



**U.S. COMMODITY FUTURES TRADING COMMISSION**

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RICHARD GREENE and BETH GREENE,  
Complainants,

v.

FIRST AMERICAN DISCOUNT  
CORPORATION,  
Respondent.

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CFTC Docket No. 98-R064

**INITIAL DECISION**

This case arises from two related stop orders placed by Richard Greene, a novice making his own trades through a discount broker. On September 30, 1997, Greene placed by phone the first disputed order, a protective good-until-cancelled ("GTC") stop order to sell two December Peso futures (order number 093). Greene immediately forgot about this order because he mistakenly assumed that it was a day order. A week later, Greene stopped placing orders by phone and tracking orders manually, and began using First American's "Auditrade" on-line trading system to place and monitor orders. Auditrade reported the status of orders that had been placed on-line. However – unbeknownst to Greene – Auditrade did not report working orders that had been placed by phone, such as order number 093.

On October 16, 1997, Greene bought four more December Peso contracts, and placed the second disputed order – a protective GTC stop order to sell six December Pesos

(order number 14385). On the morning of Friday, October 24, 1997, the forgotten order to sell two December Peso contracts (order 093) was filled. About an hour before order 093 was filled, Auditrade had received an instruction to cancel the order to sell six contracts (order 14385). As a result, Greene had four unprotected long positions, which were liquidated the next trading day to satisfy a margin call. Respondents claim that only Richard Greene could have cancelled order 14385, because he had selected the four digit access code required to place orders for his account through Auditrade. In contrast, Greene asserts that he could not have cancelled the order because he was at work away from his personal computer. On Monday, October 27, 1997, First American liquidated the remaining four contracts to meet a margin call. Also on October 27, First American informed Greene for the first time that its Auditrade system did not record orders placed by phone.

Complainants seek to recover \$9,000 in damages for First American's alleged failure to make "full and fair disclosure" about the capabilities of its on-line trading system and about the two stop-loss orders. Specifically, complainants claim that First American should have told Richard Greene that its Auditrade system did not automatically track working orders that had been placed by telephone. Complainants also claim that the cancellation of order 14385 was unauthorized and that First American should have told Richard Greene before the market closed on October 24<sup>th</sup> that he had four unprotected December Pesos. First American denies any violations.

The findings and conclusions below are based on the parties' documentary submissions and oral testimony. For the reasons set out below, it has been concluded that complainants have failed to show that they are entitled to an award.

## Factual Findings

Unless otherwise noted, dates are in 1997, and amounts are rounded to the nearest dollar.

### *The parties:*

1. Complainants Richard Greene and Beth Greene are residents of Live Oak, Florida. When the Greens opened their joint, non-discretionary, discount account, Richard Greene was 54 years old and Beth Greene was 39 years old. Both were employed as registered respiratory therapists. The Greens indicated on the account application that they had a joint average annual income of between \$25,000 and \$50,000, and a joint net worth (including home) of over \$100,000. Richard Greene had invested in stock mutual funds for about seven years, and had maintained a commodity futures and options account for about one year, after taking the Ken Roberts course. Beth Greene had invested in stock mutual funds for about two years, but had never speculated in commodity futures and options. [See pages 5-7 and 123-126 of the hearing transcript; account application, Exhibit 6 to complaint; and ¶A to Richard Greene affidavit (filed September 25, 1998).]

Since Richard Greene exclusively made trading decisions and dealt with First American, all references are to him.

2. First American Discount Corporation ("FADC" or "First American"), a registered futures commission merchant located in Chicago, Illinois, cleared Greene's trades and handled Greene's orders. Field Financial Group, Incorporated, a registered introducing broker guaranteed by First American and located in McLean, Virginia, acts as a marketing arm of First American, and in that capacity ran the Internet advertisements discussed below.

***The account-opening:***

3. On September 1, 1997, in response to an advertisement on the Internet, the Greenes opened a joint, non-discretionary, discount account with First American. The Greenes signed various documents including: a First American customer contract; a standard CFTC rule 1.55 risk disclosure statement; and a Field Financial "Additional Risk Disclosure" form. As a discount customer, Greene did not receive any trading advice, but had direct access to the First American trading desk – initially by telephone and later by the Internet using First American's "Auditrade" on-line trading system. [Exhibit 6 to complaint; see pages 14-15 of hearing transcript.]

