U.S. COMMODITY FUTURES TRADING COMMISSION
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OFFICE OF
PROCEEDINGS

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N.T. NIXON,
Complainant,

v.

LIND-WALDOCK & COMPANY,
Respondent.

CFTC Docket No. 96-R15

INITIAL DECISION

Nixon claims that Lind-Waldock improperly forced him to liquidate all open positions in one of two self-directed accounts and seeks to recover $11,450. Lind-Waldock denies that it forced him to close the account or to liquidate any positions, and otherwise denies any violations.

The findings and conclusions below are based on both sides' documentary submissions and on the oral testimony of the witnesses for both sides, and reflect my determination that the testimony of respondent's witnesses was more plausible and convincing than the testimony of Nixon. Unless otherwise indicated, dates are in 1993, times are central time zone, and amounts are rounded to the nearest dollar.

Factual Findings

1. By letter dated April 26, 1993, Nixon informed Lind-Waldock that he had "developed a strategy for investing on my own and would like to open an account." Nixon indicated that he had been investing in futures for "over 10 years." [Exhibit B to Lind-

Waldock's final verified statement.] On his account application Nixon indicated that he had been investing in stocks and bonds for over 30 years, and that he had a liquid net worth over $100,000. [Exhibit A to Lind-Waldock final verified statement; *see* pages 45-47 of hearing transcript.]

2. On August 27, 1993, Nixon signed the various account-opening documents, including the customer agreement. Paragraph one of the customer agreement provided in pertinent part that:

> All transactions by the Broker on Customer's behalf shall be subject to . . . the Commodity Exchange Act . . . and all rules and regulations thereunder.

Paragraph four of the customer agreement provided in pertinent part that:

> Broker shall not be responsible for delays in the transmission of orders due to breakdown, excessive call volume of transmission or communication systems or facilities, or to any other cause or causes beyond Broker's reasonable control or anticipation.

Paragraph five of the customer agreement provided in pertinent part that:

> Customer agrees at all times relevant to this Agreement to maintain such margin in his/her account as Broker may from time to time in its sole discretion require, and will meet all margin calls in a reasonable amount of time. . . . For the purpose of this agreement, a reasonable amount of time shall be deemed to be one (1) hour.

[Exhibit to Amended Answer.]

3. On or about September 28, 1993, shortly after opening his first account (number 765020), Nixon informed John Rumsey of Lind-Waldock that he wanted to open a second account. Nixon told Rumsey that he would be funding the second account from a different source

and would be following a different trading strategy. Rumsey instructed Nixon to submit a letter confirming that Nixon would not be long and short in the same contract in the same expiration month in the two accounts.[1/] [¶ 12 of Nixon's motion filed October 7, 1995, and pages 49-51 of hearing transcript.]

On October 18, 1993, Nixon mailed the letter requested by Rumsey, which stated in pertinent part:

> [W]ould you please duplicate my current account . . . . for the purposes of opening another account, in which a different trading technique would be utilized? <u>I shall not be long and short in the same contract in the same expiration month in the two accounts.</u>

[Exhibit E to Lind-Waldock final verified statement (emphasis added).] Nixon testified that at this time he had no problem with the long-and-short rule. [*See* pages 49-51 of hearing transcript.]

Nixon also included in this letter the following eccentric suggestions:

> In order to make it possible to ascertain quickly which correspondence is for which account, would you please modify the mailing name or mailing address slightly? For example, could you list the name as N.T. Nixon, II, or N. Nixon. If you cannot do that, could you make a subtle change in the address to read "Box Four Two One" or abbreviate Pennsylvania as "Penna.", instead of "PA." If you are unable to do the above, could you make a minor mis-spelling of New Brighton"?

Lind-Waldock rejected Nixon's suggestions and simply addressed the

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[1/] The prohibition against a customer being long and short in the same contract in the same expiration month in two accounts (the "long-and-short rule") is codified in CFTC rule 1.46. The purpose of the long-and-short rule is to prevent a customer from artificially increasing open interest in the market. *See* pp. 14-15 of hearing transcript.

account statements for the second account: "N.T. Nixon, Account #2."

