



U.S. COMMODITY FUTURES TRADING COMMISSION

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OFFICE OF PROCEEDINGS
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OFFICE OF
PROCEEDINGS

MICHAEL GHODSIAN,
d/b/a DIVERSIFIED INVESTMENTS,
Complainant,

v.

SAUL STONE & COMPANY,
LEO H. RUTKOWSKI,
EUGENE J. SIKORA, and
GEOFFREY SEAN THOMPSON,
Respondents.

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* CFTC Docket No. 96-R159
* Judgment Officer McGuire
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INITIAL DECISION

This dispute arises from a series of mistakes and miscommunications by both sides in connection with the purchase of a single S&P index futures contract on July 18, 1996. Ghodsian claims that respondents mishandled his order and misinformed him about its status, and seeks to recover his \$9,261 loss on the trade.^{1/} Respondents deny any violations, and allege that Ghodsian acted in bad faith by failing to follow their verbal trade confirmation procedure on July 18, 1996, and by attempting to disavow the trade on July 24, 1996.

The findings and conclusions below are based on the parties' documentary submissions and oral testimony, and reflect my

^{1/} Ghodsian initially had also sought to recover \$20,000 in lost profits: "My intended timing turned out to be amazingly correct [regarding] the very bottom of the market and to date I would have made nearly a \$20,000 gain. This would have been a bright beginning for the establishment of my track record for future reference." [Page 4 of Complaint.]

credibility determinations. For the reasons set out below, it has been concluded that Ghodsian has failed to establish any violations by respondents.

Factual Findings

1. Michael Ghodsian, a resident of Los Angeles, California, is registered as an investment advisor and as a commodity trading advisor, and operates Diversified Investments as a sole proprietorship, which had approximately 60 securities customers in 1996. Although Ghodsian was registered as a CTA, he had never traded commodity futures or options before he placed the disputed trade. [See pages 7-9 of hearing transcript.]

2. Saul Stone and Company is a registered futures commission merchant, located in Chicago, Illinois. Eugene Sikora, Saul Stone's vice president of Sales and Marketing Division, was Ghodsian's principal contact at Saul Stone, and assisted Ghodsian in establishing the account. Leo Rutkowski, who worked for Saul Stone's Operations and Risk Department, explained Saul Stone's trade confirmation "check-out" procedure to Ghodsian on July 18, 1996, and spoke to Ghodsian on July 24 about the mix-up on his order. Geoffrey Thompson twice spoke briefly to Ghodsian about the account.

3. Ghodsian first contacted Saul Stone in 1990, but would not sign the account-opening documents until August 11, 1995, and would not deposit any funds until just before he placed the disputed trade on July 18, 1996. During this lengthy time, Ghodsian tracked various markets, including the S&P futures market. Ghodsian's main

contact at Saul Stone during this time was Sikora.

Ghodsian understood that the S&P futures contract was traded in Chicago, understood that Chicago was in the Central Time Zone, two hours ahead of the Pacific Time Zone, and understood that the S&P futures contract was traded during limited hours. [See pages 10-12, and 20 of hearing transcript.]

4. On August 11, 1995, Ghodsian signed the account-opening documents for a self-directed trading "Futures Direct" account with Saul Stone. As a self-directed trader, Ghodsian could place his orders by calling directly to the trading floor, and did not have an account executive assigned to handle his orders, to make recommendations or to discuss market information.

Saul Stone permitted its self-directed trading customers to have direct access to the trading floor, and Saul Stone relied on independent floor brokers to execute trades for its self-directed customers. As a result, Saul Stone required that a self-directed customer sign an addendum to the customer contract -- titled "Futures Direct Account Customer Acknowledgements" -- under which the self-directed customer agreed to monitor his or her account and to inform Saul Stone of any errors by following an order confirmation "check-out" procedure either after the market close or before the market open the next trading day. The "Futures Direct Account Customer Acknowledgements" provided in pertinent part:

Customer agrees to check daily activity and positions on a same day basis, and it is Customer's responsibility to do so on an ongoing basis and to notify Stone of any errors immediately. Further, customer agrees to be available by telephone to receive information, requests and account information from Stone. . . .