***The Auditrade on-line trading system***

4. From October 6 to 24, Greene used the Auditrade on-line order entry system to place trades and to monitor working orders. The Auditrade system permits customers to transmit orders via the Internet, without any special software. Customers must enter their account number and their self-selected four-digit password to place trades and to view account activity and account statement screens. Simultaneously, Auditrade records orders placed by customers and records the time that an order is placed, and e-mails this information to First American, as well as reports it back to the customer on the "Account Activity" screen. Also simultaneously, Auditrade reports – on the "Account Statement" screen – all completed transactions, including those made pursuant to phone orders. However, Auditrade does not record, or report the status of, orders placed directly to First American by telephone. Finally, First American has no ownership interest in the vendor

that operates Auditrade. [See ¶¶ 1 to 10, 12, 19 and 20 of Donney affidavit (produced February 24, 1999); Gilmore testimony at pages 200-201 of hearing transcript; and October 24 and 27 Auditrade Account Statements (Exhibit 1 to Complaint).]

Sometime in September, Richard Greene saw an Internet advertisement that announced that First American and Field Financial had just developed "an exciting new Internet Order Access System which is designed . . . to simplify your order entry process. You will be able to enter your orders with the click of a button, view your statements, and more." [See Exhibit 4 to complaint.] When Greene decided to shift to the on-line order system, he received a one-page "Internet Order Entry and Password Form" which contained basic instructions for accessing the order entry system, including the selection of an access code.<sup>1</sup> The form also advised:

**When In Doubt – Call Technical Support:**

. . . . And while we feel we have taken every precaution in the development and testing our system, the internet is new and can be unstable. Therefore, if you have any reason to believe that your order did not transmit properly, or if there is any uncertainty about the status of an order, please call tech support staff immediately.

[Emphasis added; Exhibit A to FADC's Reply to Order to Show Cause (filed January 21, 1999).] First American did not provide Greene any other written or oral instructions about using Auditrade. Also, First American would not advise Greene that Auditrade could not record or track any orders placed by phone, until after the forced liquidation on October 27. [See pages 8, 53-61 and 112-115 of hearing transcript; transcript of 5:48 p.m. EST

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<sup>1</sup> It cannot be determined on this record whether this form was strictly for Green's personal use, or whether he transmitted it back to First American after he had selected his access code. It also cannot be determined on this record whether First American knew the access code.

conversation on October 27 (produced January 22, 1999); and ¶1b of First American's reply to order dated February 2, 1999 (filed February 9, 1999).]

***Trading activity:***

5. Trading began on September 19, and ceased on October 27, when First American liquidated the account. During this time, Greene made a total of nine round-turn trades, mostly involving December Mexican Peso or Deutsche Mark futures contracts. From September 19 to September 30, Greene placed the orders by phone, and relied on his own hand-written log to keep track of working orders.<sup>2</sup> This was a trial-and-error period for Greene, who had some problems properly placing orders over the phone. In this connection, sometime between September 30 and October 6, Greene lost track of order number 093.

On October 6, Greene began using the Auditrade on-line system to place and monitor orders.<sup>3</sup> Greene continued to experience problems properly placing orders on the Internet, with six out of twenty-one orders placed between October 6<sup>th</sup> and 24<sup>th</sup> reported back as "bad ticket," "call office," or "unable." [See pages 10-26 and 53-61 of hearing transcript; Exhibit 2 to complaint; and Exhibit 4-3 of FADC's response to August 27 Order (filed January 21, 1999).]

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<sup>2</sup> Greene did not retain the log.

<sup>3</sup> The Auditrade "Account Activity" screen reported the status of pending, working, filled and dead orders. Complainants produced copies of the Account Activity screen printed out on October 6, 14, 16, 21 and 27. Exhibit 2 to complaint.

***Disputed Trades:***

6. On September 24, Greene bought two December Pesos (at 123.750 and 123.800). On September 30, Greene telephonically placed an open order to sell two Pesos at 124.500 (order number 093), which is the first disputed order. Almost immediately, Greene forgot about order 093, and on October 6, Green placed a protective stop order to sell two long Pesos, at 124.000 (order number 13108). On October 27, Greene would tell Peter Newcomb, First American's operations manager, that he had "probably assumed that order 093 was a day order." [Transcript of 5:58 p.m. EST conversation on October 27, 1997 (produced January 25, 1999); see pages 20-22, 105-106 and 152-168 of hearing transcript; and ¶ 2 of Greene's affidavit in reply to the Order dated January 28, 1999 (filed February 9, 1999).]

