



U.S. COMMODITY FUTURES TRADING COMMISSION

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

RECEIVED
CFTC

2001 SEP 18 10 23 34

OFFICE OF PROCEEDINGS

LYNDA F. COSENTINO,
Complainant,

v.

JACK CARL FUTURES
d/b/a ED&F MAN INTERNATIONAL,
and MICHAEL C. MALONE,
Respondents.

*
*
*
*
*
*
*
*
*
*
*

* CFTC Docket No. 00-R089

INITIAL DECISION

Lynda Cosentino alleges that that respondents mishandled complainant's instruction to cancel-place a stop order with a market order, and that respondents then obstructed complainant's efforts to cure respondents' mistake by failing or refusing to confirm the status of complainant's orders and her market position.¹ Respondents deny that they mishandled complainant's order and assert that they followed all of complainant's instructions. Respondents also assert that the clerks who were manning the 24-hour discount order during non-regular trading hours, accurately confirmed that information which they could personally verify, but

¹ Complainant's principal documentary submissions are the 22-page "Description of Complaint," the reply to Jack Carl's answer (dated September 18, 2000), and her statement dated May 18, 2001. The "Description of Complaint" consists of an introductory paragraph (page 1), numerous annotations to the transcript of three conversations on June 15, 1998 (pages 1-20), and a summary of the allegations (pages 20-22). In this Initial Decision, the transcript has been extensively quoted, but without complainant's numerous annotations, and without her various pervasive editorial devices such as bold-faced font and exclamation marks.

that they properly refused to confirm information to which they had no access, such as the status of current open positions, what orders were working or filled at any given moment, or what positions may have been initiated or offset at the order desk during regular trading hours. In this connection, respondents assert that, because complainant agreed when she opened her non-discretionary discount account that she would be responsible for tracking orders and positions, their duties did not extend to providing up-to-the-minute status reports on her orders and her open positions. Respondents claim that the primary and direct cause of complainant's losses was a series of novice trading mistakes by her husband (Kenneth Cosentino), who was trading her discount account pursuant to a power of attorney. According to respondents, Ken Cosentino lost track of his orders and positions, and then provided wrong or confusing information about his orders and his trading strategy which substantially hindered respondents' efforts to reconstruct his orders and to help him determine his market position.²

After carefully reviewing the parties' documentary submissions,³ it has been concluded, for the reasons set out below, that Lynda Cosentino has failed to establish by a preponderance of the evidence any violations proximately causing damages.

² Respondents' documentary submissions are Malone's answer, Jack Carl's answer (with exhibits), Jack Carl's final verified statement (with exhibits), and Jack Carl's replies to the discovery orders dated May 14 and June 4, 2001.

³ Because the essential material facts are not in dispute, an oral hearing was not necessary to resolve this matter.

Factual Findings

The parties

1. Lynda Cosentino, a resident of Fort Lauderdale, Florida, indicated on her account application that she is between 19 and 35 years old, that she is the owner of firm called Perm-A-Care, that she has a high-school education, that her annual income is between \$25,000 and \$50,000, that she has additional income "from trusts, investments, etc." of about \$45,000, that her liquid net worth is about \$45,000, and that she has never had a commodity account or any other investment accounts. [Exhibit A to Jack Carl's answer.]

Kenneth Cosentino, Lynda's husband, placed orders for her account pursuant to a power of attorney, and exclusively dealt with the Jack Carl order desk.⁴ [Exhibit C to Jack Carl's answer.] Although the record is silent on Ken Cosentino's educational, professional and investment background, the recording of his conversations with respondents makes clear that – at least on June 15, 1998 -- he was a shaky, mistake-prone trader.

2. E.D. & F. Man Futures, Incorporated is a registered futures commission merchant, with its principal place of business in Chicago, Illinois. Jack Carl Futures is the discount brokerage division of E.D. & F. Man Futures.

⁴ Complainant's submissions are often confusing as to whether Lynda or Ken, or both, participated in certain conversations. For example, all of her submissions, including statements and correspondence signed by both Lynda and Ken Cosentino, are written in the first-person singular. As a result, on this record, it cannot be determined with certainty whether one or both of the Cosentino's participated in Fred Monte's currency trading course and in the account-opening process.

