



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

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OFFICE OF  
PROCEEDINGS

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THEODORE TAK-LUNG LEE, )  
Complainant )  
v. ) CFTC Docket  
REIFLER TRADING CORPORATION ) No. 00-R090  
and RICHARD M. YAMAGUCHI, )  
Respondents )

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**INITIAL DECISION**

In this case, complainant filed his complaint as a Voluntary Proceeding and paid the required \$50 filing fee. Respondents' answer selected the Summary Proceeding instead and paid the additional filing fee. After some initial apparent confusion regarding his discovery obligations, complainant filed what were numbered as apparent answers to respondents' interrogatories but which were not responsive to the questions asked. Furthermore, he did not respond to a request for documents. In addition, complainant has submitted a number of unsworn faxes during the course of this proceeding. Respondents filed their verified statement even before they received complainant's answers to discovery. A review of the record demonstrates that there is little likelihood that an oral hearing would prove helpful in analyzing the dispositive issues in this case. Accordingly, the record consists of the materials set out above. Complainant's failure to submit verifications of his submissions has been considered in determining the weight to be given to his factual assertions.

***Complainant's allegations:***

The complaint, filed in June 2000 against Yamaguchi and Refco, Inc., can be split into two related allegations, all relating to events in April 2000.<sup>1</sup> First, complainant contends that respondent Yamaguchi recommended that complainant go long in a "mini" Nasdaq futures index position without informing him in timely fashion of the fact that negotiations had broken down between U.S. Justice Department and Microsoft attorneys in the federal antitrust case involving the computer software company. According to complainant, he was in Japan at the time and

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<sup>1</sup> Respondent Reifler appears from Commission registration records to have been an introducing broker for Refco, Inc. As shall be seen, complainant often misunderstood the relationship.

therefore Yamaguchi's failure to reveal the failure of settlement talks deprived complainant of crucial information that would have made him decide not to enter the market when he did.

The second allegation can be described generally as a complaint that Yamaguchi and Refco failed to follow instructions regarding the account after he had taken the mini Nasdaq position. In this regard, complainant contends that Yamaguchi and Refco: (1) failed to return \$10,000 in margin funds as requested by complainant, causing him to "bounce" checks that were drawn on his bank account to which the funds should have been sent; and (2) placed a "wide" stop-loss order on his mini Nasdaq position rather than the "tight" stop-loss order that he directed them to place.

***The original complaint:*** The complaint set out the allegation regarding the Microsoft information in straightforward fashion, but complainant's submissions regarding the failure to follow instructions allegations have been confused and, occasionally, self-contradictory. The original complaint's rendition of this alleged wrongdoing is set out here:

The market opened [after the Nasdaq mini was taken] and plunged that evening (4 April Tokyo time). I had bought another mini NASDAQ on the dip hoping to sell on a rise. The margin department[] told me that I had an intra-day margin call. I told him that I can wire the fund over. I intended this to be a day trade and requested Al to wire back the \$10,000 back to Key Bank, Al then liquidated one of my mini NASDAQ positions at a loss. At the same time I asked Key Bank to recover the funds back. At this time I thought the matter was closed and the funds had been returned to Key Bank.

Also Mr. Yamaguchi called me the same night in Tokyo telling me the margin department had put a Wide Stop Loss order for my one left over mini NASDAQ position. My immediate response was to make a Tight Loss. I e-mailed the instruction as the attached document shows. [No document was attached to the complaint; *see* discussion to follow.]

For your information because of this situation I was mentally distressed and was in bed for several days while in Tokyo required hospitalization upon my return home [Washington State], medical evidence available upon request.

I was able to be reached in Japan (i.e., call from Mr. Yamaguchi). Mr. Yamaguchi had numbers to communicate with me via phone, fax or e-mail. When I was in Hong Kong April 9-11, I e-mailed Mr. Yamaguchi my hotel and room number upon my arrival.

No further communication was received from REFCO therefore I believe the \$10,000 had been returned to my account at Key Bank.

