## U.S. COMMODITY FUTURES TRADING COMMISSION

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'00 FEB 28 AM 8 30 OFFICE OF **PROCEEDINGS** OFFICE OF PROCEEDING PROCEEDINGS CLERK JAMES H. KARLS. Complainant **CFTC Docket** No. 99-R137 DELONG, FRIEDMAN, AND SUKENIK, INC., Respondent

## INITIAL DECISION

In a complaint filed just days before the expiration of the statute of limitations, complainant contends that the broker responsible for the floor execution of four stop orders took an unreasonably long time to execute those orders once the stops were hit and they became market orders. His sole evidence of wrongdoing is a chart he prepared that he claims shows that the trades occurred some two to five minutes after the times when the stops were hit (Attachment 1 to June 8, 1999 complaint).

The orders in question were placed on June 9 and June 10, 1997. Complainant actually was not a customer of respondent DFS – instead, he claims, he was told by his broker First Options to call a toll-free telephone number (included in complainant's submissions) if he wished to place any orders on New York exchanges, and that number turns out to have belonged to DFS (June 8, 1999 narrative at ¶ 3). Complainant admits that respondent DFS itself was not the floor broker involved in the allegedly delayed executions (June 25, 1999 addendum narrative at ¶ 2), but he contends that DFS refused to provide him with the name of the broker in the exchange pit who actually executed the orders. According to complainant, "He (with his buddies) is the one who took my money." (June 25, 1999, addendum narrative at ¶ 2). In any event, complainant alleges that he tried unsuccessfully for two years to get the floor broker's name from DFS and he seeks to hold DFS liable "because of their stonewalling" (id.). He has chosen not to name First Options because in his view they did nothing wrong (id.).

Complainant also tried to name the unknown floor broker when he filed his complaint, but he was informed by the Director of the Office of Proceedings that without a name no complaint could be filed. He was told that he might be able to obtain the name of the broker during discovery once the case was forwarded for adjudication (Lenz letter dated July 15, 1999). Respondent DFS filed a terse answer that neither admits nor denies any involvement in complainant's orders (July 21, 1999 answer at  $\P$  6). According to the answer, DFS has closed its *Chicago* office and records would be held by First Options, not DFS (*id.*). The answer, however, also alleges that all responsibility for complainant's orders would lie solely with First Options (*id.* at  $\P$  2 and 4). DFS states that it does not know who the floor brokers were who executed complainant's orders, but despite that lack of knowledge goes on to assert that any such brokers were not DFS employees or agents and "presumably" were agents or employees of First Options (*id.* at  $\P$  4). DFS opines that the market information submitted by complainant does not show undue delay in the execution of his orders because "it appears" that the coffee market was "extremely volatile" on the days of the trades, although DFS does not say on what basis they draw this conclusion (*id.* at  $\P$  5). Finally, in a conclusory aside, DFS suggests that the case should have been filed against First Options, not DFS (*id.* at page 2). DFS makes no comment whatsoever regarding complainant's contention that he placed orders directly with DFS at a toll-free number owned by DFS.

Complainant filed no discovery requests and neither side submitted a verified statement. By failing to avail himself of the suggestion to use discovery to identify the floor broker, complainant has allowed that person to remain unnamed (and the statute of limitations would probably have run if he had tried to do so, in view of his last-minute filing).

It will be assumed that complainant properly named DFS as a respondent in this matter.<sup>1</sup> Even so, the sole evidence complainant has provided is that delays occurred for unexplained reasons. While it would be improper to ratify DFS's decidedly not-authoritative speculation that the times involved in complainant's trades were entirely reasonable, it would be just as foolhardy on the same lack of evidence to assume the opposite. If delays occurred, we do not know many more things than we do know. For example, we do not know if the market was heavily traded, how long such trades normally took in that market, who was responsible for handling the order ticket at any given time, the particulars of the reporting system – or even if the trades actually occurred when complainant stated that they occurred.<sup>2</sup>

A number of questions obviously are sidestepped by the finding that no evidence exists of substantive wrongdoing. Section 14(a)(1)(A) of the Commodity Exchange Act expressly provides that in cases of damages stemming from floor trading violations, the FCM that selected the floor broker may be held liable for any reparations award against the floor broker if the FCM is found responsible under the *respondeat superior* provision of the Commodity Exchange Act, section 2(a)(1). In this case, the question would be whether DFS or First Options, or both, "selected" the floor broker whose alleged violations are at issue.

The language of the statute suggests in addition that it may have been fatal to complainant's case to proceed solely against DFS. The cited section of the Act provides for vicarious liability of the FCM "if an award of actual damages is made against [the] floor broker" selected by the FCM. That provision would be superfluous if it were to mean that the FCM would be liable regardless of whether the floor broker in fact was named. Thus, complainant might have undercut any case he would have had against DFS by failing to file his complaint in time to allow for sufficient discovery so as to identify, and subsequently move to name as a respondent, the floor broker.

<sup>&</sup>lt;sup>2</sup> Complainant's time and price data allegedly were taken from time and sales ("T&S") reports of the exchange (footnote to Attachment 1 to June 8, 1999 complaint). Apparently he has inferred the actual times of his trades from the T&S reports, not the trading tickets, and he suggests that any delays in reporting the "hit" prices also

Faced with a lack of explanations from the company through which he apparently placed his trades,<sup>3</sup> complainant has concluded that fraud occurred and that a floor broker, or several floor brokers engaged in a conspiracy, stole his money. That conclusion might or might not be correct, but complainant has the burden to submit proof that fraud is the most likely explanation, not just a possibility.

For the reasons stated, the complaint is DISMISSED.

Dated: February 28, 2000

Joel R. Maillie JOEL R. MAILLIE Judgment Officer

would have occurred in reporting his own trade prices (id.). Suffice it to say that complainant's "evidence" consists of assumption piled upon assumption.

It must be noted that complainant loses only because he has not presented evidence to support his charges, not because DFS has demonstrated that it did nothing wrong. To the contrary, DFS's inability to explain or document its relationship with a First Options customer is appalling and demonstrates at best a cavalier approach to what would seem to be a basic obligation to know whether it accepted orders from a particular customer. Moreover, DFS has ignored complainant's assertion that he has been unable to get information from DFS for nearly two years. Presumably, if he contacted DFS previously and objected to trading results, DFS created some type of record of its investigation and response, but nothing indicating that activity has been submitted here. If complainant's "stonewalling" charge is true, DFS may wish to note that such responses to customers can create a climate of suspicion leading to litigation that often could have been avoided with simple professional business practices.