Jack Carl offers three types of accounts: a discount account that provides brokerage execution services at a discount order desk; a “One-on-One” broker-assisted account; and a managed account. [See ¶¶ 3-4 answer; ¶ 4 Jack Carl’s “Response to Complainant’s Submission” (filed June 4, 2001); and Jack Carl promotional brochure (exhibit to complaint).] As described below, Lynda Cosentino would open a discount account with Jack Carl, at the suggestion of one Fred Monte who taught a trading course taken by one or both of the Cosentinos.

Michael Edward Culhane was a registered associated person with Jack Carl at the relevant time. Culhane’s responsibilities were limited to “assisting customers through the account-opening process.” Culhane left Jack Carl before the date of the disputed order. [¶ 7, on page 2 of Jack Carl’s answer; ¶¶ 1 and 8 of Jack Carl’s June 7th response; and ¶¶ 1-5 of Culhane’s affidavit (filed June 7, 2001).]

Patricia Lemberg has been a registered associated person with, and employed as a sales representative by, Jack Carl since 1996. In that capacity, after a new customer has completed the new account forms and deposited funds in the account, Lemberg conducts a “new account orientation” where she reviews with the new customer “some Jack Carl policies and procedures that may not be covered in the customer agreement or order entry manual.” [Pages 4-5 of Jack Carl’s answer; exhibit D to Jack Carl’s answer; and Lemberg affidavit (filed December 21, 2000).]

Michael Malone, a registered associated person with Jack Carl at the relevant time, worked as a clerk at the E. D. & F. Man 24-hour order desk the night of the disputed order. Andrea Ariola, who was not registered, also worked as a clerk at

the 24-hour order desk the night of the disputed order. [¶ 6 on page 2 of Jack Carl's answer.]

3. Fred Monte and Comp Tech -- neither of whom has ever been registered -- offered a course in "computerized currency day trading," for which the Cosentinos paid approximately \$6,000. [See "postscript" to factual description of complaint; pages 2-3 of the Cosentinos' statement dated May 18, 2001; promotional and class materials (attachments to the Cosentinos' May 18th statement); and ¶ 8 on page 2 of Jack Carl's answer.]

Monte negotiated a reduced commission rate of \$20 per contract per round-turn trade for customers that he referred to Jack Carl. Monty did not receive any compensation from Jack Carl for these referrals. According to Jack Carl, out of 4,444 accounts opened at Jack Carl in 1998, sixteen were opened by Comp Tech students. [¶ 8 on page 2 of Jack Carl's answer; ¶¶ 2, 3 and 7 of respondents' "Response to Complainant's Submission" (filed June 7, 2001); ¶¶ 4-7 of Culhane affidavit; and Densberger affidavit (filed June 25, 2001).]

The E.D. & F. Man/Jack Carl order desk:

4. At the relevant time, E. D. & F. Man maintained a 24-hour order desk for customers who wish to place orders for execution on foreign markets or other markets that operate during non-regular hours. Jack Carl customers could place orders for their accounts at this desk during non-regular trading hours, or they could leave instructions for an order to be placed the following morning on a voice-call

system at their regular trading hours order desk. Orders for US markets executed at the 24-hour desk after regular trading hours were for the next day's trade date.

5. At the relevant time, Malone and Ariola were among several clerks assigned to work the 24-hour order desk. Clerks at the 24-hour desk serviced all E.D.& F. Man and Jack Carl institutional and retail customers, and did not have access to all relevant client information that would normally be available to a daytime order clerk. Therefore, they could not confirm to clients any account information which they could not personally verify, including the status of any current open positions, what orders the client may have working or filled at every given moment, or what positions the client may have initiated or offset at the order desk during regular trading hours. For this reason, Jack Carl informed all new clients, before they began trading, that they were responsible for knowing their positions.⁵ [Jack Carl answer.]

6. In June 1998, the 24-hour desk had two shifts, the "Asian" shift (2:30 to 11:00 p.m.) and the "European" shift (11:00 p.m. to 7:00 a.m.). Clerks at that desk took orders for overseas market exchange for physicals ("EFPs") and for domestic futures contracts traded on electronic trading platforms, such as GLOBEX.⁶

Regardless of the order type, customer orders were initially handwritten on an order ticket with a pre-printed order number, and then either placed directly to

⁵ On this record, it cannot be determined whether or not respondents and the Cosentinos discussed the fact that the 24-hour desk would not have access to the same account information as the daytime desk. It also cannot be determined whether Ken Cosentino had dealt with the 24-hour desk before June 15, 1998.