Upon my arrival in New York, direct from Hong Kong, 12 April I learned, from a voice mail message left by Mr. Yamaguchi on my cellar [*sic*] phone that REFCO had liquidated my NASDAQ position at a substantial loss. I immediately protested bu[t] was scheduled to fly to Mexico City that same evening.....

Both the requests for return of funds by Key Bank and to put a Tight Stop on my account were ignored by Mr. Yamaguchi and REFCO.

(Docket Tab #1 – Complaint narrative at pages 1-2; punctuation in original.)

**Director's July 6 request for clarification:** The Director of the Office of Proceedings requested more information from complainant, including account statements, the document he said was attached but was not, and whether he was alleging misconduct by the otherwise-unidentified "Al" (Docket Tab #3 – Lenz letter July 6, 2000). This letter to complainant also informed him that Yamaguchi had been registered with Reifler Trading Corporation during the alleged violation period of April 2-19, 2000; a prior registration with Refco had ended in February 1998. In view of this information, complainant was asked if he intended to name Reifler as a respondent. The Director instructed complainant to mail his reply by July 17 and instructed him further that his submission must be sworn to or otherwise verified.

**Complainant's July 19 faxes:** Complainant responded with a fax to the Director on July 19, 2000 (Docket Tab #4). The fax explained that complainant had been away (returning to his home in Bellevue, Washington, on the 18<sup>th</sup>) and sought additional time in which to reply to the July 6 letter. He stated that he had prepared a reply and attached a copy of the letter he said he was mailing to the Director.

Later that same day, apparently as a result of a telephone conversation with a member of the Director's staff, complainant faxed a new request for an extension along with a new, revised version of the letter he said he would be mailing (Docket Tab #5).

**Complainant's addendum dated July 18<sup>th</sup>:** Both of the letters mentioned in complainant's faxes were mailed on July 21 in a single envelope and would be received on July 25 by the Commission (Docket Tab #7).<sup>2</sup> The revised letter is more extensive, and because that letter is the first post-complaint submission that actually contains factual allegations, it is referred to here as an "addendum" to the complaint.<sup>3</sup> In this addendum, complainant provided more information: First, he identified "Al" as Al Pucci as the head of the Refco margin department.

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<sup>2</sup> In the meantime, complainant sent *two more* faxes, these dated July 21 (Docket Tab #6). One, addressed to the staff member with whom he had been conversing (*id.*, page 01), stated that he wanted to name Yamaguchi and his employer Reifler as respondents. The other fax, sent a minute later, was addressed to the Director of the Office of Proceedings (*id.*, page 02) and verifies his decision to name Yamaguchi and Reifler.

<sup>3</sup> Oddly, complainant changed the date on the *first* of these letters to July 28<sup>th</sup>, but the *revised* letter mentioned in his second July 19 fax remained dated July 18. All references to the revised letter as the addendum are to the one dated July 18. Complainant deleted a single item from the original letter in the revised version: In its first paragraph, complainant took issue with an appellate decision of the Commission in a separate reparations case he had filed against another brokerage firm, Lind-Waldock, and suggested that he was thinking about filing a lawsuit against the Commission and complaining to Congress about the Commission's alleged favoritism shown the broker. He concluded that he had "doubts" if he should "be asking for your judgment" in his current case but he would try to answer the July 6 letter nonetheless.

Second, complainant stated that he did not know Yamaguchi worked for Reifler and suggested that Yamaguchi's failure to reveal this was another violation of a fiduciary duty.<sup>4</sup>

Unfortunately, complainant's additional explanation of the failure to follow his trading instructions and to return his margin funds did not shed any light on the confusion his prior version created:

