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LARRY R. HATHAWAY,
Complainant

v.

BARNES BROKERAGE CO., INC., and
SHARON JAY JENSEN,
Respondents

CFTC Docket
No. 96-R072

INITIAL DECISION

Respondents liquidated complainant's futures positions when a margin check did not arrive within three days after the margin call was issued. Complainant contends that the liquidation constituted unauthorized trading and claims he would have made a profit of \$6,120.32 if he had been allowed to remain in the market.¹ Respondents contend that they acted properly and respondent Barnes counterclaims to recover a margin deficit of \$4,099.12.

Review of the Evidence

1. *November 6 agreement regarding the margin call:* Complainant Hathaway was told by respondent Jensen on Monday, November 6, 1995, that his account was in a margin deficit and therefore he would have to submit more money or his positions would be liquidated. The parties are in agreement that Jensen agreed to allow Hathaway to mail a check for \$4,000 that day to cover the margin call. Their sworn submissions disagree as to whether Jensen originally demanded more money than that, as well as whether she originally requested Hathaway to wire transfer the funds. This dispute is mooted, however, by the fact that Jensen admits she agreed to both the amount of the deposit and the means by which it would be sent.

2. *November 8 attempt to contact Hathaway; liquidation (Jensen's Answer version):* According to Jensen's Answer, when the mail two days later (November 8) still did not include the deposit, she tried to telephone Hathaway. Jensen spoke with Barbara Low, Hathaway's wife, and left

¹ Complainant also contends that respondents improperly accepted trades from him when his account had insufficient margin (*see note 3, infra*). This claim is rejected. Complainant has not demonstrated that the information regarding his account balances was not made available to him, nor has he established any damages flowing from this possible violation of Barnes' own margin policies.

a message for Hathaway to call her back. He did not do so. The Answer states (incorrectly; see ¶3, *infra*), that a decision was made at that point to place stops on Hathaway's positions, which eventually were stopped out that day with a deficit of \$4,099.12.

3. *Liquidation (Jensen's Verified Statement version)*: Jensen's Verified Statement provides more details, and offers a correction regarding the timing of the liquidation stop orders. In her affidavit attached to the Verified Statement, Jensen asserts that after the market closed on Wednesday (November 8), she and Allen Lovitt (a Barnes Brokerage vice-president) decided that Jensen would place stops on the positions if she was unable to reach Hathaway before the market opened on Thursday and if the morning mail did not have the check. The stops were to be calculated so that when the \$4,000 finally arrived it would cover any existing deficit.

The Verified Statement and Jensen's affidavit claim that on Thursday, she again tried to call Hathaway but again reached his wife instead. Ms. Low told Jensen that Hathaway was playing in a golf tournament through Friday and was unavailable, but since Low was leaving town she would leave a note for Hathaway to call Jensen when he got home.

When the mail received at 10:30 Thursday morning did not include Hathaway's check, Jensen and Lovitt decided to place the previously discussed stop order. According to Jensen, this order was placed at 10:44 a.m. and executed that afternoon toward the close of trading. The affidavit includes as Exhibit J a copy of the original order ticket to correct an earlier error regarding the date by establishing that the order was placed and executed on Thursday rather than Wednesday as had been stated in respondents' Answer. Timestamps on Exhibit J appear to confirm the times in the Verified Statement.

4. *November 8 events (Hathaway's and Low's versions)*: Hathaway's story is slightly different, particularly insofar as whether Jensen left messages about the need for Hathaway to call her. According to Hathaway, Jensen accepted Low's assurance on Wednesday that the margin check had been sent. Hathaway's reply to the discovery requests also included Low's notarized statement discussing her conversation with Jensen on Wednesday, November 8, as well as Low's offer to contact Hathaway if necessary. However, according to Low, Jensen accepted Low's assurance that the check had been sent, and said she would talk to "us" on Thursday. Low's affidavit does not address whether a conversation occurred on *Thursday*, nor does any of Hathaway's evidence address the golf tournament information. Therefore, it is determined that Jensen's version of the Thursday conversation is unrebutted.

5. *Documentary evidence*: Hathaway's documents submitted in response to discovery included a copy of the carbon duplicate of a November 6 check for \$4,000 written on the account of Barbara Low and made payable to Barnes Brokerage. In the memo section of the check, there is a notation "LRH's acct." Hathaway avers that he placed a stop payment order on the check on Friday, November 10, upon being informed by Lovitt of the liquidation. Bank records submitted by Hathaway in reply to discovery confirm that a stop payment was placed that date on the check whose number corresponds to the carbon duplicate dated November 6. According to Hathaway, Lovitt told

him that the decision to liquidate had been made on *Wednesday* after Jensen had spoken with Ms. Low.