⁶ In June 1998, GLOBEX was not able to handle stop orders, and therefore stop orders on CME foreign currency contracts that traded on GLOBEX were placed as EFP's.

the exchange or EFP broker, or passed to a GLOBEX operator for entry on an electronic market. [Page 3, Jack Carl's answer.]

The account-opening

7. According to the Cosentinos, Monte represented that he taught a "low-risk" currency trading technique that had "been proven" to generate an "80% daily return." Complainant has produced copies of some written class materials, but otherwise has not described Monte's class in any detail.

According to complainant, Monte represented that he had a "special agreement with Jack Carl to provide 'special assistance' to his students." ["Post-script" on pages 21-22 of factual description of complaint.] However, complainant has not described any other statements by Monte concerning the precise nature and extent of this "special assistance." Nor has complainant asserted that she or Ken ever told respondents that they were expecting any "special assistance" beyond that what Jack Carl had actually promised to discount customers. Similarly, complainant has not produced any evidence that the respondents were, or should have been, aware of any of Monte's promises.

8. In late March of 1998, the Cosentino's informed Monte that they were interested in opening an account with Jack Carl, in Lynda's name. Soon afterwards, in a three-way conversation involving Monte, Culhane and one or both of the Cosentinos, Monte introduced Culhane as a "good friend," who would "take good care of you." [Pages 1-2 of the Cosentinos' May 18th statement; and ¶ 5 of Culhane affidavit.]

9. Culhane sent an account-opening package to the Cosentinos that included a Jack Carl promotional brochure that described Jack Carl's different account plans.

The brochure stated that the discount plan offered:

- direct floor access available
- 24-hour global trading
- fast, accurate executions
- instant reports in many markets
- fully automated quotations
- professional order specialists
- computerized order entry

[Bullets in original.]⁷

The Jack Carl brochure also stated that the more expensive broker-assisted "One-on-One" account was "designed for traders requiring a greater degree of support;" and that for a "One-on-one" customer, "Your broker will assist you with order placement, help you track your positions and equity, and follow your special instructions." [Attachment to complaint.] As discussed below, despite the fact that she had opened a discount account and was paying a reduced discount commission rate, complainant asserts that she was entitled to the higher level of support provided to Jack Carl's "One-on-one" customers.

10. On April 3, 1998, Lynda Cosentino opened a discount account by signing a Jack Carl customer agreement, a standard risk disclosure statement, and a "Supplementary Risk Disclosure." [Exhibits A and B to Jack Carl's answer.]

⁷ Cosentino asserts that these features "gave me the impression of that a broker was sitting in front of a computer taking orders with a history of recent account activity in front of him." [Page 1 of reply to answer (dated September 18, 2000).]

Lynda Cosentino also executed a discretionary trading authorization and limited power of attorney naming her husband, Ken Cosentino, as her agent authorized to enter into transactions for her account and to act on her behalf with respect to all other things necessary or incidental to the conduct of the account. [Exhibit C to Jack Carl's answer.]

11. On or about May 8, 1998 -- after Lynda Cosentino had wired a deposit of \$9,999 -- Patricia Lemberg conducted a standard new account orientation.⁸ The Cosentinos do not dispute Lemberg's assertion that she explicitly emphasized that "You are responsible for knowing your market positions." [Exhibit D to answer, and Lemberg affidavit.]

12. The Cosentinos received a Jack Carl "Order Entry Handbook," which described the following "repeat and confirmation" protocol for orders:

Your OS [order specialist] will read the order back to you to make sure that he transcribed it according to your intentions. We cannot overemphasize the importance of paying careful attention to this repeat. *It is your job to make any corrections or clarifications which you feel may be necessary. Do not confirm any order which was incorrectly or incompletely repeated or about which you are unsure. . . .* At Jack Carl Futures, we go to great lengths to prevent errors when taking your order, but mistakes can and sometimes occur. That's why we repeat every order for confirmation and why teamwork between client and OS is so important.

[Attachment to Jack Carl's final verified statement, italics in original, underlining added for emphasis.]

⁸ Lynda Cosentino would wire an additional \$5,000 on May 18, and \$3,500 on June 12, for a total investment of \$18,499. On July 8, 1998, respondents would refund the \$3,768 account balance. Thus, the trading in the Cosentino account would realize \$14,731 in net losses.