...Al Pucci (same person name as the one who turned my account into a liquidation only account at Lind Waldock, which is bought out by Refco on Janu[ary 7<sup>th</sup>, 2000) is the head of the margin department who has put a wide stop loss order without my consent nor any letter of discretionary authorization from myself. He has had to return 10,000 dollars to Key Bank, which bounced my good checks of 18000 dollars payable to MBNA Credit Card company on Mach 30<sup>th</sup>. That is why there was 10,000 dollars in my account to be wired to Refco. Key Bank has to pursue its course to recover the 10,000 dollars from Refco as Refco refused to contact Key Bank despite another enquiry sent on April 7<sup>th</sup>. I have asked Al to liquidate enough positions to return funds to Key Bank after discovering that there was actually no money left in the account. I would like to name Al as the defendant per your suggestion. I assume that there are people who moved in from Lind-Waldock, and did damages to my account. It is a chain reaction of Ira Epstein to Lind-Waldock to Refco, with latter two companies, seems like same person was involved. I would name Al Pucci as a defendant now as he did not return funds to Key Bank despite requests being made.

Complainant then goes on to discuss the document that he had referenced as being attached to his initial complaint where he allegedly gave respondents a "tight" stop-loss order:

The e mail that I sent to Richard Yamaguchi after he told me that Al placed a wide stop loss order is in my Tokyo computer; however, I asked them as why did they put a stop loss order without my discretionary authorization letter and he responded that it was in their right; therefore, I recall that have told him that all stop losses are to be tight and not wide in my Tokyo computer. I was NOT aware and informed that the stop loss order was good till cancelled. I will try to look for that email in my Tokyo computer. I will send you the daily statements with this mail. However, despite my requests faxed many times, Refco did not mail me daily statements from April 3<sup>rd</sup> to 20<sup>th</sup>, except 7<sup>th</sup>, where there was 15000 dollars in the account more than enough to wire back to Key Bank.

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<sup>4</sup> At times complainant has suggested that he would have not opened his account had he known that Refco had bought Lind-Waldock, the company with which he previously was engaged in litigation. That case involved a decision by the brokerage firm to restrict complainant's account to liquidation trades only (apparently as a result of Lind-Waldock's discovery of information showing that complainant had a history of litigating against brokerage firms), but the complaint was dismissed by the judge and this dismissal was affirmed on appeal to the Commission. *Lee v. Lind-Waldock & Co.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,173 and page 50,157 at footnote 3 (CFTC June 29, 2000).

Commission records reflect that complainant has filed four complaints in reparations, including this one, in the period from 1998 through June 2000.

In the next two paragraphs, complainant discusses whom he should name as respondents:

It seems like my defendant is Mr. Richard M. Yamaguchi alone at this time as he never ever should have called me in Tokyo [after the Microsoft news]. It is viable that Mr. Al Pucci also should be the defendant, as he placed a stop loss order with out my neither instruction [*sic*] nor letter of discretionary authorization to handle my account. In this case, Refco is named as co-defendant.

Again, I ask you to review the case by asking specific names of Al Pucci.....

Thus, complainant still had not submitted a copy of the e-mail referenced in his initial complaint that he said he had sent to Yamaguchi when he learned of the “wide” stop and instructing respondents to place a “tight” stop instead. That document allegedly was in Tokyo on his computer there.

***Complainant’s July 21 letter:*** After the July 18 and misdated July 28 letters discussed in the previous section had been mailed, but before they were received on July 25, complainant sent a new letter to the Director of the Office of Proceedings (Docket Tab #8). In this letter, dated July 21 but received by the Commission on August 4, complainant stated that he wanted only to name Yamaguchi and Reifler as respondents, dropping Refco.

Included with this letter were a number of account statements as requested by the Director on July 6, plus copy of a fax sent to Refco’s compliance officer on May 9, 2000, in which he demanded an explanation for retaining his account balance “illegally.” The cover letter does not explain the relevance of the May 9 fax.