Also, on October 6, Greene had switched to Internet trading. The printout of the October 6 activity report did not report any orders that had been working before October 6. [See pages 214-216 of hearing transcript.]

7. On October 16, Green placed a market order to buy four more December Peso contracts, and as a result Greene was now long a total of six December Peso contracts. Accordingly, Greene cancelled the protective stop order to sell two December Pesos at 124.000 (number 13108), and placed an open order to sell six December Pesos, at 124.300 (order number 14385),<sup>4</sup> which is the second disputed order. [See pages 26, 29-

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<sup>4</sup> One minute later, Green accidentally double-punched the order, which was given order number 14386 and which was immediately designated with a "call office" message. The next day, Greene spoke to Peter Newcomb, FADC's operations manager, and cancelled the duplicative order.

31, 62-64, 82-83 and 180-182 of hearing transcript; and page 3 of transcript of 5:48 p.m. EST conversation on October 27.]

8. On Monday, October 17, the world financial markets experienced a major "correction." Nonetheless, Greene's December Pesos would hold steady until the close on Wednesday, October 22, when the liquidation value was \$4,350. However, by the close on Thursday, October 23, the liquidation value of the six December Pesos had plummeted to \$450 (at 125.725 points).

At the close on October 23, Greene had long forgotten the stop order to sell two December Pesos at 124.500 (order 093), and thus assumed that his only working order was the stop order to sell six December Pesos at 124.300 (order 14385). [See pages 31-32 of hearing transcript.]

9. On Friday October 24, the first disputed order (93) would be filled, and the second disputed order (14385) would be cancelled.

At 7:20 a.m. CDT,<sup>5</sup> the December Peso opened at 126.800, and then began a day-long slide. At 10:30 a.m., the December Peso traded at 125.000.

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<sup>5</sup> With apologies to the reader, in order to comport with the evidence in the record and the parties' related submissions, time references to events in the Peso pit at the Chicago Mercantile Exchange are Central Time, and all other time references (including those involving phone calls between Greene and First American, Auditrade activity, Greene's printouts of Auditrade screens, and Greene's conduct on October 24) are Eastern Time. See ¶2b of respondents' reply to February 2, 1999 order (filed February 9, 1999). Times on Friday, October 24 are Daylight Savings Time, and times on Monday, October 27 are Standard Time.

At 10:58:32 a.m. CDT, the market hit 124.500, and order 093 was elected and filled at 124.400, for a small profit of \$593. First American would report the fill on Greene's message machine at 12:17 p.m. EDT (11:17 a.m. CDT).<sup>6</sup>

At 10:58:51 a.m. CDT, the market hit 124.300, the price for order 14385. However, this order was not filled, because at 10:35 a.m. EDT (9:35 a.m. CDT), Auditrade had received an order to cancel order number 14385. Respondents assert that because it would be impossible for anyone else to place the cancellation order without knowing the account number and access code, it was Greene who placed the cancellation order at 10:35 a.m. EDT. In support of their assertion, respondents produced the e-mail transmission from Auditrade to First American that accurately reflected the information in Auditrade's database; *i.e.*, that someone, presumably Greene, who knew Greene's account number and access code had requested the cancellation at 10:35 a.m. EDT. Respondents also assert that the Auditrade activity report would have immediately confirmed this cancellation on Greene's screen.<sup>7</sup> [Pages 167-169, 171-175 and 182-198 of hearing transcript; ¶¶ 10-20 of Donney affidavit (produced February 9, 1999); ¶ 11 of Garcia affidavit (January 22, 1999); ¶ 13 of Newcomb affidavit (January 21, 1999); Zhu e-mail message (Exhibit C to Garcia affidavit); TOPS system cancellation confirmation (Exhibit B to Garcia affidavit); and order ticket 884 (produced January 22, 1999).]

