



U.S. COMMODITY FUTURES TRADING COMMISSION

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DONALD EDWARD GLASS,
Complainant,

v.

ROSENTHAL COLLINS GROUP,
d/b/a FOX INVESTMENT, and
ANNEMARIE ZIRON,
Respondents.

CFTC Docket No. 98-R124

INITIAL DECISION

This dispute arises from respondents' determination to liquidate Glass' account on Monday July 7, 1997, when a drop in the silver market triggered a margin call and created a debit account balance, and after respondents had been unable to contact Glass who was on vacation. While on vacation, Glass was aware of the market drop and had actually assumed that a margin call had been issued, but also assumed that that he had five days to meet the margin call because respondents had routinely given him five days to meet previous margin calls. According to Glass, "The central issue in this complaint is simple: "Did I, or did I not, have five additional days to provide additional margin?"¹ Glass argues that the liquidation was unreasonable and unauthorized in light of respondents' "well-

¹ Page 5 of Complaint, and page 1 of Glass' final verified statement; see also Glass' reply to interrogatory 5, and page 4 of letter from Glass to CFTC dated September 25, 1997 (Attachment 2C to Complaint).

established business practice” of granting five days to meet margin calls. In contrast, respondents assert that the customer contract authorized them to liquidate the account when necessary for their protection and that the specific circumstances around the disputed liquidation significantly differed from the previous margin calls – in this instance, the account was in deficit and deteriorating due to a volatile and dropping market, and the complainant was inexplicably out-of-touch² – and justified immediate liquidation. After carefully reviewing the parties’ documentary submissions, it has been concluded that Glass has failed to show any violations by respondents.

Factual Findings

The parties

1. Donald Edward Glass is a resident of Horseshoe Bay, Texas, a college graduate with a Bachelor of Science degree in Chemical Engineering from Carnegie Institute of Technology, and a retired managerial employee of Shell Oil Company. Prior to opening his account with respondents, Glass’ experience in trading commodity futures had been limited to a brief but successful speculation in the silver market in the late 1970s. Glass was 70 years old when he opened his Rosenthal-Collins account. [Glass’ responses to interrogatories 2, 10 and 11 and document request 12.]

² Glass has neither asserted, nor produced any evidence, that he provided respondents with a phone number where he could be reached on vacation, or otherwise informed respondents about his vacation.

2. Rosenthal Collins Group, d/b/a Fox Investments ("Rosenthal" or "RSC") is a registered commission merchant, and Annemarie Ziron is an associated person of Rosenthal.

The parties' course of dealing:

3. In March 1994, Glass opened a non-discretionary account with Rosenthal. Ziron was Glass' account executive. [Exhibit A to respondents' final verified statement.]

4. Paragraph 7 of the customer agreement signed by Glass provided in pertinent part that:

I agree to maintain such collateral and/or margin as [RSG] may from time to time, in [its] sole and absolute discretion, require, and agree to pay immediately on demand any amount owing. . . . I shall make deposits of margin as RSG requests within a reasonable time after such request. It is agreed and understood that one hour may be deemed to be a reasonable time; provided, however, that RSG, in its sole and absolute discretion, may request that deposits be made in a lesser amount of time. RCG's failure to require satisfaction of a margin call in less than one hour . . . on any occasion shall not be deemed to be a waiver of its right to do so in the future.

Paragraph 8 of the customer agreement provided in pertinent part:

In the event I fail to deposit sufficient funds to pay for any commodities and /or to satisfy any demands for original and /or variation margin, or whenever in [RSG's] sole and absolute discretion [Rosenthal] consider[s] it necessary, [RSG] may, without prior demand or notice, when and if [RSG] deem[s] appropriate, notwithstanding any rule of any exchange, liquidate the position in my account (s), hedge and /or offset those positions in the cash market or otherwise, sell any property belonging to me or in which I have an interest, cancel any open orders for the purchase and sale of any property, or borrow or buy any property required to make delivery against any sales, including a short sale, effected for me, all for my sole account and risk.