***Faxes regarding settlement offers:*** All of the above-mentioned documents were included as the complaint served on respondents on August 14, 2000 (*see* footnote to Lenz letter to respondents in Docket Tab #9). Following that service, complainant on August 29 faxed a letter to the Director in which he complained about receiving calls from someone from Refco attempting to get him to agree to settle his complaint (Docket Tab #11). He stated that he would appreciate it if the CFTC would “negotiate a rate” as did the judgment officer in his first case, and concluded that he would be “waiting” for the Director to arbitrate the case if the amount offered to him by respondents seemed “satisfactory.” In a postscript, complainant stated that he had decided to stop trading with discount futures firms because they are “so badly managed” unlike companies regulated by the SEC. A second fax sent an hour later on the same day is included in the record under the same Docket Tab, and it reflects the fact that Refco had raised its offer to settle. Again, complainant referred to settlement discussions in his prior litigation that apparently were part of a mediation effort by the judge in that case.

The next day, August 30, complainant faxed another letter regarding Refco’s settlement offers, and seeking CFTC’s involvement to “negotiate/arbitrate this case” (Docket Tab #12). He stated that he did not know why Refco would be involved since it was not a respondent. He

asked to be called by the staff member with whom he previously had spoken. The record does not include any information regarding whether such a contact occurred.

None of complainant's faxed letters included a certificate of service. Accordingly, on August 30, the Director mailed complainant a letter acknowledging receipt of his faxes and instructing him that Rule 12.10 required a copy of all submission to be sent to respondents and a certificate of service to be attached (Docket Tab #13). That letter indicated that a copy of the August 29 and 30 faxes were being sent to respondents to cure the lack of service.

The following day, August 31, saw yet another fax from complainant regarding Refco's effort to settle the case, but this time the Refco employee identified himself as representing respondent Reifler instead. Complainant stated that he refused to talk with and "hung up" on that employee because he could not tell who he was working for and that he was not interested in negotiating unless a CFTC judgment officer arbitrated (Docket Tab #14). The fax had no certificate of service, but complainant would not yet have received the Rule 12.10 warning since that was mailed to him the previous day.

Two days later, complainant sent a fax notifying the Director that he was moving to Japan (as a result of "the demise from this last trade") and changing his address. He referred again to more settlement overtures from Refco and to his refusal to negotiate without CFTC involved. As with all of his previous faxes, no certificate of service was included (Docket Tab #15).<sup>5</sup>

**Respondents' answer:** Respondents appeared through an attorney and noted in their answer (Docket Tab #16) the many faxes sent by complainant, and declined to address any allegations other than those set forth in the original narrative included with the original complaint (Answer at 1-2). The answer generally denied any wrongdoing and emphasized complainant's trading history and sophistication, allegedly including over 80 trades in the mini Nasdaq contract in March 2000 alone (*id.* at 2). According to the answer, complainant's trading led to margin calls in April 2000 that, when unmet, resulted in liquidations (*id.* at 2-3, 6). Respondents basically contended that complainant was not deprived of any knowledge regarding the Microsoft case but they did not deny that Yamaguchi did not specifically inform complainant of the negotiation breakdowns (*id.* at 3-4). As to the instructions, respondents admitted a discussion with complainant about a "wide stop loss" but denied ignoring instructions to place a different stop (*id.* at 7). Essentially, the answer denied liability, asserted that complainant did not state a cause of action, and left him to prove all his specific allegations of wrongdoing.

Following receipt of the answer, on September 19, 2000, the case was forwarded as a summary proceeding to the undersigned and the parties were sent a Notice of Summary Proceeding informing them of the opportunity to take discovery and to submit final verified statements once discovery was complete (Docket Tab #19).<sup>6</sup>

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<sup>5</sup> Copies of these latest faxes were sent to respondents on September 18.

<sup>6</sup> An international certified mail receipt in the file reveals that delivery was accomplished to the Tokyo post office on September 27, 2000.

**Discovery and other submissions:** Complainant sent a fax to the Director of the Office of Proceedings on October 17 in which he acknowledged receipt of the Notice of Summary Proceeding (Docket Tab #21). In this document, sent from complainant in Japan, he stated that he was forwarding the “documents” to a friend in Seattle who was moving to Texas for the winter, and that he would be having his friend “read and explain the content” to him. He asked to be instructed whether any “reply” to the Notice of Summary Proceeding was necessary. He then went on to state again that Yamaguchi had violated the duty to inform him of the Microsoft news. No certificate of service was attached to this document. For unknown reasons, complainant sent this same fax, identical except for the date, again on October 17 (Docket Tab #22), and again without a certificate of service.

