

carefully reviewing the parties' documentary submissions, it has been concluded that Leifer has failed to show that he is entitled to any recovery.¹

Factual Findings

The parties

1. Brett Leifer, a self employed coin dealer residing in Wayland, Massachusetts, has a bachelors degree in business and accounting, and a masters degree in education. When he opened his non-discretionary Lind-Waldock account in 1990, Leifer stated that his annual income was over \$50,000, and his net worth over \$100,000. Leifer also stated that he had traded commodities for about three years and invested in stocks and bonds for about 20 years.

2. Lind-Waldock is a registered futures commission merchant, located in Chicago, Illinois.

3. Under paragraph 5 of the customer contract, Leifer agreed: (1) "to meet margin calls in a reasonable amount of time;" and that "for the purposes of this agreement, a reasonable amount of time shall be deemed to be one hour;" (2) to furnish Lind-Waldock with the "information necessary for immediate verification of [bank] wires;" and (3) that if the account was in deficit, Lind-Waldock could liquidate "all positions . . . at the market price then trading, without prior notice." [Bold-face and all-caps in original deleted.]

¹ Leifer's principal submissions are: (1) the letter to Lind-Waldock dated November 11, 1997 (produced July 27, 1999); (2) reparations complaint; (3) the request for tape-recordings (April 15, 1999); (4) replies to interrogatories and requests for admissions; (5) reply to discovery order (September 17, 1999); and (6) final statement (October 14, 1999). Lind-Waldock's principal submissions are: (1) letter to Leifer dated December 12, 1997; (2) reparations answer; (3) Fortsas affidavit (filed July 29, 1999); (4) reply to discovery order (August 26, 1999); and (5) reply to discovery order (September 24, 1999). In this connection, Lind-Waldock has shown that it made a good-faith effort to locate and produce tape-recordings of the various conversations on October 27, 1999. Therefore, no sanctions will be imposed for the non-production of those recordings.

Market conditions on October 23, 24, 27 and 28, 1997

4. On October 23 and 24, 1997, the Dow Jones Industrial Average lost 319 points — the largest two day drop with the exception of the October 1987 crash — in reaction to the Asian stock meltdown. [See, e.g., page A-1, *Wall Street Journal*, October 27, 1997 (“Asian Meltdown Prompts Worry Over Possible Impact on U.S. Market”); and page A1 of *USA Today*, October 27, 1997 (“Sliding Dow raises Specter of Correction”).]

As anticipated, on Monday October 27, 1997, the U.S stock markets experienced a major correction, with the Dow Jones Industrial Average dropping 554 points. Circuit breakers and limit moves were triggered in the stock and stock index markets. On October 28, 1997, the U.S. stock markets opened down, but rebounded after about an hour.² [See, e.g., page A-1, *Wall Street Journal*, October 29, 1997.]

The disputed trade

5. On October 27, 1997, Leifer bought two December 1997 Mini S&P 500 Index futures contracts, at 931.25.

6. On October 28, 1997,³ at about 7:00 a.m. EDT, 6:00 a.m. CDT,⁴ before the Mini S&P pit opened, Lind-Waldock issued a \$5,000 margin call to Leifer, and placed a debit stop

² Lind-Waldock’s assertion that fast market conditions prevailed during most of the day on October 28, 1997, as well as other its other assertions about prices at specific times during that day, while plausible, are unsubstantiated, because Lind-Waldock inexplicably failed to produce the time and sales report for that day, despite being twice reminded. Since the information not produced is not dispositive, sanctions under CFTC rule 12.35 have not been imposed.

³ While Leifer and Lind-Waldock disagree about the legal responsibility for their respective actions and statements, they essentially do not dispute what was done and said on October 28, 1997. Any significant disputed facts are noted where appropriate.

⁴ Leifer’s submissions use references to Eastern Daylight Time and Lind-Waldock’s submissions references to Central Daylight Time. In order to avoid confusion, this Initial Decision will cite both Eastern and Central Daylight Time.

order for the Mini S&P position. According to Lind-Waldock, it is standard industry practice to place debit stop orders while a margin call is pending. Because Globex did not accept stops for the Mini, Lind-Waldock "manually worked" the stops on Leifer's Mini S&P position. At this time, Lind-Waldock employee Jeff Kurst informed Leifer about the margin call. Leifer asked if he could place a stop, and Kurst explained that Globex would not accept stop orders. Leifer told Kurst that he would wire \$10,000 to \$12,000 when his bank opened at 9:00 a.m. EDT, 8:00 a.m. CDT.

