



U.S. COMMODITY FUTURES TRADING COMMISSION

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

**OFFICE OF
PROCEEDINGS**

**EBB EVERETT, Jr.,
Complainant,**

v.

CFTC Docket No. 96-R137

**RB&H FINANCIAL SERVICES, L.P.;
HEDGERS, INCORPORATED; and
WILLIAM F. TIERNAN,
Respondents.**

Appearances:

Ebb Everett,
Kansas City, Missouri,
pro se

William J. Nissen, Esq., Sidley & Austin
Chicago, Illinois,
for respondents

INITIAL DECISION

For the reasons set out below, it has been concluded that complainant has failed to establish any violations by respondents. Thus, the complaint has been dismissed, and respondents' counterclaim for the \$68.16 unpaid deficit account has been granted. In addition, complainant has been ordered to pay to respondents' the \$76.16 in attorneys fees and expenses that were incurred in filing a motion to compel complainant's replies to their discovery requests; and respondents' request for an award of the \$1,931.40 in total attorneys fees and expenses incurred in defending this matter has been denied.

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Background

The pleadings

On July 22, 1996, Everett mailed a reparations complaint form, which included a brief factual description. Everett's complaint can be broken down into the following allegations: (1) that his account was charged "normal" transaction fees on Tiernan's "day off" but otherwise charged \$200 transaction fees; (2) that Tiernan disregarded Everett's instruction "to roll over the account to its highest yield";^{1/} (3) that, "[a]t the first margin call I ordered a stop of my account, [but] Bill refused," and stated:

[I]f I keep doing that you'll be rich. I'm not [sic] going to make you rich". I thought you were going to pay for this thing. This is the first time in 22 years [that] someone has walked into my office and told me to do this and it worked.

and (4) that Tiernan "sold my contracts without my permission."

On July 24, 1996, the CFTC Office of Proceedings issued a deficiency letter that directed Everett to explain and support his \$11,410 damage claim, and instructed Everett to produce a "detailed chronological statement of the facts regarding what was said and when, and how you relied on those statements," because his complaint had "not specifically described the manner in which he was injured by the alleged violations." Rather than producing the requested detailed factual description, Everett merely asserted that "on or about July 27, 1994 [*i.e.*, the account-opening], defendant was negligent and with jealousy a fore thought [sic], did misrepresent me [sic]." Everett also doubled his damage claim to \$22,790. Everett's damage calculation was

^{1/} In the two addenda to the complaint, Everett indicated that he made this "roll-over" instruction on or about July 27, 1996, when he opened the account. Everett did not describe Tiernan's response to Everett's purported "roll-over" statement, and did not explain whether this statement was a specific instruction or an expression of his expectation that Tiernan could guarantee the "highest yield."

based on multiplying the purchase price for each of the four disputed silver contracts by \$1,000. Everett did not explain the basis of this calculation, or produce any related evidence about market conditions or his trading strategy.^{2/} [First addendum to complaint, filed August 5, 1997.]

On August 15, 1997, the Office of Proceedings issued a second deficiency letter that informed Everett that his first addendum was not responsive, and again instructed him to produce a detailed description of the facts underlying his claim. Again, rather than producing the requested detailed factual description, Everett repeated verbatim the assertions in the initial factual description and the first addendum, with the exception of the new allegation that "on or about August 4, 1994 [after the first margin call on August 2, and after Tiernan had purportedly refused or disregarded Everett's instruction to "place a stop on my account"], Tiernan had "lead [sic] me to believe that I had a call-put [sic] on my account and that I had to move the stop down before it reached 12 cent [sic]." [Second addendum to complaint, filed September 27, 1996.]

The complaint and the two addenda were served on respondents, who afterwards filed a joint answer denying all of Everett's allegations, and counterclaiming for the \$68.16 debit balance. Respondents also sought attorneys fees and expenses based on Everett's decision to press his claim after rejecting their offer to settle by dropping the counterclaim and by paying him the amount that they had calculated to be his total trading losses.

^{2/} Everett would subsequently fail to explain or substantiate his damage claim in reply to respondents' discovery requests and in reply to an order issued by the undersigned. [See Everett's replies to respondents' interrogatory 1 and document request 4, and Everett's reply to Order dated October 27, 1997.]

Before the initiation of discovery, a telephone conference was held to encourage settlement and clarify issues. During the conference, respondents renewed their offer to pay Everett his entire out-of-pocket losses and to drop the debit balance claim. Everett again rejected respondents' offer. [See Notice dated July 31, 1997.]

Discovery and respondents' motion for summary disposition

Both sides conducted discovery. Everett asked for recordings of conversations and an explanation for "Why did my margin calls progressively increase?" Respondents replied that they had no recordings, and that the margin calls were based on margin requirements established by the exchange.