Respondents have contended throughout this proceeding that the \$4,000 check never arrived, an assertion not disputed by Hathaway. According to Jensen, Hathaway told her on November 10 that the envelope in which it was mailed had been returned marked "Return to sender." A copy of an envelope postmarked November 6 and addressed to "Barnes Brokerage, Ms. Sharon Jensen" was produced in discovery. However, it is impossible to determine from the copy in the record whether there are any markings showing that the envelope was returned to sender. The name on the return address on the envelope is that of Barbara Low.²

6. *Subsequent market movements:* It is undisputed that the positions liquidated by respondents eventually reached a price at which, if Hathaway had remained in the market and timed his exit properly, he would have made a profit. According to Hathaway, he had a "predetermined sell point" that would have resulted in a net profit of \$6,120.32 on these contracts. He contends that the market went "way beyond" his predetermined sell price. Respondents do not dispute this alleged predetermined sell price. They claim instead that the market did not reach that level until December 17, and assert that in the time between the liquidation and December 17, Hathaway had several opportunities to re-enter the market at a price lower than the liquidation but did not do so. Therefore, they claim, they cannot be responsible for Hathaway's failure to ride the market to the profitable level he seeks with the benefit of hindsight.³

² Respondents also claim that the check, even if it had been received, could not have been cashed, because Low's name was not on the account and "CFTC rules and regulations" would have prohibited respondents from applying Low's check to Hathaway's account. It is noted that the account was opened solely in Hathaway's name and that Low's name does not appear anywhere in the account-opening documents. Respondents have not, however, provided any authority for this bold proposition and the undersigned is unaware of any authority holding that a futures commission merchant can only accept margin checks drawn on an account that is held in the same name as the futures trading account. In the absence of confusion as to which account the funds were being deposited to, or of suspicion as to whether a stolen check may have been forged, there appears to be no bar of the sort suggested by respondents.

³ The parties have submitted much additional material regarding prior margin deficits in Hathaway's account. Ironically, both sides have attempted to portray the account as regularly undermargined. *Hathaway* does so apparently to demonstrate a course of dealing with respondents that would establish that their haste in not awaiting arrival of the November 6 check was unusual and thus improper. *Respondents*, for their part, apparently wish to portray Hathaway as someone who routinely traded while undermargined and thus failed to adhere to his margin responsibilities.

The prior margin history of this account is deemed irrelevant to this dispute despite the parties' expenditure of substantial energies digging up such past details. The evidence is ambiguous as to whether the parties had established a course of dealing that could be deemed to have governed their relationship with regard to margin. Complainant has not shown that respondents abandoned their right to call for margin as authorized in the customer agreement, but respondents have likewise not demonstrated that complainant's prior undermargined

Discussion and Conclusions

In complainant's favor is the principle that a customer has the right to depend on a broker's agreement to accept both the form and means by which a margin call will be met. As applied here, that would suggest that once respondents agreed on November 6 to accept a mailed check as sufficient to meet the margin call, that agreement superseded any directly conflicting provisions found in the customer agreement as to how, and how quickly, margin must be posted when demanded. Thus, respondents could not, for example, lawfully have liquidated the positions on November 6 immediately after agreeing to the mailed check, despite the fact that the customer agreement's terms might provide for such untrammelled authority.

In respondents' favor, on the other hand, is the notion that the November 6 arrangements did not eliminate the customer agreement, nor did it negate the powers conferred on respondents by that agreement. Respondents certainly would not have attempted to meet their customer's desires on November 6 (by allowing him to mail a check) had they anticipated that doing so would be considered tantamount to waiving all rights to enforce their margin responsibilities. Obviously, respondents were not obligated to wait weeks or even months until the margin check arrived.

Thus, the provisions of the November 6 agreement must be considered limited by principles of reasonableness, which here means determining whether respondents acted reasonably in exercising their liquidation authority under the customer agreement *in light of the November 6 agreement* to allow Hathaway to mail his margin check.⁴ Cf. *Baker v. Edward D. Jones & Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,167 (CFTC Jan. 27, 1981).