The disputed order

13. By May 21, 1998, Ken Cosentino had made a series of currency day trades that had generated about \$4,000 in losses, and the Cosentinos had deposited an additional \$5,000. According to the Cosentinos:

There were times in the beginning that certain Jack Carl brokers were very understanding with the fact that I was new to currency trading and they absolutely went out of their way to be helpful and even corrected me if I was saying something wrong, they tried to make sure they were executing the way I intended. I expected and became used to that type of treatment.

[Page 2 of complainant's reply to discovery order (dated May 18, 2001), emphasis added.] Nonetheless, the Cosentinos have not specifically described any of those instances where Jack Carl brokers purportedly corrected Ken Cosentino's errors, and have not shown that they ever actually advised respondents that they were expecting such special assistance on a routine basis. Moreover, the assertion that respondents provided some special assistance "in the beginning" suggests that respondents had not continued to provide any special "treatment" on a routine basis.

14. On June 16, a total of thirty September Yen futures contracts would be day-traded for the Cosentino account, generating a gross trading loss of \$7,263, plus \$854 in commissions and fees. The orders relating to some of these trades form the basis of this dispute.

15. On the evening June 15, 1998, Ken Cosentino had been placing several orders trading Yen contracts with the Jack Carl Globex desk. Set out below is a transcript of Cosentino's conversation with Andrea Ariola in which he would place

two orders -- order 308 to sell five September Japanese Yen futures contracts ("JYU") at the market; and order 309 to buy five JYU, at 71.40 stop. Ken Cosentino's attempt, in a subsequent conversation, to cancel/replace order 309 lies at the center of Lynda Cosentino's reparations complaint:

Ariola: Jack Carl.

Cosentino: Yeah. This is Cosentino. 25696

Ariola: 5696?

Cosentino: 25696, desk 105.

Ariola: Order?

Cosentino: I'd like to sell five Sep Yen at market.

Ariola: Selling five Sep Yen at market 105 is that right?

Cosentino: Yes.

Ariola: Hold. OK. You sold one at 70.54, and four at 53 [i.e., order 308].

Cosentino: 70.54, and four at 70.53.

Ariola: Right.

Cosentino: Wait. Say that again please.

Ariola: You sold one at 70.54; you sold four at 70.53. You said it, right.

Cosentino: OK. Good. I'd like to put a stop on it please.

Ariola: OK.

Cosentino: Buy five Sep Yen at 71.40 stop.

Ariola: OK. 105. 25696. Buying five Sep Yen 7140 stop.

Cosentino: Yeah.

Ariola: Ticket number 309.

Cosentino: 309?

Ariola: Yes.

Cosentino: Oh.

Arioloa: Bye!

[Transcript and tape recording of conversations between Cosentino and Ariola and Malone produced as an attachment to the complaint, underlining added for emphasis.] According to respondents, because Cosentino was on the telephone for the fill, Ariola did not state the number (308) for the sell order.

16. Later in the evening, Ken Cosentino would place the call on which this case turns. Cosentino told Malone that he intended to cancel/replace order 309. Malone could not immediately locate the ticket for order 309, in order to cancel it.⁹ Malone thus would begin to ask Cosentino a series of questions to help him locate the ticket. While Malone searched for the ticket, Cosentino told Malone to place a market buy order, which Malone would treat as a new order, rather than the “replace” portion of the cancel/replace order:

Malone: Jack Carl.

Cosentino: This is Ken Cosentino. Number 25696. Desk number 105. I'd like to cancel/replace on ticket number 309.

Malone: What currency?

Cosentino: The Yen.

Malone: OK. Number 309 in the Yen. Was that placed tonight?

Cosentino: Yes

Malone: Could it have been recorded to an answering machine?

Cosentino: No! It was uh, I sold five Yen, one at 70....

Malone: You were selling them or you did sell them?

Cosentino: I did sell them!

Malone: Then what are you calling me for?

Cosentino: Because I want to buy them.

Malone: Ok, then why am I looking for ticket number 309 in the Yen?

Cosentino: Because that's the ticket number she gave me. Anyway, just buy all five at Market please.

Malone: Buying five September Yen at the market, right? Overfill 105, 25696.

Cosentino: 25696. Yes.

Malone: 105 desk?

Cosentino: Yes.

Malone: 25696. New position or off-set?

