# UNITED STATES OF AMERICA Before the COMMODITY FUTURES TRADING COMMISSION

## Appearances:

William E. Peveto and Elizabeth Peveto, pro se.

Steve Malina, Esq. on behalf of Respondents First Western Commodities and Futures, Ltd. and LIT Division of First Options.

## Before:

Painter, ALJ

## **OPINION:**

On January 30, 1998, William E. Peveto and Elizabeth Peveto, Complainants, filed a complaint with the Commodity Futures Trading Commission ("Commission") alleging that Mark Anthony Stirek, First Western Commodities and Futures, Ltd., and LIT Division of First Options, Respondents, wrongfully liquidated their account. On July 2, 1998, Complainants amended their complaint to further charge that Respondents made unauthorized trades in their account and misrepresentations with regards to contract prices and commissions. Respondents

deny Complainants' claims and maintain that both industry standards and their Customer Agreement<sup>1</sup> permitted liquidation of Complainants' under-margined account.<sup>2</sup>

The facts in the following are based on the record. Where there were conflicting facts, determinations were based on weighing the evidence and the credibility of its source.

## Finding of Fact

Unless otherwise indicated all dates occurred in 1997.

- 1. Mark Anthony Stirek ("Stirek") is registered as an Associated Person and Principal of First Western Commodities and Futures, Ltd. ("First Western") and a member of the National Futures Association ("NFA"), residing at Brambley Creek Ct., Las Vegas, Nevada 89129.<sup>3</sup>
- 2. First Western is a member of NFA and a Guaranteed Introducing Broker clearing through LIT Division of First Options ("LIT"). First Western's principal place of business is 2620 Regatta Dr. # 119, Las Vegas, Nevada 89128.<sup>4</sup>
- 3. LIT is a Futures Commission Merchant ("FCM"), a Securities Broker-Dealer, and a member of NFA and the National Association of Securities Dealers. LIT is a Delaware Corporation with a principal place of business located at 141 W. Jackson Boulevard, Suite # 2000A, Chicago, Illinois 60604.5
- 4. On September 4, William E. Peveto and Elizabeth Peveto opened a non-discretionary account with Respondents that was introduced through First Western and managed by Stirek.<sup>6</sup>

<sup>&</sup>lt;sup>1</sup> Hearing Exhibits R-1, Customer Agreement signed by both complainants.

<sup>&</sup>lt;sup>2</sup> Answer of Respondents and Hearing Tr. page 80, Maraffio testimony.

<sup>&</sup>lt;sup>3</sup> Answer of Respondents.

<sup>&</sup>lt;sup>4</sup> Answer of Respondents.

<sup>&</sup>lt;sup>5</sup> Answer of Respondents.

<sup>&</sup>lt;sup>6</sup> Hearing Exhibit R-1. Account start-up documents filled out and signed by both complainants.

References to "Peveto" made in the following are to William E. Peveto as he conducted most if not all communications regarding this account.

5. Complainants signed a customer agreement stating, in pertinent part:

Customer will maintain such margin and collateral as Broker may require from time to time and will pay on demand any amount owing with respect to any of Customer's accounts. Customer understands that Broker's margin requirements may exceed those set by any exchange and may be increased without prior notice, including with respect to existing positions.

Customer acknowledges that if Broker fails to receive sufficient funds to pay for any commodity or to satisfy any demand for initial or variation margin within a reasonable time after demand, and, in the absence of unusual circumstances, one hour shall be deemed a reasonable time, Broker shall be entitled, but not obligated, to sell any property held by Broker in any of Customer's accounts, offset any open positions and liquidate Customer's accounts in whole or in part. Customer recognizes that under present regulations and practices Broker is not required to give Customer prior notice of such actions and Customer will be liable for any resulting loss.<sup>7</sup>

- 6. Complainants further agreed that "Reports of execution of orders shall be deemed conclusive and binding immediately upon Customer receiving the report of execution" and "to give written notice to the Compliance Department in the event of unresolved, disputed transactions or other similar problems."
- 7. On October 27, Complainants' account, consisting of 10 Dec 97 Dow Jones Industrial Average contracts ("DJ Avgs"), 3 Dec 1997 E-Mini S&P 500 ("E-minis"), and 3 Jan 98 NYM Natural Gas contracts ("NYMs"), 9 fell under margin. 10
- 8. On October 27, after a sharp decline in the market, Stirek telephoned Peveto and recommended that Peveto liquidate all positions. Peveto declined.<sup>11</sup>

<sup>&</sup>lt;sup>7</sup> Hearing Exhibit R-1, Customer Agreement.