Customer has the sole responsibility to monitor the orders which it places.

[¶¶3 and 7 of "Futures Direct Account Customer Acknowledgements" addendum to Saul Stone customer contract, exhibit A to Saul Stone's Answer; see pages 16-18 of hearing transcript.] As part of the check-out procedure, Saul Stone agreed to fax summaries reporting the account status and any trading activity each night after the market close.

5. On August 15, 1995, Ghodsian sent a letter to the attention of Leo Rutkowski that stated:

Diversified Investments is owned by the undersigned. It is not a pool and does not solicit shareholders. Should there be any change in the status of the ownership of the corporation we will notify you in writing within thirty days.

[Emphasis added; Exhibit 10, Ghodsian's Final Statement.] The information in this letter would form the basis of a difficult conversation between Ghodsian and Rutkowski on July 17, 1996, when Ghodsian decided to begin trading.

6. On July 17, 1996, Ghodsian decided that the S&P had hit a bottom, and called Sikora. Ghodsian said that he wanted to begin trading that day, and informed Sikora that he would be wiring \$50,000 to begin trading. Ghodsian has not explained why he waited until the last moment to wire funds, and has not produced any evidence of any representations by respondents about how much time to allow wired funds to clear before he could begin trading.

Ghodsian could not place an order on July 17 because Saul Stone's bank did not receive notice of the transfer of \$50,000 from Ghodsian's bank until 2:15 p.m. CDT; and Saul Stone's bank did not

notify Saul Stone that Ghodsian's funds had been received until after the market close that day. [See pages 18-21 of hearing transcript.]

7. On July 18, at about 11:50 a.m., EDT, 8:50 a.m. PDT, Leo Rutkowski called Ghodsian to confirm that the information in the August 15, 1995 letter had not changed, to clear up whether Diversified Investments was a corporation as stated by Ghodsian in the letter or a sole proprietorship as represented elsewhere by Ghodsian, and to review Saul Stone's check-out procedure, before Ghodsian could place any trades.^{2/} Saul Stone produced a recording of the last portion of this conversation concerning the check-out procedure, but not the initial portion concerning Diversified Investments. Ghodsian characterized the initial portion of the discussion as an "argument," an "unnecessarily long exchange," a "less-than-positive experience," and "redundant and [the cause of] undue delay." [Ghodsian letter to Saul Stone, dated November 20, 1996; pages 1, 2 and 6 of Ghodsian's Final Statement, and ¶¶4 and 15 of Rutkowski's answer.] As a result, Ghodsian became agitated that he could not immediately place his order:

I was trying to put the order through and all of a sudden, I'm in the middle of something. I had opened the account a whole year earlier in anticipation that every thing would be okay. . . . Here I was, trying to get an order through; the market right in front of me is picking up; and we're getting into a silly discussion whether a sole proprietorship is a corporation, or not. That's when I was agitated. . . .

I was mostly agitated at Rutkowski. And to his credit .

^{2/} Saul Stone did not provide any written instructions or explanation concerning the check-out procedure.

. . . I must say that he was courteous and patient. But he was just too patient, my God, in the kind of market that was happening.

[Pages 20-21 of hearing transcript.]

Throughout the subsequent, recorded, portion of this conversation Ghodsian seemed not just agitated, but also impatient and distracted. For example, Rutkowski explained first that Ghodsian probably would not get a fax on the first day, and thus that it was "very important" for Ghodsian to make a verbal "check-out" if he placed any orders, and second that Ghodsian had to notify Saul Stone before the market open the next day of "any discrepancies or any problems." Ghodsian then replied "I can't concentrate right now. . . . I don't even know what you're talking about." Ghodsian testified that he could not "concentrate" on Rutkowski's explanation because he had been simultaneously watching the market pick up on his screen. [Pages 23-24 of hearing transcript.]