Cosentino: I'd like to buy all five that I sold.

Malone: OK.

Cosentino: Yes.

Malone: OK. One moment. It's offered at 70.38. I can buy five at that price.

Cosentino: 70.38? Isn't it offered at 7 . . . the bid is 70.33, isn't it?

⁹ According to respondents, since order 309 was entered as an EFP, it was not readily available to Malone. [Page 7 of final verified statement.]

Malone: 35 bid; offered at 38. You can't buy the bid. You have to buy the offer, sir.

Cosentino: OK. Go ahead.

Malone: You bought five Sep Yen at 70.38. Ticket number 722.

Cosentino: OK.

[Underlining added for emphasis.] As can be seen, Malone unilaterally treated Cosentino's instruction "Anyway, just buy all five at Market please" as a new order, rather than the replace portion his order to cancel/replace 309. Thus, while Cosentino had offset the short position initiated by order 308, he still had order 309 working to purchase an additional five JYU, at 71.40 stop

After reporting the fill on order 722, Malone would next ask Ken Cosentino if he had any other working orders:

Malone: You said you had an order working?

Cosentino: No. That was the only order I had working.

Malone: 309?

Cosentino: Yes.

Malone: And it is working to buy five Yen?¹⁰

Cosentino: No. Now it should be flat.¹¹

Malone: What is order number 309 doing sir?

¹⁰ Here Malone has correctly described the terms and status of order 309.

¹¹ Cosentino here disagrees that 309 is working, but then uses the wrong terminology, stating that the order should be "flat" – a term which indicates that a trader is out of the market, rather than that the order should have been "cancelled."

Cosentino: You are confusing me. I called earlier, and I sold five Yen at market, OK. And I got a fill of 7054 on one of them and I got fill of 7053 on four.¹²

Malone: And what ticket number was that?

Cosentino: That was ticket number 309.¹³

Malone: Ok, then why were you asking me?

Cosentino: I just wanted to exit the market on a buy.

Malone: I need to know [unintelligible] sell ticket numbers.

Cosentino: I did sell those? Right?¹⁴

Malone: I have several thousand order here sir, I can't confirm that for you right now sir. [unintelligible.]

Cosentino: I'm confused at what just happened here.

Malone: You sold five earlier, you just bought five September Yen at 7038. That was ticket number 722. Do you need to cancel any orders that are working in the market?

Cosentino: Well yeah, I want to cancel all orders that are working. If I have any working right now, I want to cancel them!

Malone: What are the ticket numbers?

Cosentino: I got stopped out on my other ticket numbers. This is the only one that was working.

Malone: OK. Then, you're done. You're flat.

¹² As can be seen here, while Malone's statements and questions are usually couched in the present tense, Cosentino's statements are couched in the past actions. This would be a recurring problem during the remainder of Cosentino's conversation with Malone, and throughout the subsequent conversation with Ariola. As a result, one reason that Cosentino and respondents would fail to reach a satisfactory resolution was because they were literally talking past each other.

¹³ Cosentino here appears to have confused order 309 with order 308, perhaps because Ariola had not given him the order number (308) for the sale of five Yen.

¹⁴ Here Cosentino appears to using the term "sell" to mean liquidation of the short position, which was a mistake that he would make several times in his subsequent conversation with Ariola.

Cosentino: Ok, what's your name? What's your name?

Malone: This is Mike.

Cosentino: Mike

Malone: Yep

Cosentino: Thanks Mike

Malone: Ok

Cosentino: Bye

Malone: You're welcome

[Underlining added.] As can be seen, when Malone asked Cosentino to give the order numbers of any other working orders that he wanted to cancel, Cosentino did not state an order number, but replied vaguely that, "This is the only one that was working." Malone did not ask Cosentino for further clarification, and merely assumed that Cosentino meant order 722, apparently because Cosentino had mentioned order 722 after he mentioned order 309. Malone, who apparently also abandoned the search for the order ticket for order 309, then incorrectly advised Cosentino that he was "done" and "flat."

