement in the record, appended to Respondent's response to Complainant's information request (Ex. R-3; Tab 18) shows no modification of any kind. Complainant's signature appears in six places in the papers. The customer agreement clearly provides that FADC had full authority to liquidate any positions in the event a margin call is not met in a timely manner. The agreement further provides that one hour is a reasonable time for the customer to meet a margin call, but that FADC had the right to declare a lesser period of time. I find and conclude that Exhibit R-3, the customer agreement, was not modified by complainant, and that it was in effect during the life of this account.

12. Carl Gilmore, Assistant Operations Manager of Respondent during the relevant period, and currently custodian of records for Respondent, testified that Christman's original customer agreement papers had been separated, and it was his opinion that Complainant, on reading that he was to separate the Risk Disclosure Statement from the other papers, simply tore the pages at the wrong place. Gilmore, on reviewing the account opening documents, saw no evidence of any kind that Complainant had modified any part of the agreement. (Tr. 103-107)
13. William Joseph Mallers, Jr., testified that he and his father had founded FADC in 1984, and that he had served as President of the company since 1989. Mallers testified that not once in the life of the company had FADC permitted alteration of its customer agreement to give a customer more time to meet a margin call. (Tr. 85-88)
14. Complainant's allegation that he modified or altered the customer agreement to provide at least 24 hours to meet a margin call is simply unbelievable, and unsupported by any probative evidence.
15. I find and conclude that witnesses Durrett, Gilmore, and Mallers gave honest and reliable testimony.

DISCUSSION:

This Complainant is an intelligent, sophisticated individual with considerable experience in trading commodities, particularly silver futures. Prior to the events at issue he knew how to complain, and how to put his complaint in writing, as memorialized by Exhibit C-1. He was cogently aware of the volatility of the silver futures market and, in fact, made a profit of nearly \$400,000 trading silver futures in April 1995.

Obviously hoping to repeat his April success in trading silver, Complainant, on May 2, 1995, purchased 100 contracts of July 1995 silver. He was money ahead through the close on May 8. May 9 was another story. At about 8:30 a.m. he received a margin call for \$127,000. In response he wired in \$75,000. Had the market turned in his favor things may have worked out fine. But things got worse instead. In a five minute time span, from

about 12:10 to 12:15, the market dropped another 20 cents an ounce.

Complainant was kept well informed of events by FADC. At about 12:17 Complainant was told to put in a stop order. He declined to do so and instead entered a limit order at 5.61. At that time, Complainant could have entered a market order, or a stop order below the current market price. He did not do so. To ensure that the account did not go into deficit, FADC amended Complainant's 5.61 order by placing a stop at 5.47, with the proviso that execution of one order canceled the other. The stop was hit and the 100 contracts were sold, three at 5.47 and ninety-seven at 5.46.

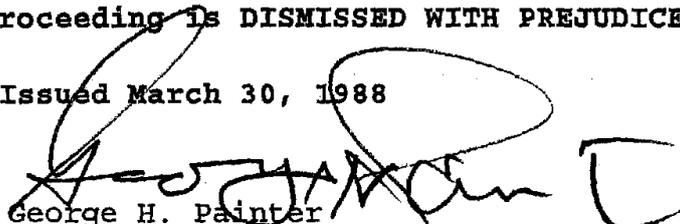
From March 9, 1995 to the time the complaint was filed on April 27, 1997, Complainant made no written complaint about the events of May 9, 1995. His original complaint says nothing about the claimed modifications of the customer agreement, and in fact this issue was first raised in August 1997, more than two years after May 9, 1995. I find that Complainant did not alter the customer agreement transmitted to FADC, and that FADC did not, orally or in writing, amend its customer agreement to guarantee Complainant 24 hours to meet a margin call.

I find and conclude that FADC had a right and a duty enforce its margin policies and the margin requirements of the exchanges. Complainant concedes that on May 9, 1995 he was unable to promptly meet an outstanding margin call. Respondent had ample authority to enter the 5.47 stop order. In sum, there is no merit to this complaint and it must be dismissed.

ORDER

Complainant has failed to establish by the preponderance of the evidence that he sustained monetary damages by reason of unlawful conduct on the part of Respondent or its agents. The evidence fails to show that Respondent violated the Commodity Exchange Act in any manner in connection with the handling of the account at issue. Accordingly, this proceeding is DISMISSED WITH PREJUDICE.

Issued March 30, 1988


George H. Painter

Administrative Law Judge