Rutkowski then explained the importance of the check-out procedure by using an example that was remarkably similar to the situation that would arise in Ghodsian's account, and instructed Ghodsian that for each trade he must call Rutkowski, either soon after the market close or before the market open the next day:

RUTKOWSKI: Well, okay. I'll give you the -- I can give you an example if you have a minute here. If I can break it down for you. Say, for example, you're trading S&P, okay?

GHODSIAN: Uh-huh.

RUTKOWSKI: And according to your records, you've bought

five S&Ps and sold five S&Ps, okay. But for whatever reason -- for example, one of your buys does not make it into your account for whatever reason, okay? Somebody writes the wrong account number down, the broker -- something else -- something else he has like a piece of paper and the broker doesn't realize it and it doesn't get -- doesn't get into your account for some reason.

Okay. And then you get your fax the next morning and it shows, well, four buys by five sells, okay? Okay. But you know that you bought five. Well, then it's -- the situation is real simple. You just need to call me and say I'm missing buying one at such and such price. I tell the broker that. He takes care of it, so to speak. It's his responsibility.

Okay, if the market opens higher and you're -- for example, you're short one and you call after the bell rings at say 9:00 and you say, oh, well, you know I didn't realize that there was this problem. There was a discrepancy. Then you may -- and I want to underline the word "may" -- you may be responsible at that point. Do you understand what I'm saying?

GHODSIAN: I understand what you're saying but --

RUTKOWSKI: Is that example clear?

GHODSIAN: That's not going to work because --

RUTKOWSKI: What do --

GHODSIAN: 9:00 your time is 6:00 our time, and we're asleep at that time.

RUTKOWSKI: Well, you -- I -- hey, I understand you live in California and I -- that was just an example. The fax service is given to our customers free of charge, if you want it, in order to make sure that our records reflect your records, okay.

GHODSIAN: But I have --

RUTKOWSKI: And it's up to you -- I guess what I'm trying to say to you, sir, is the orders that you place and your open -- the orders that you place, your open positions, et cetera, need to be fully monitored by you, okay?

GHODSIAN: Yeah, it's not --

RUTKOWSKI: You know what -- what we're responsible for is clearing your trades, okay, and the thing is that if

you tell us that there's a problem, discrepancy or whatever prior to the market opening, then, you know, we'll, you know, we'll take care of it. We'll have the broker take care of the situation.

If you can't get to the phone, you know, you're -- unfortunately it's too early for you in California -- the only other thing I can suggest, sir, is that you can call at the end of the trading day, okay, perhaps about 4:30 or so Central Time, 4:30/5:00 Central Time. We have somebody here, okay, who can go over your trades and see if your, you know, if your records reflect our records at that point, okay. And then if you're comfortable at that point, then you would just need to double check the fax the next morning again prior to the market opening and -- and then, you know, everything goes on from there.

But one way or the other, we need to make sure that your records reflect our records so, you know, so business can be taken care of properly. Do you understand what I'm saying?

GHODSIAN: Oh, yeah, but right now I'm -- I'm going to convey to you that I don't think it's practical.

RUTKOWSKI: You don't think it's practical?

GHODSIAN: No, no, not if --

RUTKOWSKI: Well --

GHODSIAN: If I can -- if I can deal you -- with you with fax, fine. If I have to be awake 5:00 in the morning just because you might have messed up someplace, it doesn't make sense.

RUTKOWSKI: Well, it's not necessarily that we might have messed up. Brokers, you know, sometimes give up trades -- sir?

GHODSIAN: Yes.

RUTKOWSKI: Okay. Brokers sometimes give up trades to, quote/unquote, "the wrong house" or sometimes, you know, somebody may have -- they thought you, you know -- you gave your account number, but they thought you said something else and perhaps they wrote down a wrong account number. You know it's a -- it's a business that there's a number of -- a number things happen from the time that you call and place your order to the time it gets into your account.