17. According to Cosentino, his exchange with Malone had "confused me and raised a flag in my mind that [Malone] may not be executing my order properly." [Annotation on fifth page of "Description of Complaint."] So, shortly afterwards, Cosentino called the order desk, and spoke to Ariola, "just to confirm that my previous order was executed properly." [Annotation on page 7 of "Description of Complaint."] Despite the fact that Cosentino would repeatedly use

incorrect and confusing terminology, Ariola would successfully determine that 309 was a buy order that was still working:

Cosentino: This is Ken Cosentino 25696, desk 105. I'd like to know. I just called in and I got a guy by the name of Mike. I called in and I cancel/replace on my sell order. I had one yen at 70.54, and four yen at 70.53 that I sold. And I told him that I wanted to buy all five at market. And he confused me as though he was putting in a separate order for a buy. And I just need to know if I sold those Yen.¹⁵

Ariola: Ok, first you gave him a sell order and then you gave him a buy order is that right?

Cosentino: No! I told him I was cancel/replace ticket number 309 on the Yen.

Ariola: Ok, so what were you doing again?

Cosentino: Initially I had sold five Yen, ok, and I got my fills (70.54 and 70.53). Then I called in when it went down to 70.33, he gave me a fill of 70.38, I need to make sure that, that's the only order I had going. I want to know if I am flat right now, basically.

Ariola: Ok, we can't confirm anything right now. You had a buy stop with him right?

Cosentino: I had a buy stop on it, yes.

Ariola: Ok. Yeah, you're going to have to call later.

Cosentino: But I don't know where I am right now. Do I?

Ariola: That's right! Anything else.

Cosentino: Wait a minute. This is crazy.

Ariola: I know. You're trading in a fast market. OK. I can confirm that you did buy five, but we can't tell you the price.

¹⁵ Here, it is clear that Cosentino is aware that Malone may not have cancelled 309 when he bought five Yen. Unfortunately, rather than actually telling this to Ariola, he effectively tells her that 309 was a sell order.

Cosentino: You can't tell me the price?

Ariola: Right.

Cosentino: Ok. He gave me a fill of 70.38. Is that right or wrong?

Ariola: For your sell order? For which order?

Cosentino: For my buy order.

Ariola: For your buy order? He gave you a price?

Cosentino: Yes.

Ariola: Hold on. Yeah, I had a ticket number 722, you did buy five at 70.38. That is correct.

Cosentino: Ok. I bought five at 70.38, on ticket number 722. And what about my sell order that I put in earlier?

Ariola: What ticket number was that?

Cosentino: Number 309.

Ariola: Was that a stop, or was that a limit?

Cosentino: That's the stop right there, 71.40.

Ariola: I have a 288, that's a buy stop. Do you know that?

Cosentino: No, I . . .

Ariola: Number 288, that I took. It was buying five Sep Jap Yen, at 70.20, stop.

Cosentino: Ok. Can you cancel that for my please?

Ariola: Cancel it? It's already been filled.

Cosentino: Ok. I've been filled on that one. What else do I have running there do you know?

Ariola: You haven't been keeping up with your own trades?

Cosentino: Yes. I know I was filled on that. This 71.40 Stop.

Ariola: There's a 71.40 stop that was selling. Is that right?

Cosentino: No that was buying, I mean selling.

Ariola: It was buying? Which one? I have one working to buy 5 Sep Jap Yen, 71.40 Stop. That's still working.

Cosentino: That's still working?

Ariola: Yeah. The high's only been 71.00, even.

Cosentino: Ok. Can I buy those then? I want to get out of the market.

Ariola: What are you doing with that ticket? That buy stop, the 71.20 stop, what are you doing with it?

Cosentino: The 71.20 stop was filled.

Ariola: No. I mean the 71.40.

Cosentino: That one I wanted to cancel it, straight cancel it, so I can get out of the market. Man, you guys have really accomplished to confuse me here.

[Underlining added.]

Next, Ariola would remind Cosentino that 309 was still working, and ask him if he wanted simply to cancel 309:

Ariola: I'm asking you, what do you want to do with the five Sep Jap Yen 71.40 stop, that is still working on ticket number 309.

Cosentino: I want to cancel it!

Ariola: You want to straight cancel it?

Cosentino: Yes.

Ariola: And what do you want to do?

Cosentino: And then I want to buy five Yen at market.

Ariola: Ok. We're going to cancel 71.40 stop, and then go to market and buy five September Yen. Is that right?

Cosentino: Yes.

Ariola: Ticket 309. Hold, ok. You bought five Sep Jap Yen: one at 70.31, two at 70.30, and two at 70.29.