[Emphasis added; exhibit A, to respondents' final verified statements; see Glass' reply to respondents' interrogatory 4.]

5. On numerous occasions between June of 1996 and April of 1997, respondents routinely gave Glass five days to meet margin calls. However, Glass has not disputed respondents' assertion that for each of these margin calls, unlike the disputed margin call on July 7, 1997, they were able to contact Glass and his account was not in deficit. [Page 2 of Complaint; page 2 of letter from Glass to respondents dated September 10, 1997 (Attachment 2A to Complaint); page 2 of letter from Glass to CFTC dated September 25, 1997 (Attachment 2B to Complaint); pages 1-2, and 4 of Glass' final verified statement; Glass' replies to interrogatories 1 and 3, and Glass' replies to document requests 2 and 8; and Rossetti letter to Glass dated January 27, 1998 (Attachment 2E to Complaint.)]

The disputed liquidation:

6. Glass' complaint arises from the liquidation of four long December 1997 silver futures contracts on July 7, 1997. Glass had bought three of the silver contracts at 513.00 on November 22, 1996, and one contract at 487.90 on June 25, 1997. [See exhibits B and C to respondents' final verified statement.]³

7. On July 1, 1997, Glass flew to his nephew's house in Columbus, Ohio. While at his nephew's house, he followed the markets on CNBC and knew that the sugar market was dropping. From the afternoon of Thursday July 3, to Sunday July 6, Glass would be

³ Respondents have not challenged Glass' assertion that he was following a long-term trading strategy. [See page 4 of Glass' final verified statement; and respondents' reply to Glass' interrogatory 2.]

attending a family reunion at a "remote trout farm with no television or telephone." Before leaving for the trout farm reunion, Glass called Fox. Because Ziron had already left on vacation, Glass spoke with Bill James. Glass and James discussed the drop in the silver market. James reported that Glass' silver position had "weakened" and suggested that Glass "might want to lighten up a little," but Glass decided to hold all four contracts. James also reported that the account was not on margin. Glass has not asserted, or produced any evidence, that he provided Ziron or James the phone number at his nephew's house or that he otherwise informed them that he would be out of town the next two business days. On Sunday July 6, Glass returned to his nephew's house. [See page 2 of Glass' final verified statement; pages 3-4 of complaint; Glass' reply to respondents' interrogatory 4; page 2 of letter from Glass to respondents dated September 10, 1997 (Attachment 2A to Complaint); and page 2 of letter from Glass to CFTC dated September 25, 1997 (Attachment 2B to Complaint).]

8. On the next business day, Monday July 7, 1997, the silver market opened at 478, which caused Glass's account to become under-margined and go into deficit. Glass was following the drop in silver prices on CNBC, and assumed that his silver position was under-margined. Glass also assumed that he would have five days to meet the margin call based on the past practice and thus did not call respondents. Also on July 7, while the market was still open, Ziron called Glass' home telephone to inform him about the margin call, but did not leave a message.⁴ Later, at 2:49 p.m., Ziron called again, and this time left

⁴ Glass had checked his phone messages on Monday, but apparently had done so before Ziron called.

a message on his answering machine. [See exhibit D, to respondents' final verified statement of facts; pages 4-5 of complaint; page 2 of letter from Glass to respondents dated September 10, 1997 (Attachment 2A to Complaint); and page 2 of letter from Glass to CFTC dated September 25, 1997 (Attachment 2B to Complaint).]

9. Because Glass's account was under-margined and in deficit, and because Ziron had been unable to reach Glass, Rosenthal exercised its right to liquidate the contracts to protect itself and Glass from additional loss. The contracts were liquidated at 435,⁵ for a loss of \$14,345. Following the liquidation, Glass's account had a deficit balance of \$2,869. [See Exhibit E, to respondents' final verified statement and respondents' reply to complainant's interrogatories 6.]