It's a very -- it's a very -- it's a very labor intensive business, okay, and the point is that all we ask you to do is, you know -- unfortunately, sir, we understand that you live on the West Coast and that you're two hours behind us. But, you know, what we're asking you to do is, you know, if you can't get up at 6:30 in the morning or a little before 6:30 in the morning to check your trades, then all we're asking you to do is then call, you know, approximately -- as an alternative, call the -- the same night at 4:30 or 5:00, 3:00 or -- 3:00 or -- 03:00 or 4:00 your time --

GHODSIAN: You're not sending the faxes at that time.

RUTKOWSKI: No, we won't send the faxes. But we have somebody here specifically to check the trades and to, you know, also check out with you verbally. And if you, you know -- if you verbally check out okay with him at that time, then, you know, at that -- at that particular point, you know, all you would say is, you know, this is Mr. Ghodisian. My account number is 18880. I want to double check my trades from today.

.....

GHODSIAN: All I'm saying is this seems to be a little nonsensical and if it is, then I'll just close my account and move someplace else.

I'll see for a few days or a few months, whatever it is, how it works out practically. But it's -- working with each other is one thing. To try to put responsibility totally on somebody else's shoulder ahead of time is something completely different.

RUTKOWSKI: Sir, I was trying to explain to you --

GHODSIAN: They normally say when you discover a problem, let us know and we'll take care of it or we'll discuss it, whatever it is. But this business of saying that you have to call 6:00 in the morning or 4:30 in the afternoon sounds good except that in practice may not work out, and then we'll see. That's all I'm saying.

[Emphasis added.]

8. At 12:15 p.m. CDT, 10:15 a.m. PDT, on July 18, 1996, Ghodisian placed an order directly to the trading floor to buy one September S&P contract at the market. The order was handled by an

independent floor broker who cleared through First Options of Chicago. Set out below is a transcription of pertinent portions of the recording of the order:

DAVIS: John Davis.

GHODSIAN: Hi, John. This is Michael Ghodsian, Diversified Investment in Los Angeles with a new account, Account Number 18880, and I want you to buy one contract of the September S&P 500.

DAVIS: Buy one -- buy one of the futures, right?

GHODSIAN: Right.

DAVIS: Okay.

GHODSIAN: September S&P.

DAVIS: Okay.

GHODSIAN: Give me a price?

DAVIS: Yeah, I'm checking. Do you primarily do futures or do you do options? You do options as well?

GHODSIAN: The only thing I'm going to do for now is the S&P futures, and --

DAVIS: Okay. Okay. . . . You bought one at 45 evenly, [i.e., 645.00] sir. What I'm going to do is -- well, I'm going to -- let me get the direct line to our futures desk.

GHODSIAN: Okay.

DAVIS: Hold on. (Simultaneous conversation in the background.) Okay.

GHODSIAN: Yes.

DAVIS: Okay. The -- because this is like for the options desk. We can do the futures here. But if you're going to be just doing futures --

GHODSIAN: -- that other number here.

DAVIS: Might as well give you that number. That number is 1-800-221-8622.

GHODSIAN: Uh-huh.

DAVIS: Okay. The one you --

GHODSIAN: The back-up number?

DAVIS: The back-up number is the number you just dialed here. That's the 1-800 --

GHODSIAN: Okay. 922 --

DAVIS: 922-1468.^{3/}

GHODSIAN: Okay.

DAVIS: Okay. So you bought one of the September S&P futures at 645 even and that's on Ticket 169.

GHODSIAN: Ticket Number 169?

DAVIS: Right. And your account was 18880, right?

GHODSIAN: Uh-huh.

DAVIS: Correct? Okay.

GHODSIAN: Ticket Number 169. Now this has been the first time I'm trading. Did I tell you that the right things or is there anything I should have said differently?

DAVIS: No, no. That's fine. You said your account number and then you said exactly what you wanted to do.

[Emphasis added.]

Ghodsian's reference here to the number he called as the "back-up" number contradicts his assertion that the Saul Stone floor manager had given him an incorrect number to place his order.