Respondents sought discovery from complainant by sending him interrogatories and requests for documents, copies of which they filed here on October 18 (Docket Tab. #23).

On November 16, complainant sent another fax to the Director without a certificate of service, claiming difficulties in litigating the case:

As I faxed previously, I cannot comprehend the legal terminology nor can write one satisfactory to you as CFTC returned all the documents which I wrote to contest in the previous cases as my composition of the letter is hard to comprehend.

My friend who wrote the documents, finally arrived in Texas from Seattle for the winter and I have express mailed him the only two documents which you registered to me which was received by my sister while I was away on November 13<sup>th</sup>. I have just returned from USA and Europe in job search and leaving tomorrow for Hongkong and Singapore. Kindly do registere your mail to me as I find that post office has not kept mails as Lee is a common name for foreigners.

As I paid only \$50 for this case, I believe that I need not to respond; however, their lawyer wrote a lot of wrong items....

(Docket Tab #24; punctuation and spelling as in original.)

The undersigned took no action on complainant’s submission since it appeared to be an apology and explanation for delays in receiving his mail. It was assumed (incorrectly) that complainant’s statement about his \$50 filing fee justifying not replying was referring to respondents’ answer since that answer had been forwarded by international certified mail by this Office to complainant in Japan (Docket Tab #17). Unfortunately, the fact that complainant was not serving respondents’ attorney was not noticed at this time.

Soon thereafter, on December 1, respondents filed a motion to compel answers to their discovery requests, contending that complainant had ignored them (Docket Tab #25). In the alternative, respondents sought dismissal although they did not explain why such a departure from the standard discovery procedures would be appropriate.

Upon receipt of the motion to compel, the Court issued a Notice to Complainant (Docket Tab #26) finding that he had continued to file *ex parte* faxes contrary to the reparations rules (and, it is noted, contrary to the express instructions given him by the Director to file certificates of service) and ordering him to immediately send to respondents' attorney, by fax or express mail, copies of his three faxes. The Notice also instructed complainant that his desire to have someone help him would not result in his delaying the proceeding; if he wished to hire an attorney to represent his interests, he was free to do so. Upon concluding that complainant's November 16 suggestion that he "need not to respond" to respondents' submissions was directed not to the mid-September answer but instead to their mid-October discovery requests, the Court warned complainant that he was obligated to answer discovery and to comply with all of the reparations rules, including the service requirements, or he would face sanctions.

Respondents sought sanctions against complainant less than two weeks later (Tab # 17) but this motion was ignored since experience with the international certified mail sent to complainant was that items were taking as long as three to four weeks to get to him. Indeed, the certified receipt for the Notice to Complainant appears to indicate that delivery of that document occurred in Japan on January 3, 2001, for it is stamped "03-1-01."

Confirming delivery of the document on that date, complainant on the same day faxed a letter to the undersigned (Docket Tab #30) in which he continued to assert that his \$50 filing fee "does not require interrogatives." Included with that fax were a series of some 26 numbered paragraphs and factual statements over two pages that do not respond in any coherent fashion to the 26 interrogatories sent to complainant.<sup>7</sup> Moreover, his response totally ignored the document requests. In a two-page "Summary" that follows, complainant again related his views

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<sup>7</sup> For example, in interrogatory number 23 complainant was asked why he believed the market plunge of April 4 (Tokyo date) occurred as alleged in paragraph 3 of the complaint (*see* Docket Tab #26, Interrogatories at page 9). Complainant's January 3 submission contains an item 23 as follows: "After a hassle on April 3<sup>rd</sup> night - Tokyo time, I fell deeply sick and went a week under medication. I was home all that week followed. As Mr. Fedder has written that Mr. Yamaguchi has suggested to put stop; so I asked him to put a tight stop loss order. In the Orient, we entrust that he did it. Again, I was betrayed. I was sleeping or dozing almost 16-18 hours daily in bed due to the nervous breakdown; which later when I returned had to be hospitalized at the Psychiatric unit in Bellevue [Washington]."