7. At about 7:30 a.m. EDT, 6:30 a.m. CDT, Konstantino N. "Dino" Fortsas, assistant supervisor of Lind-Waldock's "L" desk, discussed the margin call and market conditions, and Leifer again said that he would wire \$10,000 or \$12,000 as soon as his bank opened at 9:00 a.m. EDT, 8:00 a.m. CDT.⁵ Fortsas also told Leifer that Lind-Waldock would be placing a stop order to prevent the account from going deficit and that Lind-Waldock would cancel the stop when it received verification that the wire transfer was forthcoming.

8. At 9:11 a.m. EDT, 8:11 a.m. CDT, Fortsas and "Barb" told Leifer that Lind-Waldock had just placed an order to sell at 852 stop.⁶ Leifer told them that since he was going to wire the margin funds as soon as his bank opened he would prefer that Lind-Waldock not use protective stops, but relented and gave Fortsas the telephone number and name of the contact person at his bank – "Georgia" – to confirm the wire.

9. Around 9:30 a.m. EDT, 8:30 a.m. CDT, Fortsas twice called Georgia to verify amount of wire and get a Federal reference number, but Georgia was not available.

⁵ According to Leifer, Lind-Waldock employee Jeff Kurst also participated in this conversation.

⁶ According to Lind-Waldock, at this time, the December Mini S&P was trading at 859.

10. At approximately 9:49 a.m. EDT, 8:49 a.m. CDT, the debit stop order was filled at 849.00. The fill would not be reported back to Lind-Waldock for another 30 minutes.

11. At about 10:00 a.m. EDT, 9:00 a.m. CDT, Fortsas spoke to Georgia, but she could not verify wire. A short time later, Leifer told Fortsas that he had wired \$12,000 just as the bank had opened. At this point, Lind-Waldock decided to rely on Leifer's word, and placed an order to cancel the stop. However, as noted above, the stop had been already been filled about a half an hour earlier. Thus, the cancel order was reported back as "too late to cancel".

12. At about 10:30 a.m. EDT, 9:30 a.m. CDT, Barb asked Leifer if he wanted to re-enter the market.⁷ Leifer told her that this was the first time he knew that he had been taken out of the market, and then complained that he had been liquidated despite the fact that he had promptly wired the funds as soon as possible as he had repeatedly promised. Unhappy with the turn of events, Leifer chose not to re-enter the market.

13. At about 10:35 a.m. EDT, 9:35 a.m. CDT, Fortsas told Leifer that he could not yet determine the fill price. Fortsas also tried to explain why Lind-Waldock had not tried to remove the stop until it had been able to confirm the wire. Coincidentally, at this time, Lind-Waldock finally received the bank's confirmation of the wire.

CONCLUSIONS

In order to establish violations by Lind-Waldock, Leifer must show by a preponderance of the evidence either that Lind-Waldock misled him about its margin policy or that Lind-Waldock's margin call and liquidation were made in bad faith. See

⁷ On this record, the prevailing price for the December Mini S&P cannot be determined.

Baker v. Edward D. Jones & Company, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,167 (CFTC 1981). Leifer has shown no misrepresentation by Lind-Waldock concerning its margin policy. The customer agreement authorized Lind-Waldock to liquidate all positions at the prevailing market price, without notice, if the account was in deficit, authorized Lind-Waldock to demand immediate verification of bank wires, and provided that one hour was a reasonable time to meet margin calls. The agreement did not provide special allowances for differences between market hours and bank hours.

Leifer similarly has not shown that Lind-Waldock acted in bad faith. Here, Leifer entered a very volatile market. When the market moved against Leifer's position triggering a margin deficit, Lind-Waldock acted reasonably and prudently before Leifer's bank opened by notifying Leifer of the margin call and by using manual stops while the market traded on Globex and then by placing a protective stop order when pit trading opened. Lind-Waldock further acted reasonably and prudently when it promptly attempted to confirm the bank wire before canceling the stop order as soon as the bank opened, attempted to cancel the stop order when Leifer advised that he had confirmation that the bank had just wired the funds, and then offered Leifer an opportunity to re-enter the market as soon as the wire was confirmed. Finally, Lind-Waldock was not obligated to cancel the stop order before the bank opened despite Leifer's assurances that he had arranged for the wire. In these circumstances, Leifer is not entitled to an award.

ORDER

No violations causing damages having been shown, the complaint is DISMISSED.

Dated November 30 , 1999.

A handwritten signature in black ink, appearing to read "P. Y. McGuire". The signature is written in a cursive, somewhat stylized font.

Philip Y. McGuire,
Judgement Officer