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EUGENE MOREL, Complainant v. COMMONWEALTH FINANCIAL GROUP, INC., and CINDY FAYE BRITTON, Respondents	CFTC Dkt. No. 96-R014

INITIAL DECISION

Complainant seeks the return of $5,500 with which he traded options on futures contracts through Commonwealth. The complaint was filed in two parts, an original complaint and a subsequent amendment. The first complaint form had two complainants listed, Eugene Morel and Mark Whisenhunt. The form was signed only by Eugene Morel. Attached to the form was a typed narrative on the letterhead of Mark Whisenhunt, identified in the letterhead as trustee for the "Eugene A. Morel Trust." The narrative was written in the first person as if *Whisenhunt* had written it, but again, the only signature on the narrative (above Whisenhunt's signature block) appears to be that of *Morel*.

Because of these discrepancies, the Assistant Director of the Office of Proceedings called Morel to determine who in fact was the complainant (*see* Jones Memorandum to File, dated November 15, 1995). Morel confirmed that Whisenhunt was the trustee for Morel's trust (as indicated by the letterhead), but the account in question had been opened in Morel's name personally. Morel thereafter filed an amended complaint and narrative in his name only. In view of the fact that the only verifications in the file are those of Morel, both narratives will be treated as his. Matters asserted in Whisenhunt's name will be considered as Morel's version of what Whisenhunt may have told him.

In any event, there are few substantial differences between the two narratives. Essentially, what appears to have happened is that Whisenhunt spoke with respondent Britton (a Commonwealth associated person) about opening an options on futures account on Morel's behalf. Because Whisenhunt wanted the account opened quickly, he arranged for Britton and Morel to speak directly to each other. Eventually, with Whisenhunt's knowledge and approval, it was decided that Morel would open an account in his own name, rather than in the trust's name,

and a power of attorney was granted to Britton to effectuate the trading in the account. Morel sent a check for $5,000 to Commonwealth with the standard account opening forms.

The first transactions were made in the account on October 21, 1994, consisting of a spread of five call option and five put options in the January '95 heating oil futures contract. The Whisenhunt narrative claims that Whisenhunt and Britton had not discussed spreads during their first conversation, and both narratives claim that Britton's choice of a spread thus constituted unauthorized trading or churning. The assertion of unauthorized trading can be rejected due to the existence of the power of attorney. Even if that document did not exist, however, the unauthorized trading claim would have to be rejected insofar as it relies on any theory that Whisenhunt's original conversation could have controlling effect over the trading of the account. When Morel opened the account in his own name, he became the customer and any involvement of Whisenhunt as trustee for Morel's trust ceased to have any relevance in this matter. In the absence of evidence that Britton knew that Morel was incapacitated or otherwise acting to his own detriment in trading the account, Morel's decisions, not Whisenhunt's intentions, are all that would matter in determining what instructions Britton was required to follow.[1]

As to churning, Morel's claim that the "type" of account was different than what he and Whisenhunt envisioned, and the Whisenhunt narratives statement that a spread was not anticipated, are not enough to substantiate Morel's conclusion that Britton was trading to maximize commissions. The record shows the spread transaction on October 21, 1994, and two additional options purchased 4 days later. While one might question the departure from what Whisenhunt envisioned, questions alone are not enough to carry the burden of proof, and complainant chose not to provide any additional evidence underlying his assertions when requested.[2] This record does not contain sufficient indicia to find any pattern of trading to generate commissions in disregard for complainant's interests. While an inference of commission maximization might be made from the number of options purchased, there are also many possible legitimate explanations. Accordingly, the churning charge must be dismissed.

The only other matter in controversy in this case involves a correction to the price of the calls purchased in complainant's October 21, 1994, spread transaction. That correction was issued on October 26. On October 25, however, the complainant had purchased two more options (this time in the March heating oil futures contract) and had sent in an additional $500. The price correction resulted in Morel being told by Britton that he would have to either deposit more money to cover the higher margin or liquidate the two options he had bought on October 25. He chose the liquidation. Morel voices displeasure at the timing of this correction and at the way he was treated by Britton and other Commonwealth employees when he called to complain.

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[1] A document providing for Whisenhunt's fees as trustee for Morel suggests that the trust was created voluntarily by Morel, with a $500 monthly fee paid to Whisenhunt by Morel for trustee services. Account opening documents signed by Morel (submitted by respondents in reply to a discovery order issued sua sponte by the Judgment Officer) indicate that he was self-employed as a motel owner, that he had an annual income of between $25,000 and $50,000, and that he had a net worth between $50,000 and $100,000. Those documents show no prior investment experience. All the standard risk disclosures appear to have been signed by Morel.

[2] Complainant never replied to discovery requests sent to him by respondents (who, in turn, did not file a motion to compel). Thus, the record does not contain any elaboration of complainant's story other than the two narratives.

There is no evidence of any wrongdoing in connection with the correction in the price. The delay involved appears to have been unusual, but that alone is no indication of any violative conduct. Moreover, the record contains no suggestion that the delay occurred as the result of factors within Commonwealth's control or that it stemmed from any scheme to defraud complainant. Finally, the account statements submitted for these transactions show that complainant was given a commission credit of $375 at the same time of the price adjustment. Under the circumstances, complainant's suspicion has not been shown to have any foundation in fact, nor does he seem to have been harmed by the error since, if he had wished, he could have deposited sufficient money to pay for any additional options he desired.[3]

As to how Commonwealth's employees treated Morel when he complained to them, poor business practices--even rising to the level of abusive customer treatment as alleged here--do not fall within the jurisdiction of the reparations program unless those practices violate the Commodity Exchange Act and cause monetary damages.

For the reasons stated, the complaint is DISMISSED.

Dated: May 1, 1997

Joel R. Maillie
Judgment Officer

[3] The first narrative explicitly states that the ultimate worthless expiration of the options purchased in the spread was a "no fault situation in itself." In light of this concession, it is unknown why complainant seeks the return of all his money.