The entire submission is an exercise in *non sequiturs* and make little or no sense. Complainant's submission does not respond to item 1 (asking for complainant's trading strategy; responded to by complainant with a statement that he did not know the relationship between Yamaguchi, Reifler, and Refco); item 3 (seeking information regarding any statements made by complainant to other persons regarding these events, including identifying any such persons; complainant's response says he worked as an interest rate forecaster, that Yamaguchi persuaded him to invest in the Nasdaq mini index contract and other vehicles, and that, "Being Japanese origin, he had my trust"); items 4 and 5 (seeking complainant's net worth, income and other financial information; response by complainant states "Customer Agreements are made by the brokers and for the brokers" and mentions prior trading in interest rates and bond futures); item 6 (seeking complainant's educational background; the response discusses the Yamaguchi phone call and the failure to tell him about Microsoft); and so forth throughout the document. Attempting to glean any information from this document is an exercise in futility and it may fairly be viewed as so unresponsive to both the questions and the December 1 Notice as to require being disregarded as obstructionist.

of the wrongdoing by Yamaguchi, this time arguing in paragraph after paragraph about the impropriety of Yamaguchi calling and waking him up with the Nasdaq mini recommendation.

In contrast to every prior submission from complainant, the January 3 submission included statements to the effect that he had sent a copy of this document to respondents' attorney.<sup>8</sup>

An hour after faxing his reply to the Judgment Officer, complainant faxed a letter to the Director of the Office of Proceedings in which he complained about his treatment by the Judgment Officer in the December 1 Notice, and questioning whether "Ms. Maille" could be fair (Docket Tab 31). As that document was not directed to the Court and did not include a specific request for relief, it was transmitted by the Director for inclusion in the case file without further action.

A follow-up fax from complainant on January 8 reiterated difficulties in receiving his mail in timely fashion and expressed his hope that he would get a fair decision (Docket Tab #32). That letter indicated that complainant was in serious financial difficulties, including an investigation by the "Japanese IRS," and that he was over one million dollars in debt.

On January 10, complainant faxed another letter to the Court complaining about respondents' attorney's method of mailing documents to him rather than emailing or faxing them (Docket Tab #34). He then stated, inexplicably, that he would be in Hong Kong for "most of the rest of" his life and therefore, "Kindly do not from by mail me as I may not be in Japan."

**Discussion:** The lengthy reiteration of the pleadings in this matter reveals that the complaint is without foundation. First, regarding the alleged failure to disclose the information about the Microsoft negotiations, to prevail complainant would have to meet his burden of demonstrating four things by a preponderance of the evidence: First, that the information was known to Yamaguchi but not disclosed; second, that the information was material; third, that the failure to disclose this information was accompanied by some sort of fraudulent intent or other *scienter* that would be the equivalent of fraud (such as recklessness); and fourth, that the failure to disclose proximately caused damages to complainant.

As to the first, complainant has not presented any credible evidence what information was known to, but allegedly withheld by, Yamaguchi that necessarily should have been transmitted to him. Any information available to Yamaguchi was presumably only such information that would have been available to the general public as news. Complainant argues, but does not support, that news takes one to two days to get to Tokyo, but this assertion is absurd in the modern era. Indeed, the numerous fax and other transmissions made by complainant from Japan, and even his requests that items be emailed to him there, demonstrate that virtually simultaneous electronic transmission of information was easily available to complainant in Japan. Implicit in

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<sup>8</sup> This submission was also mailed and was received in the Office of Proceedings on January 8 (Docket Tab # 33).

the idea that complainant must demonstrate that information was withheld is a requirement that the information must have not been equally available to complainant. Without evidence showing the timing of the release of this information and when it became known to Yamaguchi, there is no basis for making any conclusion that its dissemination in Japan was in some fashion delayed before people there could act on it if they wished. It may not have been known to complainant when he agreed to accept Yamaguchi's recommendation that the Microsoft negotiations had broken down, and he might have been awakened by Yamaguchi, but even that does not mean complainant did not have the information available to him even prior to the call.