<sup>&</sup>lt;sup>8</sup> Hearing Exhibit R-1, Customer Agreement.

<sup>&</sup>lt;sup>9</sup> Peveto Complaint.

<sup>&</sup>lt;sup>10</sup> Account Statement, October 27 attached to Peveto Complaint, and Hearing Tr. pages 17-18, Peveto testimony.

- 9. On October 27, Stirek and Peveto spoke on the telephone at least 10 times. The Court finds that these calls dealt primarily with the decline in the market, whether or not to liquidate the account, and the under-margined status of the account.<sup>12</sup>
- 10. On October 28, Peveto wired \$60,000 into his account.<sup>13</sup> The Court finds that Peveto wired the money in response to a margin call.
- 11. On October 28, after the \$60,000 wire, Peveto's account remained under-margined by approximately \$42,802.86.<sup>14</sup>
- 12. On October 28, Stirek and Peveto spoke on the telephone at least 8 times and on October 29 at least 15 times.<sup>15</sup> The Court finds that these calls dealt primarily with the under-margined status of the account.
- 13. On October 30, at 6:42 a.m. Stirek faxed Peveto a margin status report to notify him of a margin call on his account. Peveto called Stirek to request a more legible copy. Stirek faxed the document again at 6:52 a.m. and once more at 6:55 a.m. <sup>16</sup>
- 15. The 6:55 a.m. fax was legible but dated October 28. Peveto telephoned Stirek to discuss the margin call and request information reflecting the account status as of October 29.<sup>17</sup>

<sup>&</sup>lt;sup>11</sup> Hearing Tr. pages 17-18, Peveto testimony.

<sup>&</sup>lt;sup>12</sup> Answer of Respondents attached as Exhibit B, "Long Distance Call Report."

<sup>&</sup>lt;sup>13</sup> Hearing Tr. page 20, Peveto testimony, See also Hearing Tr. page 94, Maraffio testimony, and infra note 53.

<sup>&</sup>lt;sup>14</sup> Hearing Exhibit R-3, Margin Status Report. This report is dated October 28 but Respondents contend that it represents figures from October 29. If it does represents the account status as of October 29, then the October 28 under-margin amount would be higher than \$42,802.86. The reason for this is that there was a jump in the market from October 28 to October 29. It is probable then that the under-margin amount would be lower on October 29 than on October 28.

<sup>15</sup> Answer of Respondents attached as Exhibit B, "Long Distance Call Report".

<sup>&</sup>lt;sup>16</sup> See Peveto Complaint and Attached three faxes denoting the times that they were received.

<sup>&</sup>lt;sup>17</sup> Peveto Complaint.

- 16. Peveto expressly refused to provide any additional funds to meet the October 30 margin call without written proof of the deficit dated October 29. A margin status report dated October 29 was never sent to Peveto. Nevertheless, Peveto knew on October 30 that the account was under-margined. 19
- 17. On October 30 at approximately 1:15 p.m., Stirek notified Peveto that at 8:17 a.m. Peveto's DJ Avgs<sup>20</sup> were liquidated through the Chicago Board of Trade ("CBT") and at 8:27 a.m. Peveto's E-Minis were liquidated through GLOBEX, an on-line trading system of the Chicago Mercantile Exchange.<sup>21</sup>
- 18. On October 31, Peveto telephoned Stirek to inquire about his remaining positions and Stirek replied that Peveto had 3 Jan 98 NYMs left in his account.<sup>22</sup>
- 19. On November 4 Peveto closed his account with Respondents and received the remaining balance, \$18,339.16.<sup>23</sup>
- 20. On November 15, Peveto filed a complaint with Cheryl Maraffio ("Maraffio"), senior compliance officer for LIT.<sup>24</sup>

<sup>&</sup>lt;sup>18</sup> Hearing Tr. pages 20-22, Peveto testimony and page 94, Maraffio testimony.

<sup>&</sup>lt;sup>19</sup> Hearing Tr. page 24, Peveto testimony and page 94 Maraffio testimony. Both sides agree that on October 30, after receiving the 6:55 a.m. fax and Peveto called Stirek and requested "updated" information from October 29. It is clear from the record that although he did not receive any further information he was well aware that the account was under-margined by between \$48,000-\$55,000.