4. Trading began in the second account (number 733540) on October 25, 1993. Nixon generally made similar spread trades in both accounts, with most trades involving the December Kansas City Value Line future contract ("KC Value Line") and the December New York Stock Exchange Index future contract ("NYSE Index"). [*See* account statements, Lind-Waldock's discovery production, filed June 26, and November 20, 1996.] The account statements generally support Nixon's contention that:

> Since the money came from two separate personal funds, the two accounts were traded in different manners; i.e., depending on market conditions, the first account [no. 765020] was traded more aggressively by usually taking positions earlier and by usually taking more positions than the second [no. 733540].

[First page of factual description to complaint; *see* page 59 of hearing transcript.] However, on November 5 and 8, Nixon opened and closed identical spreads in both accounts at the same time.

5. On October 29, 30 and 31, Nixon was in violation of his agreement not to be long and short the same contract in the two account, by being long the December NYSE Index in the first account and short the December NYSE Index in the second account. This violation of the long-and-short rule contradicted Nixon's testimony that he had not been long and short in the same contract in the two accounts before November 9. [Pages 52-56 of hearing transcript.] Lind-Waldock would not discover this violation until after Nixon filed his reparations complaint.

6. On November 9: in the first account (765020), Nixon was long four December KC Value Lines, long one December KC Mini Value Line future ("KC Mini"), and short four December NYSE Index's; and in the second account (733540), Nixon was long three December KC Value Lines and short four December NYSE Index's.

Shortly before the market close that day, Nixon decided to reverse his position. However, the markets closed before he could place all of his orders,[2/] and Nixon only succeeded in selling the one KC Mini and two of the four KC Value Lines in the first account (765020), and selling eight KC Value Lines in the second account (733540). [*See* ¶ 17 of Nixon's final verified statement.] As a result: the first account (765020) was long two December KC Value Lines while the second account (733540) was short five December KC Value Lines; the first account was long four NYSE Index's while the second account was short four NYSE Index's; and Nixon was again in violation of the long-and-short rule.

In addition, at the market close on November 9, both of Nixon's accounts were undermargined: the first account (765020) was undermargined by $6,825; and the second account (733540) was undermargined by $43,125. [*See* pages 1-2 of Anderson letter to Nixon dated December 15, 1993 ("Anderson letter"), Exhibit F to Lind-Waldock's final verified statement; ¶ 20 of Nixon's final verified statement; and Lind-Waldock's reply to Nixon's

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[2/] According to Nixon, he had mistakenly believed that he had more time to place his series of orders because "unbeknownst to him, his watch had stopped and then started after he had set it that morning." *See* pages 60-61 and 108-109 of hearing transcript; and ¶ 17 of Nixon's final verified statement.

interrogatory number 13.]

7. On November 10, at about 6:40 a.m., Nixon spoke to Robert Peale at Lind-Waldock's order desk, and met both margin calls by placing orders that brought both accounts into spread positions, with correspondingly smaller margin requirements. During this conversation, Peale first brought up Nixon's first account on his computer screen while discussing the orders that would meet the margin call for that account, and then brought up Nixon's second account on his computer screen while discussing the orders that would meet the margin call for that account. At this point, Peale noticed that Nixon was in violation of the long-and-short rule. Nixon and Peale discussed several possible ways to cure this problem, with Peale emphatically rejecting Nixon's request to journal from one account to another. Nixon then placed the necessary orders to cure his margin and long-and-short problems with the second account. [Tape cassette recording of conversation at 6:40 a.m., Lind-Waldock's discovery production filed June 24, 1996; and pages 11-20 and 33-36 of hearing transcript; *see* page 2 of Anderson letter; and ¶¶ 22-24 of Nixon's final verified statement.]

At about 10:35 a.m., Nixon then placed a series of stop orders which if filled would have taken him out of the spreads and placed his accounts back under margin. [Tape cassette recording of conversation at 10:35 a.m., Lind-Waldock's discovery production filed June 24, 1996.]