Cosentino: Ok. What about this other order [*i.e.*, 722]? You see, this is what I told him to do at first, and he gave me . . . he made me buy five Jap Yen at market, and he gave me a 70.38 fill, which shouldn't have happened. I was just trying to exit the market, like I just did with you.

Ariola: Ok, so what's the problem now?

Cosentino: I want to know what happened with that [other trade]. Did I get a fill with that.

Ariola: I just gave you that ticket. Didn't I? 70.38.

Cosentino: I bought them then. So it's still running?

Ariola: Yeah. So now you're long ten, a total of ten. That's two different orders.

Cosentino: Wait a second. Now I'm long ten?

Ariola: Yeah, 'cause if you were filled on 722, you already bought five at 70.38; and if you wanted to cancel 309, then you should have just straight cancelled, instead of telling me to fill it [*i.e.*, cancel and replace with order to buy five at the market].

Cosentino: Do me a favor. Just straight cancel everything I've got please.

Ariola: I don't think I have anything left for you.

Cosentino: So, everything is cancelled? Am I still long?

Ariola: No [to first question]. Everything is filled. On 722, you bought five at 78.38, ok. [On 288] you bought five. Are you writing this stuff down?

Cosentino: Yes, I have it. I have it right in front of me.

Ariola: Then ticket number 309, we just cancelled that five Yen stop, and we changed it to buy five September Jap Yen at market. You got that?

Cosentino: What I am telling you, Andrea, is that I sold, ok, I sold five Yen, and then I called on ticket 309.

Ariola: No, 309 is where you bought five Jap Yen at those three different prices.

Cosentino: 309?

Ariola: Yeah. 309 is where I cancel/replace the stop. Are you writing this down?

Cosentino: Yeah, I do have it down. You totally, look, sell them too then.

Ariola: Where?

Cosentino: Sell them at market.

Ariola: How many?

Cosentino: All five.

Ariola: Just five?

Cosentino: I have ten, you mean?

Ariola: I already told you, I have three orders, all of them are buys, all of them buying five, they are all filled.

Cosentino: Sell them all, all of them.

Ariola: Ok. So total of how many?

Cosentino: All of them. However many I have there. You are confusing me.

Ariola: You need to be sure. If you're going to give me an order, you gotta' be sure what you're doing.

Cosentino: Sell all ten at market.

Ariola: Ok, so were selling ten at market? For that account 10525696, we're selling ten Sep Jap Yen at market.

Cosentino: Wait a minute Andrea. I'm confused at what I have running.

Ariola: Ok, I'm giving you the orders I have in front of me, and already went through this like five million times: 722 you bought five, that's filled; 309 you bought five, you're filled; and 288 you bought five, and that's filled. Do you remember those orders?

Cosentino: Ok, how do I get flat out of all this?

Ariola: When you sell.

Cosentino: Sell them all, please.

Ariola: I need to know how many. You need to tell me, you need to know how many you want to do!

.

Cosentino: I want to be flat. So you're telling me, I want to sell all of my . . . guess your saying, it's fifteen Yen.

Ariola: Yeah but, did you have other sell orders? Because maybe one of the orders are already off-setting. That's why I'm asking you. Are there any more orders that you did?

Cosentino: I did some orders earlier.

Ariola: Right.

Cosentino: But I got stopped out on all of them.

Ariola: All these three -- those are new position right?

Cosentino: Yes!

Ariola: Ok. So, we're going to sell how many then?

Cosentino: However many you just filled me on, I want to sell!

Ariola: I filled you on? We only filled you on only five.

Cosentino: Ok, sell all five please!

Ariola: Ok, we're selling five Sep Jap Yen where?

Cosentino: At the market. In order to exit the market yes.

Ariola: Selling five Sep Jap Yen at market, 105 25696. Is that right?

Cosentino: Yes.

Ariola: Ticket 342, hold. You sold five at 7010. You're filled on ticket 342.

[Underlining added.] As can be seen, this conversation was bedeviled by Ariola's brusque manner, by Cosentino's repeated use of the wrong terminology to describe his orders and strategy, and by the fact that Cosentino and Ariola often spoke past each other because he focused on the recent past, while she focused on the immediate present. Nonetheless, while Ariola was unable to verify complainant's open positions, she did not inject any false information or withhold any information in her possession; and she correctly followed Cosentino's first instruction to cancel/replace 309, and his second instruction to sell five Yen.