<sup>&</sup>lt;sup>20</sup> Exhibits submitted by Respondents on May 8, 1999, Exhibits C—Printout of CBT trade register.

<sup>&</sup>lt;sup>21</sup> Exhibits submitted by Respondents on May 8, 1999, Exhibits E—Printout of GLOBEX trade register.

<sup>&</sup>lt;sup>22</sup> Peveto Complaint. See also Hearing Exhibit R-9, Letter from Stirek faxed to Peveto on October 30.

<sup>&</sup>lt;sup>23</sup> Hearing Exhibit R-9, Account Activity Report for November 3, and Letter from Peveto to Stirek requesting remaining amount of \$18,336,16 and Peveto Complaint.

<sup>&</sup>lt;sup>24</sup> Peveto Complaint and Hearing Tr. page 81-2, Maraffio testimony. This complaint only concerned the liquidation and contained no allegations of unauthorized trades or misrepresentations with respect to prices or commissions. *See* Hearing Exhibit R-6, R-7, Maraffio's note about her conversation with Peveto, and R-10, Maraffio's letter informing Peveto of the conclusions of her investigation ("Maraffio letter").

21. On November 24, Peveto received the results of Maraffio's investigation: that the liquidation of Peveto's DJ Avgs and E-Minis was a valid liquidation.<sup>25</sup>

#### Discussion

## **Credibility Determinations**

The Commission's policy on demeanor based determinations recognizes the "efficacy of oral testimony as a fact-finding tool" and that hearings are effective tools in assessing credibility. Peveto's demeanor during his oral testimony, at best, does not favor a positive credibility determination. In addition, Peveto's credibility is undermined by the imprecise and inconsistent evidence he presented to the Court.

While the evidence clearly shows that Peveto's account was under an ongoing four-day margin call, Peveto's complaint states that he received only one margin call. The complaint also states that Stirek gave Peveto a margin call at 6:55 a.m. on October 30, which is evidenced by the fax attached to the complaint denoting "6:55 a.m." as the time the fax was received. At the hearing, however, Peveto claimed that he was unsure of the time of the call but that the 8:17 a.m. liquidation occurred "...about 15 minutes after he talked to me...and gave me the margin call." This story is simply inconsistent with the facts: 8:17 a.m. is hardly 15 minutes after 6:55 a.m. 30

<sup>&</sup>lt;sup>25</sup> Hearing Tr. pages 72-80, Maraffio testimony and Hearing Exhibit R-10, Maraffio letter.

<sup>&</sup>lt;sup>26</sup> In re Starvk, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,811 (CFTC Dec. 18, 1997).

<sup>&</sup>lt;sup>27</sup> In re Abrams, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,684 at 40,255 (CFTC Apr. 29, 1993).

<sup>&</sup>lt;sup>28</sup> See Peveto Complaint.

<sup>&</sup>lt;sup>29</sup> Hearing Tr. page 24, Peveto testimony.

<sup>&</sup>lt;sup>30</sup> Peveto tried to make the case that he did not receive notice prior to October 30 and that on October 30 he did not get a full hour to meet the margin call as stipulated in the Customer Agreement. However, there is overwhelming evidence to prove that not only did Peveto receive notice at 6:55 a.m., over an hour before Stirek liquidated the positions, but that Peveto had a margin call as early as October 27.

Moreover, despite numerous requests from Respondents and ALJ's inquiries, Peveto did not calculate damages on the issues of alleged unauthorized trading and misrepresented prices and commissions.<sup>31</sup> Peveto admits that, for some of the trades he alleges were unauthorized, he suffered no damages since he actually made money. He failed to identify any alleged unauthorized trades that lost money.<sup>32</sup> In fact, Peveto failed to plead any element of his claims of unauthorized trade or misrepresentations with any specificity and failed to present sufficient evidence to satisfy the burden of proof for either issue.<sup>33</sup>

Respondents' inability to provide the Court with clear and accurate records did not enhance their defense against Complainants' wrongful liquidation claim. Clearly, the date and time stamped on the liquidation order tickets do not conform to the exchange records. It appears that the date stamp did not advance the "2" to a "3" when it rolled from "29" to "30." However, despite the erroneous timestamp, there is probative evidence that the liquidation did take place on October 30 as the Respondents contend. Respondents submitted to the Court printouts from the CBT and GLOBEX which are valid and reliable evidence and which establish that the liquidation occurred on October 30 at 8:17 a.m. and 8:27 a.m., respectively.<sup>34</sup>

It is important to note another defect in Respondents' defense: Stirek did not show up to the hearing to defend himself, thus, impairing his own credibility. When the Court finds two witnesses equally credible or incredible, as is the case here, "the Court need only find that

<sup>&</sup>lt;sup>31</sup> Hearing Tr. pages 29-30, Peveto testimony.