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<sup>6</sup> In this connection, Greene produced a printout of the Auditrade "Account Statement" for October 24, which did not reflect the sale of the two contracts, and which thus presumably was printed out sometime during the morning of October 24, before the sale of the two contracts at 10:58 a.m. CDT (11:58 a.m. EDT). Greene's printer indicated that this was printed out at 10:36:26 a.m. EDT, immediately after Auditrade had received the instruction to cancel order 14385. Greene's testimony that the clock on his printer was not accurate was unconvincing. [Page 94-97 of hearing transcript.]

<sup>7</sup> Although Greene printed out, and produced, the activity reports for October 21 and 27, he did not produce a copy of the crucial October 24 activity report. Greene testified that he simply did not think to print out the October 24 activity report.

In contrast, Greene asserts that he did not attempt to cancel the order until after the market closed.<sup>8</sup> In support of this assertion, Greene testified that: one, he had been away from his house until about 4:00 p.m., working at two nursing homes, one of which is twenty miles from his home, and the other which is an additional twenty miles away; two, that he did not have a portable computer; and three, that his wife did not know the access code and did not place the order. In support of his testimony, Greene produced his personal expense reimbursement form for October 24. [Exhibit 1 to Greene affidavit filed February 8, 1999.] However, Greene's log did not indicate the times of his visits to the nursing homes, and by itself does not establish that Green was not home at 10:35. Moreover, Greene failed to produce, or attempt to discover, reliable and presumably readily obtainable corroborative evidence. For example: Greene's wife, a co-complainant, did not appear as a witness to verify that she had not placed the cancellation. Greene also did not produce any independent verification from either of the nursing homes that he was in fact working at or around 10:35 a.m., despite the fact that he conceded at the hearing that he could have requested such information. Most significantly, on the eve of the hearing, Greene's attorney suggested for the first time in this proceeding that respondents should produce an actual copy of the e-mail transmission which would identify the Internet Protocol ("IP") identification number for the computer that had generated the transmission containing the cancellation request. However, well before this time, Greene had waived discovery, and thus waived his opportunity to discover and offer sufficient evidence to

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<sup>8</sup> The CME Peso market closed at 2:00 p.m. CDT (3:00 p.m. EDT). See CME Time and Sales Reports (produced January 19, 1999).

allow consideration of the existence of a plausible alternate source for the cancellation order.

Finally, Greene's testimony that he did not print out a copy of the Auditrade activity report on October 24, which would have reported the cancellation, was unconvincing where: one, he had printed out the Auditrade account statement at about 10:36 a.m. that morning; two, he had regularly printed out activity reports; and three, he had become extremely concerned that afternoon that First American had mishandled his order. [See page 3 of Sloan submission (filed February 23, 1999); and pages 49-51, 65-69, 83-97, 106-107 and 122-123 of hearing transcript.] In these circumstances, the evidence simply points to Greene as the most likely person who placed the cancellation order.

10. According to Greene, around 4:00 p.m., on October 24 – after the market close – he listened to First American's message that two December Mexican Peso contracts had been sold. Greene then called First American and requested the status of the remaining four peso contracts. On Monday, October 27, Greene described this conversation to Peter Newcomb, First American's operations manager:

And I called Friday afternoon because I had a message that the Pesos had been sold and I wanted to confirm what the fill price was. And he said "Two Pesos were sold." I said, "Well, I had six." And he said, "Well, I don't know, the other four didn't come back." I guess he didn't know. And so I said, "Alright," And that was that, and I hung up.

[Page 4 of transcript of 5:48 p.m. conversation on October 27, 1997.] Despite the fact that First American clearly had not yet ascertained the status of the remaining four contracts, Greene asserts that, based on this conversation, he assumed at this point that the remaining four contracts had been sold and that his losses had been "quite reasonably contained."

[¶15 of Complaint.] According to First American, the First American employee would not

have been able to locate order 14385 in the "working order" desk, because it already had been cancelled. [¶¶ 9-11 of Newcomb affidavit; and pages 196-203 of hearing transcript.]

