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LOREN G. DAVID,
Complainant,

v.

RICH ALLEN ZIMNEY and
MUNGER COMMODITIES D/B/A
DEBORAH L.MUNGER
Respondents.

CFTC Docket No. 98-R172

INITIAL DECISION

Loren David alleges that Rich Zimney fraudulently induced him to purchase sixty December wheat call options by making a series of explicit guarantees: first, that the price of December Wheat would spike up twenty points in response to a Department of Agriculture report; second, that David would make a profit of $70,000; and third, that any losses would be limited to David's costs. David also alleges that Zimney twice guaranteed that David's limit order would get filled. David seeks to recover his $19,225 in out-of-pocket losses. Respondents deny David's allegations and seek dismissal of the complaint.

The findings and conclusions below are based on the parties' documentary submissions and oral testimony, and reflect the determination of the undersigned that David's testimony was insufficiently convincing to support his allegations. This credibility determination was based principally on Zimney's persistent inability or unwillingness to recall the specific details of significant and relevant conversations and events. David also undermined his general credibility by making implausible assertions, such as that Zimney absolutely guaranteed that a limit order would be filled, and that Zimney simultaneously guaranteed that the recommended trade would make a huge profit *and* guaranteed that he would limit David's losses to the cost of his commissions and fees. Therefore, it has been concluded that David has failed to establish that he is entitled to an award.

Factual Findings

The parties

1. Loren David is a North Dakota farmer with a high school education. Before he opened his non-discretionary account with respondents, David had traded futures with four firms over about eight years, and was familiar with stop and limit orders. David principally used these non-discretionary accounts to speculate. David testified that he had successfully sued one of the firms for mishandling an order. [*See* pages 45-51, 77-84, and 88 of hearing transcript; and account application (exhibit to answer and to complaint).]

2. Munger Commodities ("Munger") is an introducing broker located in Warner, South Dakota. Munger is guaranteed by Iowa Grain Company, a futures commission merchant with its principal place of business in Chicago, Illinois. [*See* guarantee agreement and introducing broker agreement produced as Exhibit E to respondent's discovery production.]

Rich Allen Zimney, a registered associated person with Munger, acted as David's account executive.

Opening the account

3. In June 1997, David contacted Zimney to open an account to trade commodity futures and options on commodity futures. On June 25, 1997, David completed and signed various Iowa Grain account-opening documents. In response to a question on the account application asking for information about previous law suits against brokers, David did not disclose his previous lawsuit.

David testified that he did not read the account documents. According to David he was not concerned about the documents because he implicitly trusted Zimney as a fellow farmer. However, David neither told Zimney that he had not read these documents nor informed Zimney that he blindly trusted him because he was a fellow farmer. In this connection, David has produced no evidence that Zimney used his status as a fellow farmer to induce him to disregard the account-opening documents or otherwise to suspend his own common sense and independent judgement. [*See* pages 51-52, 72-73, 82, 91-99 and 185-187 of hearing transcript.]

David would not place an order for another nine months.

The disputed trade

4. On Friday March 27, 1998, David contacted Zimney to discuss the wheat market. Zimney credibly testified that they discussed local conditions and an upcoming USDA prospective planting report. Both agreed that local conditions supported their expectation that the planting report would predict tight supplies. Zimney was certain that the market would spike up 18 to 20 points, because he believed that the market was under-priced. Zimney told David that if he wanted to speculate on the market's reaction to

the report, he had to place the trade prior to the morning of March 31, when the report would be issued.[1] Zimney also credibly testified that David acknowledged that the market may not react as expected, and that David could lose all of the option premium. [See pages 194-197 of hearing transcript.]

David testified that Zimney literally guaranteed that the wheat market would bounce up about 20 points and that David believed this guarantee because Zimney was a fellow farmer, but could not explain why it would be reasonable to assume uncritically that a fellow farmer in South Dakota could infallibly predict the behavior of the market in Chicago.[2] David further testified that Zimney promised "to take care of the trade" and "limit my loss to $3,000," but acknowledged that they had not discussed stop-loss orders or any other specific means of limiting losses. David also testified that Zimney "pumped him up" by stating that his other clients were making speculative trades based on the upcoming report. However, neither side sought to prove whether or not any of Zimney's other customers took similar positions. In any event, David is the only customer to have initiated a reparation or arbitration proceeding against Zimney. [*See* pages 88-89, and 112-116, and 196-198 of hearing transcript.]

5. On Monday March 30, David accepted Zimney's recommendation to buy thirty May wheat call options, at 4 ½ cents. David alleged that Zimney literally guaranteed a fill at this price. However, when this first order could not be filled, because the market had

[1] A friend of David – Kenneth Lyons – overheard this portion of the conversation on David's speaker phone, and initially seriously considered making a speculative trade on the wheat market. However, he quickly changed his mind and never contacted Zimney. Lyons did not hear the entire conversation because he had entered David's house after the conversation had begun and because he had left the room at least once to chat with Mrs. David.

[2] Lyons did not hear this portion of the conversation.

moved higher, David accepted Zimney's recommendation to change the order price to 5 ¼ cents. Again, Zimney supposedly guaranteed that the order would be filled, and again because the market had continued to rise, the order was not filled. Undaunted by the repeat-failure of Zimney's purported guarantee to get filled at the order price or better, David next accepted Zimney's recommendation to increase the order price to 6 cents – this time without a purported guarantee. David also increased the number of contracts to sixty. Neither side addressed why David doubled the number of contracts. This order was successfully filled, at 5 ¾ cents.

6. On Tuesday March 31, 1998, the market dashed Zimney's and David's expectations and declined in response to the report. Zimney credibly testified that he told David that the wheat contract had lost 1¾ points.[3] and suggested that he liquidate and "live to fight another day." However, David informed Zimney that he wished to hold the position for at least another day. [See pages 68, 118-154 of hearing transcript.]

7. On Wednesday April 1, 1998, Zimney reported to David that the options had lost most of their value. David told Zimney that the wanted to give the market an opportunity to rebound in an attempt to recover some of the premium.

8. After April 1, 1998, Zimney and David did not communicate for approximately two weeks. David testified that during this time he was aware that the wheat market had never rebounded, but was not concerned because he assumed that Zimney had liquidated the options in accordance with his purported guarantee to limit losses to $3,000.

[3] At this price, the position had lost $2,450, and had a liquidating value of $14,800.

9. After the options expired worthless, David sent Zimney a letter in which he complained that Zimney had promised to limit his losses to $3,000, and demanded return of $16,200. In subsequent conversations, David and Munger Commodities were unable to resolve the dispute.

Conclusions

When viewed in its entirety on its face, David's version of events – first, that Zimney guaranteed a series of events that were obviously beyond his total control or influence, *i.e.*, that limit orders would be filled, that the market would only react bullishly to a crop report, and that Zimney could get David out of the trade before he suffered significant losses; and second, that David actually relied on these purported guarantees -- was not particularly compelling or plausible. In light of David's extensive experience trading commodity futures and in light of the failure of Zimney's purported fill guarantees, David's testimony that he had uncritically continued to rely on Zimney's purported profit and loss-limit guarantees while his position deteriorated was simply not credible. Finally, the consistently vague nature of David's testimony undermined the general reliability of his version of events. In these circumstances, David has failed to show by a preponderance of the evidence that he is entitled to an award.

ORDER

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

Dated September 29, 1999.

Philip V. McGuire,
Judgement Officer