As to materiality, complainant was asked by respondents to establish that the market took a downturn and the reasons for that move. He ignored the question. There is actually no evidence in the record proving that the Nasdaq market moved in response to the breakdown in negotiations. The undersigned recollects that during the antitrust litigation various markets moved in response to different pieces of news, but the Court obviously cannot make factual findings on vague personal memories. Microsoft might be a significant part of the Nasdaq index and that issue perhaps could be established by judicial notice of public records, but it is complainant's responsibility to prove his case and not the Court's to engage in a lengthy review of all factors and news that might affect a particular instrument. Without that foundation, complainant cannot establish that this information was something that he should have been given. It is overwhelmingly like that the course of the Microsoft antitrust litigation involved a number of events that made news, but the fact is that any index involves a number of companies' market positions, and it would be hard to decide at which particular point a broker such as Yamaguchi had an obligation to report or not to report each company's latest legal or other news.

As to *scienter*, complainant's case lacks any evidence of a single crucial point: there is not even a hint in this record that Yamaguchi was or should have been aware that complainant did not know the Microsoft news. If complainant had demonstrated that he specifically sought Microsoft-related news from Yamaguchi or wished to be kept updated, then the failure to cull that information from the rest of the news available to Yamaguchi might be actionable, but here complainant has made no such case or even an allegation. It is entirely possible, in fact, that Yamaguchi believed complainant already knew the information and that he was making the recommendation to go long based on what he might have believed would be a short-term downturn in the Nasdaq's value.<sup>9</sup> With so many possibly innocent explanations, there can be no finding that Yamaguchi's failure to discuss Microsoft's ongoing legal problems was an omission stemming from an illegal intent.

Without a violation, there is no need to examine the fourth issue, i.e., damages stemming from the alleged failure to inform.

With regard to the alleged failure to follow instructions to return money and to place a "tight stop loss," what stands out here is that complainant has not provided the document that he

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<sup>9</sup> Complainant states in paragraph two of his initial narrative that he doubled his position after the market went down. This indicates that he had ample opportunity to engage in any trading he wished after learning of the news.

said would show he emailed instructions to respondents but which was suspiciously omitted from the complaint and all subsequent pleadings. Later he indicated that his computer in Japan had the document, but complainant never produced it after returning there, and neither did he ever take discovery to obtain any such document from respondents. Furthermore, complainant completely ignored the respondents' requests for any documents he did have. Under these circumstances, it is a legitimate conclusion that complainant's version of events is not reliable enough to support any finding of liability. This conclusion seems especially strong in view of the fact that complainant is certainly not shy about sending written missives complaining, instructing, demanding, and basically expostulating about almost everything at all times – it is doubtful that he would not have provided written instructions to respondents with regard to these exceptionally important requests.<sup>10</sup>

For the reasons stated, it is concluded that complainant has failed to demonstrate any violations by respondents and therefore the complaint is DISMISSED.<sup>11</sup>

Dated: September 28, 2001

  
Joel R. Maillie  
Judgment Officer

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<sup>10</sup> In addition, it must be noted that complainant has never defined exactly what he would have meant by a “tight” stop order, and although he was unhappy with the “wide” stop placed by respondents' margin department, he has not set out exactly what was unsatisfactory with it.

<sup>11</sup> Complainant's allegations that he was not aware of the Reifler/Refco/Yamaguchi/Pucci set of relationships is not considered here since it was not presented in the initial complaint or otherwise presented as a cause for relief by motion to amend or otherwise. He has not demonstrated, in any event, how he would have acted differently if he had known additional information.