According to Greene, when he failed to receive a confirmation that the remaining four contracts had been sold, he "began to panic." At about 5:00 p.m., "not knowing what else to do, therefore believing that the agents for FADC may have in fact been incorrect in their assurances, and rightfully afraid of the markets, and also because he was relatively new and inexperienced to investing," Greene thus entered a cancellation of order 14385, and entered order 15395 to sell four December Pesos, at 123.880. [¶19 of complaint.] However, Auditrade reported the cancellation request as "unaccepted," because the order had already been cancelled. [See pages 174-175 and 202-208 of hearing transcript.]

11. On Monday, October 27, First American informed Greene that his account was under-margined and in deficit.<sup>9</sup> Greene then authorized a market order to liquidate the remaining four Peso contracts. [See transcript of 7:29 a.m. conversation on October 27; and pages 203-214 of hearing transcript.] The four contracts were sold at 120.800, which resulted in a net loss of \$11,414, and a debit balance. [See pages 203-214 and 217-223 of hearing transcript.] After the liquidation, Newcomb advised Greene that the two contracts had been sold pursuant to an order placed by phone on September 30, and advised Greene for the first time that the Auditrade system did not record working orders placed by phone. [See transcript of 5:48 p.m. conversation on October 27.]

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<sup>9</sup> The transcript of this conversation shows that Greene continued to be confused and to make mistakes in his dealings with First American. At the beginning of this conversation, Greene incorrectly told the First American desk employee that he had a stop order for "twelve-four hundred" (i.e., 124.000), which actually was the price for the order (13108) that Greene had cancelled on October 16.

12. On February 12, 1999, First American filed suit in Cook County, Illinois, seeking recovery of the \$2,882 debit balance. [Exhibit 1 to complainants' motion filed February 16, 1999.]

### Conclusions

Complainants have failed to show any violations by First American in connection with order 93. Since complainants had opened a non-discretionary discount account, Richard Greene was responsible for keeping track of his own working orders, absent a promise by First American that it would provide such a service or an indication by Greene that he expected such support from First American. Here, no such request or promise for special services was made. As a result, Greene was also responsible for his many novice mistakes, including losing track of order 93, well before he had switched to First American's Auditrade system. Similarly, First American made no promises or suggestions that the Auditrade system would record and track any prior orders that had been placed outside the Auditrade system, and Greene never told First American that he assumed that the Auditrade system had such capabilities. In these circumstances, complainants have failed to show by a preponderance of the evidence that First American did not act in good faith, or did not make full and fair disclosure, in connection with the handling of order 93. See *Avis v. Shearson Hayden Stone, Incorporated*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,379 (CFTC 1982).

Complainants have also failed to show any violations by First American in connection with the handling of order 14385, chiefly because Greene's testimony was not convincing and because Greene did not produce any reliable evidence that showed that he

could not have cancelled the order at 10:35 the morning of October 24, 1997. Green's memory of relevant events is suspect, because contemporaneous with the relevant events, Greene was obviously confused. For example: Greene forgot about a GTC order because he erroneously thought it was a day order; Greene made mistakes placing on-line orders – such as double-punching orders – on almost a third of his on-line orders; and, on the last day of the account, Greene gave inaccurate information to First American about his working order. Also, Greene's testimony concerning whether and when he printed out Audittrade screens on October 24 was inherently unconvincing. Finally, complainants inexplicably failed to produce reliable and readily discoverable or readily obtainable evidence that conceivably could have substantiated Greene's assertion that he did not cancel the order. Thus, on this record Greene remains the only plausible person who could have accessed his account and cancelled the order, and complainants' claim that Greene did not place the cancellation order must fail.

#### **ORDER**

No violations having been established, the complaint is **DISMISSED**.

Complainants' request for remedial sanctions, based on respondents' apparent breach of the arbitration agreement by filing the Illinois lawsuit to recover the debit balance on the eve of the hearing in this matter, must be **DENIED** on the grounds that this forum lacks jurisdiction to remedy such breaches. Respondents' request for costs must be

DENIED on the grounds that they have failed to produce any evidence that remotely suggests any bad faith or vexatious conduct by complainants.<sup>10</sup>

Dated May 11, 1999.



Philip V. McGuire,  
Judgment Officer

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<sup>10</sup> In this connection, the record raises more questions about respondents' conduct, including their initial failure to comply with a discovery order, their refusal to acknowledge that the underlying dispute might have been avoided if they had provided a more detailed explanation of their on-line trading system during its start-up, and their apparent breach of the arbitration agreement