At about 1:52 p.m., the stops had not been elected, and Peale

notified Nixon that the Lind-Waldock margin department had directed that the stop orders be cancelled, because if filled they would have put both accounts back under margin. Peale gave Nixon the opportunity to wire additional funds before re-entering the cancelled orders, an opportunity Nixon declined. Instead, Nixon placed a different order to buy two December NYSE Index's at the market, one for each account. Later, at about 3:03 p.m., Nixon placed two market-on-close orders, one for each account, to buy one NYSE Index. [Tape cassette recordings of conversations at 1:52 and 3:03 p.m., Lind-Waldock's discovery production filed June 24, 1996; *see* pages 2-3 of Anderson letter, pages 20-24 of hearing transcript, and first appendix to factual description to complaint.]

8. On Friday, November 12, Nixon called Lind-Waldock's order desk. When Nixon protested the cancellation of the stop-loss orders on November 10, Bob Peale referred Nixon to Beth Anderson, a Lind-Waldock compliance officer. Both sides agree that Nixon and Anderson discussed the long-and-short rule violation, the margin calls, and the cancelled stop-loss orders. [*See, e.g.,* Nixon letter dated November 13, 1993 (Nixon's "protest letter"), Lind-Waldock's discovery production, filed June 24, 1996; and Anderson letter.] And both sides also agree that the conversation between Nixon and Anderson was frustrating and difficult, but they substantially disagree about what was actually said.

Anderson credibly testified that she attempted with little apparent success to explain why a margin call could not be met with

a day trade and to explain the long-and-short rule. Anderson also credibly testified that she understood from Nixon that the principal reason he had opened the second account was for accounting purposes rather than to use two distinct trading strategies, and that she then told Nixon that Lind-Waldock had allowed him to open two accounts with the understanding that he would be following two truly different trading strategies.[3/] Finally, Anderson credibly testified that she did not instruct Nixon to liquidate any positions or to close either account, that Lind-Waldock did not place either account into a "liquidation only" status which would have been consistent with any determination to force Nixon to close an account, and that Nixon terminated the conversation before they could resolve his apparent misunderstanding of the long-and-short rule.[4/] [Pages 138-151 of hearing transcript; *see* letter from Anderson to Nixon dated December 15, 1993, Exhibit F to Lind-Waldock's Final Verified Statement.]

[3/] In its discovery replies, Lind-Waldock had asserted that Anderson told Nixon that he was in violation of the long-short prohibition on November 12. [*See* Lind-Waldock's replies to Nixon's requests for admission 10 through 24, and 94.] However, at the hearing, Lind-Waldock's counsel conceded that this was the result of careless draftsmanship, and that the replies should have reflected the fact that Nixon was in violation of the long-and-short rule on November 10, rather than on November 12. [Pages 153-158 of hearing transcript.]

[4/] According to Nixon, he terminated the conversation at this point because he "had other things to do." [Second page of factual description to complaint; *see also* tape recording of November 10, 1:52 p.m., conversation, and pages 26-27, 29, and 114-117 of hearing transcript.]

In contrast, Nixon asserted that Anderson essentially compelled him to close one of the accounts by nonsensically mischaracterizing the long-and-short rule as prohibiting customers from simultaneously placing identical spreads in both accounts and by unreasonably rejecting his request to journal trades between the two accounts. Nixon did not offer any explanation for why he repeated the request to journal between the accounts that Peale had rejected outright just two days earlier. [Pages 100-107 of hearing transcript; and first and second pages of factual description to complaint.]

Nixon's assertion that Anderson gave him no alternative but to liquidate immediately all of the positions in the second account is undermined by the fact that he did not even mention the purported forced liquidations in his protest letter written the next day, November 13, 1993, in which he set out a plethora of alleged misdeeds by Lind-Waldock. In this letter, Nixon complained about matters such as: a supposedly inaccurate confirmation statement (dated November 3); the cancellation of the stop-loss orders on November 10; a conversation with a night clerk on November 10; Peale's decision to transfer Nixon's call to Anderson on November 12; and Anderson's statement on November 12 that Lind-Waldock would "not be held liable" if he terminated the conversation or did not "do something [unidentified by Nixon] that the compliance department wants." Nixon also asserted in this letter that Anderson had told him that he could not place identical spreads in both accounts, and that therefore he had decided -- without further