Also, Ghodsian testified that he did not write down the ticket number. [Page 29 of hearing transcript.]

^{3/} The Saul Stone floor manager had given him the two phone numbers. Ghodsian did not explain why he had selected the "back-up" phone number at the options desk rather than the phone number at the futures desk.

9. Afterward, but before the market close, Ghodsian called Sikora. Ghodsian told Sikora that he had bought just one contract rather than three because of what he considered his "less-than positive" experience with Rutkowski. Ghodsian did not indicate to Sikora that he considered this conversation to be the "check-out" procedure for his trade, and did not advise Rutkowski or anyone else at Saul Stone -- after the market close on July 18 or before the market open on July 19 -- that he had placed the order and received a fill report. [Ghodsian's Final Statement; pages 20 and 67-68 of hearing transcript.]

10. From Thursday July 18 to Wednesday morning July 24, First Options would treat the order as an out trade, and would not report the trade to Saul Stone until July 24. Neither side sought an explanation from First Options for its handling of the order.

11. On Friday, July 19, Ghodsian called Sikora and told him that he had not received a fax from Saul Stone. Sikora then transferred the call to Geoffrey Thompson, who told Ghodsian that he would be receiving the first fax that night. [See ¶10 of Sikora Answer; Sikora's testimony at page 69 of hearing transcript and Thompson's testimony at pages 72-73 of hearing transcript.]

Saul Stone sent faxes to Ghodsian around 4:00 a.m. after each trading day, from Friday, July 19, to Wednesday, July 24. These faxes reported no open positions in Ghodsian's account. [Exhibit to Complaint; and exhibits I and J to Saul Stone's Answer.]

12. By Monday, July 22, Ghodsian had received two faxes that reported no open positions in his account. Also that day, Ghodsian

had been tracking the S&P futures market, and had contemplated hedging his futures position which he knew was down about seven percent. Ghodsian called the options desk for quotes on put options and received what he considered confusing or conflicting information. Ghodsian then called Sikora at about 1:13 p.m. CDT, 11:13 a.m. PDT. Ghodsian complained about the confusing report he had received from the options desk. Ghodsian claims that he was then "shocked" and "surprised" when Sikora advised him that Saul Stone's records showed no positions in Ghodsian's account. Ghodsian has produced no plausible explanation for his "shock" at Sikora's statement which merely confirmed the information he had received in the faxes from Saul Stone. Thompson called Ghodsian back later that day to confirm that the account still showed no open position, and that Saul Stone would continue to investigate. [See page 3 of Ghodsian's Final Statement.]

13. Ghodsian did not speak to any Saul Stone employees on July 23.

14. On Wednesday July 24, at about 7:30 a.m. Chicago time, and 5:30 a.m. Los Angeles time, Ronald Simpson, a Saul Stone employee, called Ghodsian. As can be seen from the following transcript of that conversation, Ghodsian denied the existence of any trading activity:

SIMPSON: Hi. Sorry to call so early. This is Ron at Saul Stone & Company. How are you?

GHODSIAN: I'm just fine.

SIMPSON: I'm sorry? I was calling because I was told that you were missing the trades from the 18th, that you actually put on a trade for it Thursday. They were trying to add a September S&P to your account at the

price of 645 even?

GHODSIAN: Uh-huh.

SIMPSON: And it appears that trade was actually yours.

GHODSIAN: No.

SIMPSON: That is not yours? There has been no activity on the account at this time, is that correct?

GHODSIAN: Yeah.

SIMPSON: Thank you very much. And you know, sorry, I called so early.

GHODSIAN: Thank you.

SIMPSON: All right, bye.