<sup>&</sup>lt;sup>32</sup> Hearing Tr. page 10-14, Peveto testimony.

<sup>&</sup>lt;sup>33</sup> Although Peveto alleged wrongful trading and misrepresentations, he submitted very little evidence to the Court to demonstrate either claim and the evidence he did submit was unclear and insufficient. Peveto claims to have complained to Stirek about these two charges but he never made a formal written complaint with LIT or First Western. Nor did he mention the charges in his November 15 Complaint to Maraffio. Furthermore, Peveto continued trading with Stirek despite his feeling that Stirek did not remedy his complaints.

<sup>&</sup>lt;sup>34</sup> Exhibits submitted by Respondent on May 8, 1999, Exhibits C and E.

complainants have failed to establish their version of the facts with requisite certainty."<sup>35</sup> "In other words, a tie in credibility goes against complainants."<sup>36</sup> Complainants in this case have failed to put on a prima facie case for any allegations in their complaint.

## Wrongful Liquidation

Complainants claim that since Stirek liquidated their positions without express permission, his actions were unauthorized and therefore, wrongful.<sup>37</sup> Unauthorized trading of a commodity interest by a FCM, broker, or associated person on a customer account is a violation of Regulation § 166.2. However, the liquidation at issue here was not unauthorized because it was done in accordance with industry standards and the Customer Agreement in order to avoid the risk of further loss on Complainants' under-margined account.

The Commission recognizes margin as a device crucial in protecting merchants, brokers, and associated persons:

Margin is a security deposit to insure that futures commission merchants have adequate customer funds to settle open positions and is required by brokerage houses and exchanges to assure their own financial integrity and the financial integrity of the entire market place.<sup>38</sup>

Sections 5a(12) and 8a(7) of the Act prohibit the Commission from making rules "relating to the setting of margin levels." The Commission authorizes exchanges to determine

<sup>35</sup> Webster v. Refco, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,578 at 47,669 n. 46 (CFTC Feb. 1, 1999) (citing <u>Guiberson v. United States</u>, Case No. 76-34- C2, 1978 WL 1250 at \*5 (D. Kan. Dec. 13, 1978) (unreported op.); <u>Ackerman v. Medical College of Ohio Hosp.</u>, 680 N.E.2d 1309, 1311 (Ohio Ct. App. 1996)).

<sup>&</sup>lt;sup>36</sup> Webster v. Aiello, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,578 at 47,669 n. 46 (CFTC Feb. 1, 1999).

<sup>&</sup>lt;sup>37</sup> See Peveto Complaint.

<sup>&</sup>lt;sup>38</sup> Friedman v. Dean Witter and Co., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 at 25,537 (CFTC Nov. 13, 1981) (citing, Baker v. Jones, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,167 at 24,770 (CFTC Jan. 27, 1981)). Cf. Evans v. Kerbs and Co., 411 F. Supp. 616, 622 (1976)).

<sup>&</sup>lt;sup>39</sup> <u>Baker v. Jones & Co.</u>, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,167 at 24,770 (CFTC Jan. 27, 1981).

margin levels to ensure the economic viability of FCMs and of the commodity futures market. Moreover, firms can set even higher margin levels than those required by the exchange and demand subsequent deposits according to market fluctuations.<sup>40</sup> The amount of margin set by a particular firm represents the amount of risk that firm is willing to take on.<sup>41</sup>

In this case, Complainants signed a customer agreement acknowledging their responsibility to satisfy LIT's margin requirements and agreeing to satisfy those requirements within one hour of receiving a margin call, whether written or oral. The evidence establishes beyond any doubt that positions were liquidated on October 30 solely because Peveto did not meet a lawful margin call.