Under the circumstances established on this record, the conclusion is that respondents acted reasonably in liquidating complainant's positions. Both complainant and his wife were aware by Wednesday that the check called for on Monday had not yet arrived and that Jensen was concerned enough to call. If Jensen was calling, and planning on contacting complainant again the next day, it is inexcusable for complainant to have made no attempt to contact Jensen for two *additional* days, until Friday. Thus, complainant was aware his account had been on margin call since Monday, that the margin had not been received as of Wednesday (and thus the account was still in deficit), and that

trading would have justified virtually any decision to liquidate his positions without notice. The fact that respondents were willing to accept a mailed check from complainant demonstrates that any prior irregularities by complainant as to margin were considered acceptable to respondents.

⁴ Respondents have not explained why they agreed to such a slow method for complainant to post margin. One can imagine two opposite possibilities. Respondents might have been willing to be lenient in order to accommodate a good customer's expressed needs, but they might also have been afraid that demanding a more expedited delivery of the funds would result in an unreliable customer abandoning his position at a loss.

Jensen wanted to talk to him Thursday. But he made no effort to contact her. In so doing, he ran the clear risk that his account would be liquidated for insufficient margin.

In contrast, Jensen acted reasonably in her efforts to obtain the check. She called on Wednesday, and expressed concern that the check had not yet arrived. She was willing to wait an additional day, but indicated to Low that she still wanted to speak with complainant on the following day. According to her un rebutted affidavit, Jensen forbore liquidating the positions until *after* the mail arrived on Thursday. Thus, she and Barnes waited for three days of mail delivery before liquidating complainant's account. She twice attempted to contact complainant, and twice ended up speaking with complainant's wife, voicing the concerns about the check's failure to arrive. By no means can Jensen be seen to have acted precipitously under the circumstances.

By happenstance, the check never arrived. It was returned to complainant, although the record is glaringly silent as to when this occurred. Complainant's argument here would imply that respondents were obligated to keep the positions open, without even speaking directly with complainant himself, for however long it took for the check to be returned, and, presumably, re-mailed. Such an argument is unconvincing.

The subsequent history of these contracts does not, as complainant argues, provide him with a right to reparations for his "lost" profits. Had complainant re-entered the markets, he could have done so, according to respondents' un rebutted submissions, at a *lower* price than the one at which he was liquidated. Thus, if complainant indeed had set a "predetermined sell price" and if he had wished to risk the markets until the contracts either arrived at that price or continued to lose, he could well have *profited* from respondents' actions by having eliminated the interim price decline from his own "loss."⁵

Complainant's defense to the counterclaim rests solely on his theory that the respondents acted unreasonably, coupled with the subsequent market history. He has not established any reason why respondents should have to be responsible for an account deficit that was legitimately incurred by him while there were no disputes whatsoever in this account. Pursuant to the terms of the customer agreement, he is responsible for paying the deficit, and therefore the counterclaim is awarded, plus costs and interest.

CONCLUSION AND REPARATION AWARD

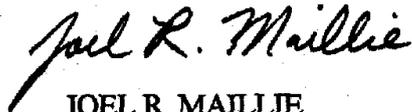
For the reasons stated above, it is determined that complainant has not proven any violations by respondents. Therefore, the complaint is DISMISSED.

Respondent Barnes, as noted, has proven that complainant is obligated under the customer agreement to pay the amount of the counterclaim. Accordingly, complainant LARRY R. HATHAWAY is ORDERED to pay reparations to respondent BARNES BROKERAGE CO., INC.,

⁵ Respondents' argument that complainant failed to mitigate his damages would thus prevail even if complainant had established any violations.

in the amount of \$4,099.12, plus prejudgment interest compounded annually at the rate of 6.06% from November 9, 1995, to the date of payment, plus costs in the amount of \$75.00 to cover respondents' filing fee.⁶

Dated: May 13, 1997



JOEL R. MAILLIE
Judgment Officer

⁶ Any appeal from this Initial Decision must be filed in timely fashion in accordance with the provisions of CFTC Rules 12.400 *et seq.* (See enclosed letter from the Proceedings Clerk.) Under Section 14(d) of the Commodity Exchange Act, 7 U.S.C. § 18(d), a final reparation award is enforceable in federal district court for a period of three years after it was issued. The statute provides for reasonable attorneys' fees to be taxed as part of the costs of the district court suit if such a suit is necessary to collect reparations. In addition, Section 14(f) of the Act, 7 U.S.C. § 18(f), provides for the automatic suspension of trading privileges on all futures contract markets of any party who fails to demonstrate to the Commission that payment of a final award has been made.