As can also be seen, Ghodsian did not inform Simpson of any other helpful facts, including: that on July 17 he had been eager to buy an S&P contract; that on July 18 he had been agitated by the delay in placing his order; that on July 18 Ghodsian had placed an order and received a fill confirmation for one contract; that on July 18 he had conducted what he considered to be the check-out procedure with Sikora; that Ghodsian had received a series of fax and telephone communications from Saul Stone indicating that the order had not been posted to his account; and that on July 22 he and Thompson had discussed the discrepancy. Ghodsian testified that he spoke as he did because he was not fully awake, and in his groggy state "had dismissed the existence of anything in my account." [Page 40 of hearing transcript.] In light of Ghodsian's eagerness to place the order, his "agitation" over the delay in placing the order, and his subsequent claim that he was entitled to lost profits based on the price of the contract after July 24, I found this explanation unconvincing.

15. At about 9:30 a.m. CDT, 7:30 a.m. PDT, Rutkowski called Ghodsian. As can be seen from the transcript below, Ghodsian and Rutkowski spent a considerable portion of this conversation talking past each other. Rutkowski frustrated Ghodsian when he said that First Options had informed him that they had a recording of Ghodsian buying three contracts and then seemingly did not notice Ghodsian's rather curt and subdued attempt to correct the error about the number of contracts. Next, Ghodsian then upset Rutkowski when he grossly mischaracterized Rutkowski's statements about the faxes, again when he effectively disavowed the trade by acting as if the purchase of three contracts (at the same price and on the same date as is order for one contract) was beyond the realm of reason, and finally by emphatically stating that Rutkowski was "100%" wrong about the order:

RUTKOWSKI: Hello, Mr. Ghodsian?

GHODSIAN: Yes.

RUTKOWSKI: Mr. Ghodsian, this is Leo.

GHODSIAN: Hi, Leo.

RUTKOWSKI: Hi. Did you get a phone call from Gile on the floor a few minutes ago?

GHODSIAN: No, I have just spoken to Gene (inaudible).

RUTKOWSKI: Okay. And you didn't get a phone call from Gile on the floor just now?

GHODSIAN: No.

RUTKOWSKI: Okay. All right, sir, it's my point -- it's my understanding at this point that your long three S&Ps were from 645.

GHODSIAN: How many S&Ps?

RUTKOWSKI: Three contracts. That's my understanding.

GHODSIAN: You guys better get your act together.
(Inaudible.) You talk to Gene --

RUTKOWSKI: Okay. Well, Gene -- okay, unfortunately, Gene is just a figure of point. He can't help you. It's our understanding I believe on last Thursday that you bought three S&Ps in and around 645. So as a result --

GHODSIAN: One.

RUTKOWSKI: Unless you sold three S&Ps at this point, you're still long three and we need to offset that because at -- at this point you're on a margin call because you don't have enough money in the account to --

GHODSIAN: Why do you -- you're making wild claims or you can make it 300 --

RUTKOWSKI: I'm not making wild claims, sir. We talked to the desk. They have a recording which you've given them in order to buy three. To the best of my understanding here, you bought three last Thursday. Are you saying you never bought three? Is that what you're saying?

GHODSIAN: I never bought three and secondly as Ron told me what -- or Leo told me that if the next day it's not on your fax, it's not yours any more. You can have no claim --

RUTKOWSKI: Sir, I never said any such thing. I never said any such thing.

GHODSIAN: Then you called me --

RUTKOWSKI: I -- I -- I gave --

GHODSIAN: (Inaudible.)

RUTKOWSKI: Yeah, okay. In regards to discussing fax -- faxes and checking out and that type of thing, at this particular point, that we can discuss later. The point is that right now, as far as we're concerned, your account is long three S&Ps --

GHODSIAN: You better know if that's my account because there is no such thing. You're wrong and you better not do it.

RUTKOWSKI: I'm wrong?

GHODSIAN: Yes.

RUTKOWSKI: Okay.

GHODSIAN: 100 percent.

RUTKOWSKI: 100 percent. Okay. So --

GHODSIAN: I don't want my account touched one way or the other.

RUTKOWSKI: Well, at this point, sir, an issue of approximately of quite a bit of money, \$30,000, and if you do not --

GHODSIAN: As I said, if you want to make claims, why don't you make it \$300? It sounds a little better. It's ridiculous. There was no such thing and I've talked to Gene about it. He said don't worry. You're not going to get this. They're going to get to. They'll look into it. It'll start clearing up by the next day in time, all kinds of nonsense like that. I just don't want to get into, you know, something that doesn't exist.