On August 18, 1997, respondents served their requests for documents, deposition on interrogatories, and requests for admissions. Everett did not timely reply to the discovery requests.

On September 26, 1997, respondents filed a motion to compel discovery. On October 11, 1997, Everett filed his replies to respondents' interrogatories and requests for documents. Significantly, Everett's replies showed that he had no recollection of any additional specific alleged misrepresentations or deceptions by respondents beyond the vague and garbled allegations set out in his complaint, and that he had no reliable or convincing evidence in support of his claim that he suffered \$22,790 in damages. [See Everett's replies to respondents' interrogatories 1 through 5, and document requests 3 and 4.] In addition, Everett did not file any replies to respondents' requests for admissions, and did not explain why he had not filed discovery replies until after respondents filed the motion to compel.

Everett was directed, by Order dated October 27, 1997: (1) to explain or clarify various

averments in the complaint and addenda, that the Order identified as vague, confusing, inconsistent or implausible; (2) to show why his failure to produce timely replies to any of respondents' requests for admissions should not be deemed as admissions of the factual matters set out in the requests, and to show why the admissions should not be considered as conclusively establishing the factual matters admitted and used as proof against Everett; (3) to show any justification for Everett's failure to produce timely replies to respondents' discovery requests, and to show why respondents' related costs should not be awarded pursuant to CFTC rule 12.30(c); and (4) to set forth any reasons why respondents' counterclaim and request for attorneys fees and costs should not be granted. In reply, Everett merely repeated verbatim the previous assertions. Everett did not address his failure to reply to the requests for admission or his failure to provide timely replies to respondents' interrogatories and document requests.

Pursuant to CFTC rules 12.33(b) and (d), and 12.201(b), Everett's unexplained failure to reply to respondents' requests for admissions is grounds for concluding that he has admitted each matter set forth in the requests for admissions, and that each matter so admitted has been conclusively established as proof against Everett.

Pursuant to CFTC rules 12.30(c) and 12.201(b), Everett's unexplained failure to produce timely replies to respondents' discovery requests is grounds for concluding that he has necessitated, without any justification, the filing of respondents' motion to compel, and that Everett must pay respondents' reasonable attorneys fees and expenses of \$76.15 incurred in filing the motion.^{3/}

^{3/} Respondents' reasonable attorneys fees and expenses are based on a charge for one-quarter of an hour labor.

Factual Findings

The findings below are based on the parties' documentary submissions and Everett's admissions, and reflect my evaluation of the evidence.

1. Ebb Everett, Jr., is a resident of Kansas City, Missouri.

Everett represented on his account application that his occupation was "investor," and that he had maintained commodity futures or options accounts with several firms, and that he had a net worth of over \$100,000.

2. RB&H Financial Services, L.P., is a futures commission merchant located in Chicago, Illinois. Hedgers, Incorporated is a Kansas City, Missouri introducing broker guaranteed by RB&H. William Tiernan, is a registered associated person with Hedgers, who was Everett's account executive.

3. In July 1994, Everett walked into Hedgers' office. Everett represented to Tiernan that he was an experienced trader, and that he wished to trade futures to take advantage of a rise in silver prices that he anticipated. Everett signed the account-opening documents on July 21, 1994. [See admissions 1 and 2; and page 2 of respondents' final verified statement.] Everett has admitted that Tiernan made no material misrepresentations or omissions during the account opening, and has produced no convincing evidence of any specific false or deceptive statements by Tiernan during the account opening. [See admission 23; Everett's reply to Order dated October 27, 1997; and page 2 of respondents' final verified statement.]

4. Everett initiated each trade in his account through a specific order he gave to Tiernan. [See requests for admission 4, 5, 6, 7, 8, 12 and 13.]

5. The RB&H confirmation statements establish that Everett's account was consistently charged, per futures contract, a \$31 commission and \$3.54 in various fees, and that he paid a grand total of \$124 in commissions and \$13.16 in fees over the life of his account. [Exhibit to complaint.] Thus, Everett's assertion that his account was charged "normal" transaction fees on Tiernan's "day off," but otherwise charged \$200 transaction fees was completely without merit.

6. On July 25, 1994, Everett bought one 1000-ounce silver futures contract. The RB&H margin call notices establish that the first margin call was issued on August 2, 1994.^{4/} The RB&H account statements establish that on August 22, 1994, Everett met the margin call, and that on September 8, 1994, Everett liquidated the silver position for a \$105.46 net profit. [See admissions 3 and 22; and page 2 of respondents' final verified statement.]