10. When Glass returned home on July 8, he listened to Ziron's message about the margin call and liquidation. On July 9, Glass called Ziron and told her that he was "stunned" that she had not given him the usual five days to meet a margin call. Ziron explained that the account had been immediately liquidated because the silver market was dropping with no recovery in sight and because she could not contact him. Glass then paid his deficit with a check that was received by Rosenthal on July 11. [See exhibit I to respondents' final verified statement; page 5 of complaint; Glass' reply to interrogatory 5b; and exchange of letters between Glass and respondents (Exhibits 2A through 2F to Complaint.)]

⁵ The December silver contract would trade between 458 and 483 on July 7. After July 7, the silver market continued to trade well below Glass' purchase prices: on July 8, the market traded between 432 and 444.5, and on July 9, traded between 433 and 441. [Exhibits F, G and H to respondents' final verified statement.]

Conclusions

Initial and maintenance margin provide a means for futures commission merchants to assure their financial integrity and contribute to the financial integrity of the entire marketplace. For this reason, the Commission has consistently upheld the right of a broker to liquidate a customer account when the account is under-margined or the broker otherwise deems liquidation necessary to protect itself or the customer, based upon its own good-faith business judgment. Baker v. Edward D. Jones & Co., Comm. Fut. L. Rep. (CCH) ¶ 21,167 (CFTC 1981); see also Gelderman v. Lane Processing, Inc., 527 F2d 571 (8th Cir. 1975). In Baker, the Commission stated that "in those market situations where a prompt response is required, a futures commission merchant is free to exercise its power to demand the deposit of additional funds by its customer and to liquidate an account without hesitation if the demand is not met." Id. Therefore, in order to establish wrongdoing by respondents, Glass must show by a preponderance of the evidence either that respondents misled him about their margin policy or that they liquidated his account in bad faith.

On this record, Glass has not shown that the respondents acted in bad faith in promptly liquidating the account or that respondents deceived him about their margin policy. The customer agreement provided that Rosenthal could require Glass to meet a margin call within one hour or less, and that any deviation from the one-hour rule by Rosenthal could not be construed as a waiver of its right to do so in the future. The customer agreement also gave Rosenthal the authority to liquidate Glass's account, without notice, when the account was under-margined or Rosenthal deemed it necessary to do so. In this case, the fact that Glass was unavailable when Ziron attempted to notify Glass that

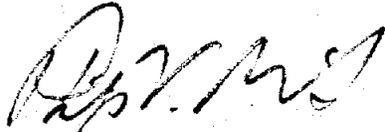
his account was on margin call and in deficit justified liquidation under the terms of the contract.

This conclusion is not changed by the fact that Rosenthal had routinely given Glass five days to meet a margin call, because the circumstances around the disputed liquidation were sufficiently unique. Here, unlike the previous margin calls, the market was volatile and worsening, the account was in deficit, and Glass was inexplicably incommunicado. On July 3rd, despite the fact that respondents had informed him that his silver contacts had lost value and had recommended that he lighten his exposure, Glass chose to hold all four positions, but did not give respondents the phone number where he could have been contacted on July 7th and otherwise did not inform respondents that he would not be available at his home phone number for several business days. Then, on July 7th, Glass did not contact respondents even though he suspected that his account was under-margined. Nothing in the record shows that Glass ever informed respondents that he expected respondents to give him five days to meet a margin call regardless of the circumstances, or that they otherwise should have been aware of his reliance. Thus, Glass was merely imputing his own expectations to respondents and could not reasonably shift to respondents his responsibility to stay in contact and to provide adequate margin on demand. See Grist v. Shearson Lehman Brothers, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,962 (CFTC 1990); and Avis v. Shearson Hayden Stone, Inc., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,379 at page 25,831 n.7 (CFTC 1982).

ORDER

No violations having been established, the complaint is DISMISSED.

Dated November 5, 1998.

A handwritten signature in black ink, appearing to read "P. Y. McGuire", written in a cursive style.

Philip Y. McGuire
Judgment Officer