According to the current standards, the Commission does not require that customers receive margin calls before liquidation of under-margined accounts.<sup>42</sup> "The Commission has consistently upheld the right of a broker to liquidate a customer account when the account is under-margined or the broker otherwise deems liquidation necessary to protect itself or the customer based upon its own good faith business judgement."<sup>43</sup> Thus, in order to establish that the liquidation was wrongful Peveto must prove either that Respondents "misled him about their

<sup>40</sup> Id. at 24,770-71.

<sup>&</sup>lt;sup>41</sup> Mohammed v. Carl/312 Futures, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,229 at 38,665 (CFTC Jan. 27, 1992).

<sup>&</sup>lt;sup>42</sup> See Glass v. Rosenthal, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,455 at 47,168 (CFTC Nov. 5, 1998), Preston v. Refco, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,233 at 45,967 (CFTC Dec. 31, 1997), Nacht v. Merrill Lynch, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,366 at 42,706 (CFTC Apr. 17, 1995), Horstein v. Prudential-Bache Sec., Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,476 at 36,809 (CFTC June 9, 1989), Roberts v. Friedman & Co., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,063 at 32,131 (CFTC may 15, 1986), Stahl v. Woodstock Commodities International, Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,661 at 30,794 (CFTC July 10, 1985), and Baker v. Jones & Co., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,167 at 24,770-71 (CFTC Jan. 27, 1981).

<sup>&</sup>lt;sup>43</sup> Glass v. Rosenthal, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,455 at 47,168-69 (CFTC Nov. 5, 1998).

margin policy or that they liquidated his account in bad faith."<sup>44</sup> Peveto did not make or attempt to make any showing that he was misled about the margin policy and he signed a customer agreement which clearly states the Respondents' margin policy.

As for the question of whether Respondents acted in bad faith, Peveto claims that the timestamped trade ticket is evidence of the fact that the liquidation took place on October 20, before the account was under-margined. However, this Court finds that the timestamped trade ticket is the result of an improperly set time-stamping devise and that the liquidation occurred on October 30, as evidenced by the printouts from the CBT and GLOBEX. 45

Peveto further claims that even if the liquidation occurred on October 30, Respondents acted in bad faith with respect to the margin call. Peveto claims to have received one margin call on October 30, which he asserts was a deficient margin call since the margin status report faxed to him did not represent the most current status of the account. However, Peveto not only received a fax, he also received a telephone call from Stirek notifying him of the status of his account. In that call, Stirek told Peveto that due to a malfunctioning fax machine, he would not be able to send Peveto a written copy of the most current under-margin amount but assured Peveto that the account was under-margined by between \$48,000 and \$55,000.

"Nothing in the Act or regulations requires a futures commission merchant to obtain the consent of a customer to liquidate positions on an undermargined account." The Customer

<sup>&</sup>lt;sup>44</sup> See id. See also Mehta v. Opportunities in Options, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,426 at 47,013 (CFTC Sept. 25, 1998).

<sup>&</sup>lt;sup>45</sup> Exhibits submitted by Respondent on May 8, 1999, Exhibits C and E.

<sup>&</sup>lt;sup>46</sup> See Peveto Complaint, and Hearing Tr. pages 20-22, Peveto testimony.

<sup>&</sup>lt;sup>47</sup> Mohammed v. Carl/312 Futures, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,229 at 38,665 (CFTC Jan. 27, 1992).

Agreement does not require a written margin call. As Nevertheless, Peveto received a written margin call and an oral margin call. This not only constitutes a lawful margin call, it exceeds the notice to which Peveto was legally entitled. In any event, the evidence clearly shows that Peveto was aware his account was under-margined well before he received the October 30 margin call.

On October 27, when the market "went down dramatically," Stirek gave Peveto the first margin call. <sup>49</sup> Peveto claims that Stirek did not give a margin call on October 27 but did suggest liquidating the account. <sup>50</sup> Peveto also claims that he wired in \$60,000 according to his own calculations and not due to any margin call. <sup>51</sup> The Court is not persuaded by Peveto's testimony. <sup>52</sup> The Court finds that Peveto wired in \$60,000 on October 28, in response to repeated telephone requests made by Stirek. This finding is supported by the Repondents' telephone records which show that there were 18 phone calls from Stirek to Peveto on October 27 and 28 and by Maraffio's testimony that Peveto told her he had a \$96,000 margin call but refused to send in more than \$60,000 without written proof of the deficit. <sup>53</sup>

Having previously discussed the under-margined status of Peveto's account on October 27, the parties unquestionably continued to discuss the deficit on October 28 and 29. Peveto claims that Stirek did not mention the margin deficit in any of those calls. However, the

<sup>48</sup> Hearing Exhibit R-1, Customer Agreement.