7. On August 30, September 9, and September 26, 1994, Everett placed market orders to buy additional 1000-ounce silver futures contracts. [See admissions 4, 5 and 6; and page 2 of respondents' final verified statement.]

^{4/} Everett claimed that "[a]t the first margin call [*i.e.*, on August 2] I ordered a stop of my account, [but] Bill [Tiernan] refused." [Emphasis added.] The October 27 Order directed Everett to explain whether the underlined language referred to an instruction to close the account or to place a stop order on the undermargined silver contract. However, Everett failed to address this issue in his reply to the Order; and also admitted that he did not try to place a stop order at this time [admission 22], and otherwise produced no evidence about the parties' conduct or about market conditions between August 2 and September 8, when he sold the contract at a profit. In the alternative, Everett's decision to continue to trade for another two months, and his assertion that on October 14th and 20th Tiernan sold contracts without Everett's permission, were hopelessly inconsistent with any instruction to close the account. Thus, Everett has failed to produce a scintilla of reliable evidence showing any violations in connection with the first margin call.

8. As a result of adverse market movements, Everett's account became undermargined, and RB&H issued a series of margin calls on October 10, 11, 12 and 13. On October 14, Everett sold two of the silver contracts for a loss of \$309.08. [See admissions 9, 10 and 23; and page 2 of respondents' final verified statement.]

Also on October 14, Everett told Tiernan that he would meet the margin call on the remaining silver contract. However, Everett did not meet the margin call as promised; and RB&H issued a second series of margin calls (for \$750) on October 17, 18, 20 and 21. On October 20, Everett placed a stop order to sell at \$5.00. Tiernan warned Everett of the risks involved in setting the stop at that price. Afterwards, the order could not be filled, and the market continued to decline. Everett then made a margin payment with a check that was returned for nonsufficient funds. After the bounced check was returned, respondents left messages with Everett that the silver position would be liquidated if he did not satisfy the margin call. Everett did not return respondents' calls. On October 25, RB&H closed the last position.

Everett has admitted that respondents made no material misrepresentations or omissions in connection with the margin calls and liquidations in October, and has produced no convincing evidence of any false or misleading statements or actions by respondents in connection with the margin calls and liquidations in October. [See admissions 11, 12, 13, 14, 15, 16, 17 and 18; Everett's reply to Order dated October 27, 1997; and page 2 of respondents' final verified statement.]

9. The RB&H account statements establish that Everett's trading losses totalled \$668.16, which resulted in a \$68.16 account deficit.

Conclusions

Initial and maintenance margins are instituted for the protection of futures commission merchants and the market integrity as a whole, and reflect the amount of risk an FCM is willing to accept for a customer's position. For this reason, it is well established that an FCM has considerable discretion to set and enforce its margin policies, absent evidence of fraudulent or bad faith conduct. Therefore, in order to establish wrongdoing by respondents, Everett must show by a preponderance of the evidence either that they misled him about their margin policy or that they liquidated his open position in bad faith. *See Baker v. Edward D. Jones & Company*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,167 (CFTC 1981). Here, Everett has repeatedly failed to clarify or substantiate his claims, which coupled with his admissions, supports the conclusion that he has failed to show that respondents deceived him about their margin policy, that respondents acted in bad faith when they issued the margin calls in August and October or when they liquidated the last silver position after Everett breached his promise to meet the margin call and then failed to return respondents telephone calls, or that respondent otherwise made any material misrepresentations. Therefore, the complaint must be dismissed, and respondents' counterclaim must be granted.

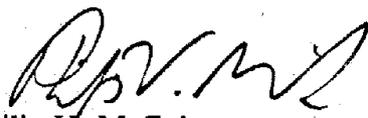
In light of his subsequent failure to produce any reliable supporting evidence, Everett's decision to press his claim for greater damages after respondents had offered to refund the reported trading losses proved to be the product of obstinate and fanciful thinking. However, by itself, this decision did not constitute bad faith or vexatious conduct warranting an award of the entire \$1,931.40 in attorneys fees and expenses that respondents incurred defending this matter. *See Sherwood v. Madda Trading Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,728 (CFTC

1979).

ORDER

No violations having been shown, the complaint is **DISMISSED**. Respondents have established that they are entitled to recover the \$68.16 debit balance, and that they are also entitled to recover the reasonable expenses of \$76.15 incurred in filing the motion to compel. Accordingly, Ebb Everett, Jr., is **ORDERED** to pay to RB&H, Hedgers, Incorporated, and William Tiernan \$144.31, plus interest on that amount at 5.468%, compounded annually from September 30, 1997, to the date of payment. Finally, respondents' request for an award of their total attorneys fees and expenses incurred defending this matter is **DENIED**.

Dated January 8, 1998.


Philip V. McGuire,
Judgment Officer