RUTKOWSKI: That doesn't exist?

GHODSIAN: No.

RUTKOWSKI: Okay. I see. Okay. Can you --

GHODSIAN: You --

RUTKOWSKI: Mr. Ghodsian?

GHODSIAN: Yeah?

RUTKOWSKI: Yeah, Mr. Ghodsian, can you just hold on one second?

GHODSIAN: Okay.

RUTKOWSKI: Can you hold the phone? Okay.

(Pause, on hold.) (End of tape.)

[Emphasis added.]

The position was liquidated later that day. Ghodsian paid about \$9 in commissions for the trade. Ghodsian has not disputed respondents' contention that he could have reinstated the position

on July 24 at a price lower than the purchase price on June 18.
[See Time and Sales reports produced by respondents on October 31,
1997.]

Conclusions

For the reasons set out below, it is concluded that Ghodsian has failed to produce any evidence of any negligent, reckless or deliberate misconduct by Saul Stone or its employees in the handling of his order, and has otherwise failed to show that he is entitled to any recovery. The specific duties and degree of care imposed on respondents are limited by the fact that they were not acting in an advisory capacity and were principally acting as a conduit for Ghodsian's order, in exchange for payment of a \$9 commission. Here, Ghodsian has, at best, shown a series of aggravating experiences -- such as out-trades, and inaccurate and delayed confirmations -- of the sort that bedevil the open outcry system. The fact that First Options did not post the order to his account until after the market close on July 23 and then misreported the number of contracts (but otherwise correctly reported the terms of the order) is insufficient to create an inference of misconduct by Saul Stone or its agents on the floor. Under the terms of Customer Acknowledgements, Ghodsian had "the sole responsibility to monitor the orders" which he placed "on an ongoing basis and to notify Stone of any errors immediately." Rutkowski specifically instructed Ghodsian to contact Rutkowski either before the market open the next day, or after the market close. Ghodsian has produced no evidence that respondents were

aware that he intended to disregard their mutual contract by not following the check-out procedure explained by Rutkowski, or that they agreed to waive the check-out procedure and assume some special alternative duty. See Avis v. Shearson Haden Stone, Incorporated, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,379 (CFTC 1982). The mere fact that Ghodsian had previously established a relationship with Sikora cannot be elevated to a promise or an established course of dealing that assured that a chat with Sikora would operate as a substitute for the checkout procedure.^{4/}

Even if respondents' mistakes and delays somehow constituted a fiduciary breach, Ghodsian has failed to show a causal nexus between such a breach and his losses. First and foremost, Ghodsian has failed to show that his "agitation" justified his failure to follow the agreed-upon check-out procedure, and has failed to show that the out-trade would not have been promptly discovered had he properly confirmed the status of his order after the market close on July 18. Ghodsian compounded his error by remaining silent after receiving the faxes during the early mornings of Friday July 19 and Saturday July 20. Ghodsian then discouraged respondents' efforts to cure the discrepancy and eventually convinced respondents that he was repudiating the trade when he made patently

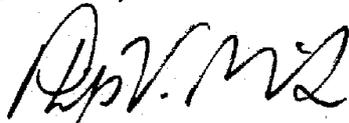
^{4/} Furthermore, Ghodsian has not established that Sikora had the authority to modify the check-out procedure, or to assume a burden on behalf of the company. Compare Cange v. Stotler & Company, [1990-92 Tr. Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,927 (7th Cir. 1990).

misleading statements such as that there had been "no trading activity" in his account, and that Rutkowski was "100%" wrong that Ghodsian had a trade. In these circumstances, respondents cannot be held liable for Ghodsian's losses.

ORDER

No violations having been shown, the complaint is DISMISSED.

Dated April 15, 1998.



Philip V. McGuire,
Judgment Officer