



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

OFFICE OF
PROCEEDINGS

OFFICE OF PROCEEDINGS
PROCEEDINGS
Nov 14 2 33 PM '97
FILED

CHARLES A. NEIMAN,
Complainant

v.

AMERICAN FUTURES GROUP, INC.,
and CHRISTOPHER A. SMITHERS,
Respondents

CFTC Docket No. 97-R038

**ORDER OF DISMISSAL FOR CAUSE AND
ORDER GRANTING ATTORNEYS' MOTION TO WITHDRAW**

The person filing the complaint in this case (Charles A. Neiman) is actually the son of the actual customer whose account is at issue (Charles A. Neiman, Jr.). Thus, in this Order the complainant will be called "Neiman III," and the father will be referred to as "Neiman, Jr."

The complaint was filed by Neiman III. According to documents submitted by the complainant, his father died in November 1995. Apparently after the complaint was forwarded to respondents, attorneys for Smithers discussed with Neiman III the fact that it appears that the complaint should have been brought by his father's estate (see fax from Patrick King to R. Britt Lenz dated May 19, 1997). Neiman III told respondents that he would be amending the complaint "to bring the action as Trustee for his father's estate."

Instead of moving to amend the complaint to act as trustee for the estate, however, complainant moved to amend the complaint to bring it "for the Charles A. Neiman Jr. Trust as Charles A. Neiman III, Trustee" (see letter to R. Britt Lenz dated May 19, 1997, received May 23). Complainant was directed to file the Trust documents and he did so on May 30, 1997.

Both respondents raised the issue of standing in their answers to the complaint, with respondent Smithers contending that complainant had not personally suffered any losses and that the account was a personal account belonging to the father, not a Trust account (Smithers Answer, ¶ 22). Respondent American Futures Group argued that the money lost had belonged to Charles A. Neiman, Jr., and should have been brought in the name of his estate. Without ruling on the motion to amend the complaint, the Director of the Office of Proceedings forwarded the case was forwarded for adjudication.

A number of conference telephone calls have been held, originally with complainant and later with his retained attorney, to sort out the standing issue. Complainant's attorney has been directed -- twice -- to provide proof of the complainant's right to bring this action. All that has been submitted by counsel is an unverified, undocumented collection of assertions that the account was originally to be opened in the name of the Trust but was opened by respondent Smithers in the name of Neiman, Jr. (the Settlor of the Trust). According to this submission, the Trustee (Neiman III) intended the account to be Trust property all along when he opened the account. The submission also asserts (without evidentiary support or legal references) that the Trust terms do not require that property or accounts be held in the name of the Trust. Therefore, according to complainant's submission, Charles A. Neiman III is the proper complainant.

The submission by counsel does not mention the estate issue. Counsel twice has now disregarded instructions to address the estate issue, and to provide proof that under Pennsylvania law the complainant would have the right as Trustee to bring an action after the death of the Settlor of the Trust if this indeed were a Trust account as counsel represents. In that regard, however, counsel's submission distorts the facts in this record: The complaint and attached documents establish that Charles A. Neiman III opened the account in question during October of 1994. The Trust documents submitted by complainant establish clearly that the Trust was not created until December 1, 1994 (by Neiman III acting under a power of attorney for his father). Under these facts, there is no possible way that the account was opened by complainant acting as Trustee for a Trust that had not yet come into existence. On this record, the evidence is compelling that Neiman III opened the account using the power of attorney and then later created a Trust. To blame Smithers for the "improper" titling of the account is unfair.

Accordingly, it is concluded that the account was opened as a personal account owned by Charles A. Neiman, Jr. Charles A. Neiman III has not established that he has authority to bring this action as Trustee since the account was not a Trust account. Efforts to obtain from complainant and his counsel the name and address of an appropriate representative of the customer's estate (as appointed by a court of competent jurisdiction) have failed. The case cannot proceed without an appropriate complainant.

The complaint in this matter is **DISMISSED** for lack of standing of Neiman III.

Respondent Smithers' counsel has moved to withdraw. That motion is **GRANTED**. The parties will mail documents to Smithers personally at the address on the motion to withdraw in the event any further proceedings, appellate or otherwise, occur in this matter.

Dated: November 14, 1997


Joel R. Maillie
Judgment Officer