Conclusions

With the benefit of hindsight, it is obvious that Ken Cosentino was not ready to trade a discount account without broker assistance, and that the problems of June 15th may well have been avoided if he and his wife had opened a broker-assisted account, or if respondents near the beginning had advised complainant to upgrade to a broker-assisted account. Nonetheless, the Cosentinos chose to open a discount account, despite the fact that Ken Cosentino had no experience trading commodity futures, and when complainant opened this account, the Cosentinos received ample

written and verbal warnings that they would be responsible for knowing their positions, and would not be receiving the “greater degree of support” provided to customers who paid higher commissions for a broker-assisted account.

In support of the argument that respondents had a fiduciary duty to provide extra assistance with placing and tracking orders, the Cosentinos focus on Fred Monte’s promise that Jack Carl would provide “special assistance,” on Jack Carl’s description of its broker-assisted account in its promotional brochure, and on the fact that Jack Carl employees had corrected certain errors Ken Cosentino had made in placing orders. However, Monte’s promise of “special assistance” by itself was too vague to be construed as a promise that more expensive broker-assisted services would be provided in exchange for payment of reduced discount commissions. Even if Monte had promised more specific services, his promise would not have been binding on Jack Carl in the absence of any evidence that he was acting as an agent of Jack Carl, such as evidence that Jack Carl knew, or had reason to know, that he was making such promises. Nothing in the Jack Carl brochure supports Cosentino’s assertion that Jack Carl was responsible for tracking her orders. The brochure unambiguously explained that discount accounts and broker-assisted accounts involved different levels of service, with the broker-assisted account for “traders requiring a greater degree of support,” including a broker who would “help you track your orders and equity and follow your special instructions.” Complainant’s assumption that a “broker was sitting in front of a computer taking orders with a history of account activity in front of him,” because the Jack Carl brochure stated that discount customers would be provided services such as

"computerized order entry," was a careless and unfounded reading of the language in the brochure, especially since the Cosentinos had received explicit written and oral instructions that they were responsible for knowing the status of orders and market positions, and that they were responsible for immediately making "any corrections or clarifications" on "any order which was incorrectly or incompletely repeated or about which you are unsure." The fact that respondents -- when Ken Cosentino began trading -- may have helped him select orders consistent with his intentions or helped him reconstruct his trading activity when he lost track of his orders does not establish that respondents had agreed to undertake such a duty on a routine basis, especially where the Cosentinos have produced no evidence that they ever informed respondents that they were expecting such extraordinary services in exchange for reduced discount commissions. See *Grist v. Shearson Lehman Brothers, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,962 (CFTC 1990).

As to complainant's allegation that Malone failed to follow Ken Cosentino's instruction to cancel/replace order 309, Cosentino clearly instructed Malone that "I'd like to cancel/replace on ticket number 309," and "I'd like to buy all five that I sold." In these circumstances, notwithstanding the fact that Malone may have been distracted by the search for the ticket, Malone could not reasonably unilaterally treat as a new order Cosentino's statement "Anyway, just buy all five at market please." Malone's decision not follow Cosentino's instruction, and his erroneous advice that Cosentino was "done" and "flat," constituted a violation of Section 4b of the Commodity Exchange Act. See *Do v. Lind-Waldock & Company*, [1992-1994

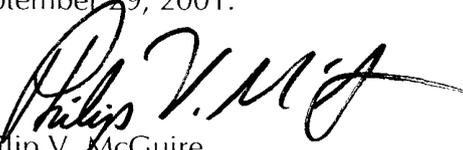
Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,910 (CFTC 1993). However, since Ariola would cancel order 309 before it got filled, Malone's violation cannot be found to have proximately caused any damages.

Finally, complainant's allegation that Ariola lied when she told him that order 309 was working has no merit, because order 309 was, in fact, still working. After Ariola reported that order 309 was still working, she asked Cosentino if he wanted to straight cancel it, which would have put him the position he intended when he had spoken to Malone. However, Cosentino unilaterally decided to reject this suggestion, and instructed her to buy five more Yen contracts. Complainant understandably wishes that Ariola had somehow rescued Ken Cosentino from his confusion; however complainant has not established that Ariola's conduct caused Ken Cosentino to lose track of his orders and positions, or that her conduct otherwise proximately caused complainant's losses.

ORDER

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

Dated September 29, 2001.


Philip V. McGuire,
Judgment Officer