consultation with Lind-Waldock -- to place orders "to eliminate the offending positions." [Lind-Waldock's discovery production, filed June 24, 1996.] In response to attempts to elicit a mere concession that he had not mentioned the purported forced liquidations in his protest letter, Nixon responded with testimony that was evasive and argumentative, and thus that ultimately undermined his assertion that Anderson had "forced" him to liquidate positions or to close one of the accounts.[5/] [*See* pages 105, 109-114, and 126-131 of hearing transcript.] Finally, Nixon's assertion that Lind-Waldock forced him to liquidate positions is contradicted by the fact that Lind-Waldock never placed either of Nixon's accounts in a "liquidation only" status, which would have been consistent with any determination to force Nixon to close an account. [*See* pages 143-144 of hearing transcript.]

[5/] Nixon's propensity to protest each and every thing to which he objects is underscored by the fact that throughout this proceeding he routinely filed a response to any submission by respondents and routinely filed an objection to, or request for reconsideration of, any ruling -- in which he would set out in minute detail each of his specific objections to respondents' submission or to the ruling -- even though in most instances such objections or requests are not contemplated by the reparations rules. *See, e.g.*, Exceptions to answer (filed January 2, 1996), Objections to amended answer (January 17), Letter (January 26), Notice (March 8), Objection (March 18), Motion to stay discovery deadlines (March 23), Objection to ruling (April 10), Objection to respondent's reply (June 18), Objection to ruling (June 27), "Clarification" (July 10), Opposition to respondent's request for a hearing (October 2), Objection to respondent's final verified statement (October 7), Motion to reconsider determination to grant respondent's request for a hearing (October 11), and Objection to January 17 order (January 28, 1997).

9. On Monday November 15,[6] Nixon placed orders to liquidate all of the positions in both accounts and closed both accounts. When asked why he had liquidated positions in both accounts, when he supposedly only had to liquidate the "offending" positions in one account, Nixon testified that he had decided that he "would be better off finding business elsewhere." [Page 127 of hearing transcript.] By November 16, all of Nixon's positions were closed out. The liquidations in the first account realized an aggregate net loss of $6,598, and the liquidations in the second account realized an aggregate net loss of $6,998.[7]

10. By letter dated December 15, 1993, Anderson replied to Nixon's protest letter. Anderson set out in detail how on the 10th of November Nixon's account had become undermargined and in violation of the long-and-short rule and why Lind-Waldock had cancelled the stop orders, and concluded that Nixon was not entitled to any adjustment. [Exhibit F to Lind-Waldock's final verified statement.]

Conclusions

The weight of the evidence supports the conclusion that Lind-Waldock did not force Nixon to liquidate his open positions on

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[6] Neither side produced evidence concerning the value of Nixon's open positions on November 11 and 12, or at the open on November 15.

[7] In the second account, Nixon realized a $1,148 profit on the liquidation of NYSE Index's, and realized a $11,429 loss on the liquidation of KC Value Lines. This loss on the KC Value Lines forms the basis for Nixon's damage calculation. *See* damages calculation attached to complaint. Nixon produced no evidence about the price of the December NYSE Index's or the December KC Value Lines after November 16.

November 15 and 16, but rather that the manner in which he closed his positions was the result of his own unreasonable interpretation of Anderson's explanation of the long-and-short rule and the result of his own rash reaction to events on November 9, 10 and 12. Nixon produced no reliable evidence that Lind-Waldock acted unreasonably, much less recklessly or with fraudulent intent, in its dealings with him, and produced no reliable evidence that Lind-Waldock informed him that he was obligated to liquidate immediately any open position. Given Nixon's propensity to protest promptly matters both minor and major -- established by his protest letter and the manner in which he litigated this case -- his failure to mention the purported forced liquidations in his protest letter weighs substantially against his claim. Other factors weighing against Nixon's claim include his inability or refusal to provide a convincing explanation for his failure to protest promptly the purported forced liquidations, and by the fact that Lind-Waldock had not placed either account in a "liquidation only" status. In these circumstances, Nixon's claim must fail.

ORDER

No violations having been shown, the complaint in this matter is DISMISSED.

Dated July 10, 1997.

Philip V. McGuire,
Judgment Officer