



U.S. COMMODITY FUTURES TRADING COMMISSION

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MALCOLM FEIN,
Complainant,

v.

MERRILL LYNCH PIERCE FENNER
& SMITH, INCORPORATED, and
DAVID BRUCE ELLIOTT,
Respondents.

CFTC Docket No. 96-R56

INITIAL DECISION

This dispute centers on the sale of Fein's four silver futures contracts on January 2, 1996, for a \$1,189 profit, pursuant to a limit order placed on December 28, 1995. Respondents claim that the four silver contracts were properly sold because Fein's limit order was a valid good-till-cancelled ("GTC") order. In contrast, Fein claims that the sale was unauthorized because the limit order should have expired on December 29, 1995. Fein claims damages of \$9,100, based on the value that the four long silver contracts would have reached on February 13, 1996.

Factual Findings

Malcolm Fein is a lawyer in Brooklyn, New York, who has traded equity and stock index derivatives for at least 15 years and traded commodity futures for at least 10 years.

Fein opened his Merrill Lynch futures account on October 5, 1995, and successfully traded precious metals futures in October

and November 1995.

On December 12, 1995, Fein purchased two March silver futures contracts at \$522.50; and on December 13, 1995, purchased two more March silver futures contracts at \$512.50.

Fein placed a series of orders to sell the four silver contracts, each time at a limit price of \$525.50, on December 20,^{1/} 21, 26, and 27, 1995. The market did not hit the limit price on any of these days, and thus the limit order was not executed.

After the market close on Thursday, December 28, 1995, Fein's account executive (respondent David Elliot) told Fein that he would be on vacation over the New Year holiday and might not return until after the market opened on Tuesday, January 2, 1996.^{2/} Elliot advised Fein to enter a good-til-cancelled ("GTC") order to sell the four silver contracts at \$525.50. According to respondents, Fein agreed and the order was read back to him. In contrast, Fein denies that he authorized a GTC order, and asserts that he assumed that the order would expire at the market close on December 29, 1995.

Also on December 28, 1995, Merrill Lynch generated and mailed to Fein an "Open Order Confirmation" form. The pertinent portion

^{1/} Respondents claim that on December 20, Fein rejected Elliot's suggestion to place a higher limit because he was more interested in a quicker, more assured profit. Fein denies that Elliot made this suggestion.

^{2/} Although Fein disputed many of respondents' specific factual assertions, he did not dispute their assertion that Elliot had told him that he probably would not return to work until after the market open on January 2.

of the form filled out by respondents unequivocally indicated that a cancellation date had not been designated and thus the order would remain open until cancelled: "IF NOT EXECUTED, THIS BUY OR SELL ORDER WILL BE CANCELLED AT THE OPENING OF THE FIRST BUSINESS DAY FOLLOWING XXXXXXXXXXXXXXXXXX." [Exhibit 1 to complaint; all caps and boldface in original.] This was the first time that Fein had received an Open Order Confirmation" form from Merrill Lynch.

On Friday, December 29, 1995, the market did not hit the limit price, and thus the order was not executed.

On the next trading day, Tuesday, January 2, 1996, the market opened at \$520 at 8:25 a.m., dropped to \$518 at 8:43 a.m., and then climbed through Fein's limit price at 9:11 a.m. Fein's order was filled at the \$525.50 limit price, and he realized a \$1,189 profit.

Shortly afterwards, Elliot called Fein to report the fill. Elliot also informed Fein that the March silver was then trading in the \$526 to \$528 range.^{3/} Respondents assert that Fein did not complain about the fill price until Elliot had told him the current (i.e., higher) market price, and that even then Fein merely complained that he wished he could have made a larger profit. In contrast, Fein asserts that he specifically protested that he had not placed a GTC order. However, Fein's assertion is undermined by the fact that he did not seek to reinstate the position at or near \$525.50, but rather placed two buy orders well below the market,

^{3/} The March 1996 silver futures contract traded in the \$526-to-\$528 range from 9:11:45 to 9:16:04, and then traded in the \$528-to-\$530 range for most of the morning. [Comex price-change register for January 2, 1995, Exhibit 7 to answer.]

one for silver futures (a limit order to buy two March contracts at \$520.50) and one for copper futures, neither of which would be filled that day.

By January 3, 1996, Fein had received the open order confirmation. That day Fein suggested to Elliot that respondents' failure to designate a specific cancellation date on the open order confirmation meant that the cancellation date had to be the next day, i.e., Friday December 29, 1995. By letter dated January 5, 1995, Fein repeated his specious argument that the GTC order was merely a day order:

I am receipt of the Open Order Confirmation and I would like an explanation of it.

As I read this Open Order Confirmation it indicates that this "Buy or Sell order will be cancelled at the opening of the first business day following." According to your statement, the Order was given on December 28, 1995, and therefore, should have been cancelled on December 29, 1995.

First of all, I want you to know that I never issue a Good to Notice [sic] Order. I never whether in my stock account or any other account issue a good for stock [sic] order. Secondly, this order should have been cancelled by your own Open Order Confirmation.

[Exhibit 3 to complaint.] Fein's interpretation of the open order confirmation form is undermined by the fact that he had never received an open order confirmation for any of the previous four limit orders.

After settlement discussions proved unfruitful, Merrill Lynch informed Fein that it was restricting his account to liquidation orders only. Fein subsequently filed a reparations complaint seeking damages of \$9,100, based on the value of the four March

silver contracts as of February 13, 1996.

Conclusions

Fein claims that had respondents not sold the four silver contracts:

I would have placed a stop order in, say at about \$533, which of course it never went to. I would have continued to do that as silver went up to approximately \$579.

[First paragraph of factual description in complaint.] Fein also claims that he would never would have used a GTC order because it "is probably the most dangerous thing an individual could do given the volatility of commodities." [Sixth paragraph of factual description in complaint.] However, the evidence in the record supports the conclusion that the use of the GTC order was consistent with Fein's strategy of trading silver futures to capture modest profits on short-term price swings. The conclusion that Fein was obviously seeking limited profit potential is supported by the fact that he had repeatedly placed limit orders at the same price from December 21 to 28, 1995. The use of a GTC limit order at the same price was not inconsistent with that strategy where Fein's broker had said that he might not be available until after the market open on January 2, 1996. Contrary to Fein's assertion, the GTC order was not inherently "dangerous" since it did not alter the downside risk Fein would have faced if he had no order in place at the market open on January 2, 1996.

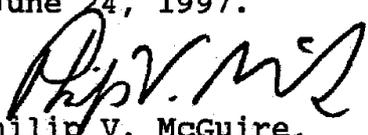
Fein assertion that he would never use a GTC order was unconvincing because after the GTC order actually captured his desired profit, he placed a new buy order at well below the then-

prevailing price rather than attempt to re-enter at or near the sale price. Fein also undermined the overall plausibility of his claim by making a best-of-both-worlds damage claim, i.e., on the one hand asserting that he would never have authorized a GTC order because it would supposedly have deviated from his usual day-trading strategy with limited profit potential, while on the other hand asserting that his damages should be based on a radically different long-term trading strategy using trailing stops with exponentially greater profit potential. The absence of any convincing reason to accept Fein's assertion that he would have gloriously benefited from radically changing his trading strategy supports the conclusion that Fein's claim for damages is principally speculative and without merit.

ORDER

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

Dated June 24, 1997.


Philip V. McGuire,
Judgment Officer