<sup>&</sup>lt;sup>49</sup> Hearing Tr. page 18, Peveto testimony.

<sup>&</sup>lt;sup>50</sup> Hearing Tr. page 17-18, Peveto testimony.

<sup>&</sup>lt;sup>51</sup> Hearing Tr. page 20, Peveto testimony.

<sup>&</sup>lt;sup>52</sup> Assuming arguendo, that Peveto did not receive a margin call, he was well aware, according to his own calculations, that his account was under-margined by at least \$60,000.

<sup>&</sup>lt;sup>53</sup> Hearing Tr. page 94-95. Maraffio testified that, while in her capacity as Senior Compliance Officer for LIT, Peveto told her that he was given a \$96,000 margin call but refused to send in more than \$60,000. See also Answer of Respondents (March 17, 1998) attached as Exhibit B, "Long Distance Call Report" (indicating that there were at least 33 telephone calls between Stirek and Peveto on October 27, 28, and 29).

relationship between Stirek and Peveto was based solely on the futures account Peveto held. When Peveto's account became under-margined, Stirek, as the introducing broker, was exposed to significant financial risk.<sup>54</sup> It is unreasonable to expect the Court to believe that Stirek, faced with the risk of liability for any deficit on the account, would not mention the account status once in 23 telephone calls.<sup>55</sup> Furthermore, Peveto had "an unequivocal duty to monitor his own account, and to deposit additional margin money when a margin call [arose]." Surely, Peveto should have, and a reasonable person would have, inquired about whether the \$60,000 was received and whether it was sufficient to cover the margin requirement.

## Conclusion

The Commission's policies and court decisions "clearly support the industry practice of liquidating an under-margined account, at least when notice has been given." It has been established by a preponderance of the evidence that Peveto had an on-going four-day margin call. Regardless of the date of the margin status report, Peveto was given reliable information about the deficit status of his account. At that point, Peveto was obligated to meet the margin requirement. Not only did Peveto fail to meet the margin requirement, he expressly stated that he would not send any more money. Futures commission merchants, commodity trading advisors, and associated persons cannot fairly be forced to take on the risk of a customer's account, when

<sup>&</sup>lt;sup>54</sup> Nacht v. Merrill Lynch, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,366 at 42,706 (CFTC Apr. 17, 1995).

<sup>&</sup>lt;sup>55</sup> Peveto offers no explanation as to what other reasons existed for the parties to speak at such a high frequency on October 28 and 29.

<sup>&</sup>lt;sup>56</sup> Mohammed v. Carl/312 Futures, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,229 at 38,665 (CFTC Jan. 27, 1992).

<sup>&</sup>lt;sup>57</sup> Horstein v. Prudential-Bache Sec., Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,476 at 36,809 (CFTC June 9, 1989) (citing Stahl v. Woodstock Commodities International, Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,661 at 30,794 (CFTC July 10, 1985)).

that customer refuses to meet margin requirements.<sup>58</sup> Therefore, Respondents were justified in liquidating Peveto's account.

#### Order

Complainants have failed to prove by a preponderance of the evidence that they sustained any monetary damages by reason of unlawful conduct on the part of Respondents. Accordingly, this matter is DISMISSED with prejudice.

Issued this 18 day of June, 1999.

George H. Painter

Administrative Law Judge

Legal Intern:

Christina A. Barone

<sup>&</sup>lt;sup>58</sup> See Glass v. Rosenthal, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,455 at 47,168 (CFTC Nov. 5, 1998), Preston v. Refco, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,233 at 45,967 (CFTC Dec. 31, 1997), Comtrade, Inc. v. Cargill. Investor Services. Inc., [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,734 at 44,037 (CFTC July 15, 1996), Nacht v. Merrill Lynch, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,366 at 42,706 (CFTC Apr. 17, 1995), Horstein v. Prudential-Bache Sec.. Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,476 at 36,809 (CFTC June 9, 1989), Roberts v. Friedman & Co., [1986-1987Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,063 at 32,131 (CFTC may 15, 1986), Stahl v. Woodstock Commodities International. Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,661 at 30,794 (CFTC July 10, 1985), and Baker v. Jones & Co., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,167 at 24,770-71 (CFTC Jan. 27, 1981).