U.S. COMMODITY FUTURES TRADING COMMISSION
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ALFRED JOSEPH SANTOS, Complainant	)	
v.	)	CFTC Docket No. 05-R054
ALARON FUTURES AND OPTIONS (d/b/a "ALARON TRADING CORPORATION"), Respondent	)	

INITIAL DECISION

The record as it stands is sufficient to resolve this case without an oral hearing, for there is no issue requiring an assessment of credibility. The essential facts are simple:

Complainant, by phone, entered an order for a spread transaction on May 27, 2003. Upon realizing that he would be on vacation, and because he did not want to have to monitor an open position while he was gone, he called Alaron again and placed a cancellation order. The parties agree that the cancellation was not effective because the spread transaction had already been executed. There appears to be no dispute as to the accuracy of Alaron's assertion that the report of the execution of the original order had not arrived at the desk when complainant called back, and that the clerk who took his cancellation order did not know it was too late to cancel. Complainant left on vacation and the options expired while he was gone for a $5,800 loss.[1]

[1] Complainant's assertion that he did not know of the open position has been challenged by respondent, which seeks an inference that he must have learned of his open position from their on-line system. Although complainant does not dispute respondent's records showing four apparent log-ins to his account after he placed the cancellation order, he does say he did not know how to use the computer system and had not used it to place orders or track positions in the several years his account was open. Thus, he argues, what he calls the four log-in "attempts" actually *support* his case by demonstrating his ineptitude. The argument, it is noted, finesses the issue of why he tried to log in several times on that one particular day if in fact he didn't know how to use the system and had not used it for several years. Nevertheless, there is no evidence that complainant ***actually*** accessed his account status showing an open position, and therefore complainant's assertion that he did not know is unrebutted and accepted, *arguendo*, for purposes of disposing of this matter.

The question presented in this matter is whether, as complainant alleges, Alaron was obligated under the Commodity Exchange Act or the Commission's regulations to call complainant to tell him that his first order was filled because the cancellation was too late.

A tape recording of the cancellation order is in the record. That tape establishes three important facts surrounding the placement of the order: (1) When complainant placed the order to cancel, he gave no instructions, voiced no expectations, and made no requests regarding notification; (2) respondent's order taker unhesitatingly accepted the order with no indication as to whether the cancellation was or was not timely; and (3) respondent's order taker did not offer to call or otherwise indicate in any fashion that complainant would be notified regarding the result of either the spread order or the attempt to cancel.

Complainant contends that respondent previously had contacted him with trade results and that the departure from that practice here violated its duty to him. Although a commodity broker firm accepting telephone orders in volatile trading markets is required to make available to its customer timely and accurate information regarding the customer's trading results, complainant has not established that the information was not made available to him. First, complainant could have obtained the information on line had he successfully negotiated his way through respondent's system after logging in to his account.[2] Second, it is undisputed that respondent sent the information about the opened spread transaction to complainant in the form of the standard confirmation statement, which he did not receive only because he had left.[3] He may not have gotten it in time to avoid losses from the expired position, but that was due only to his own actions.

As to whether respondent had assumed a duty to contact complainant with confirmations by allegedly having done so in the past, that assertion by complainant attempts to convert a voluntary customer service (it is nowhere in his customer agreement) into a duty enforceable by money damages. Neither side offered to, or presumably ever could at this point, establish with reliability the specific contents of these vaguely referenced conversations when complainant placed orders previously, and no reliable information can be inferred about what was said from the existence of *some* confirmation calls alone. Complainant has not asserted that respondent after opening the account ever expressly assumed such a duty to take this extra step for every order. While he might have appreciated such service, in the absence of a specific promise left

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[2] In addition to the questions surrounding his motivations for making log-in attempts, complainant also has not explained why, if he could not obtain any information despite trying four times, he did not then call respondent directly either for help in accessing his account or for an update on his order status and open positions.

[3] Complainant has not established that respondent was obligated to engage in any other form of notification. Respondent contends that when complainant opened his account three years earlier he waived email or telephone confirmations by checking the box stating that he himself would call back for confirmations. Complainant claims the account opening information was ambiguous because despite those waivers he went ahead and filled in his telephone number and email address, showing he wanted to be contacted. After three years, it is hard to imagine that respondent could legitimately be required to go back to review the account opening screen every time complainant made a new transaction, to note an alleged ambiguity, and then to ignore complainant's specific notification selection and instead take action on the basis of information made unnecessary by that selection.

unfulfilled, he has no argument that doing something extra automatically should become a requirement enforced by law.[4] *Compare Avis v. Shearson Hayden Stone, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,379 (CFTC Apr. 13, 1982) (salesman's express promise to undertake additional duty obligated him to carry it out in a professional manner).

Finally, although complainant suggests that respondent's clerk had a duty to refuse the cancellation order or to caution him that it might have been untimely, the Commission has previously stated that no such duty exists. Complainant's experience here differs markedly from that of the customer in *Do v. Lind-Waldock & Company*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,516 (CFTC Sept. 27, 1995). In *Do*, the customer placed a market order and then called five minutes later to attempt to cancel that order. The order taker, believing that the market order already would have been executed, told Ms. Do that the cancellation was too late and refused to accept the cancellation. Normally, as it turned out, the order taker would have been right in his belief, but unusual trading conditions unknown to the clerk had triggered a trading halt on the exchange and therefore Ms. Do's cancellation indeed would have been effective if she had been allowed to place the order. The Commission held that the order taker should have checked on the status of the order instead of simply stating that the market order already would have been executed, and awarded Ms. Do damages based on losses experienced in the opened position that she had tried to avoid taking.

Here, complainant was allowed to place his spread order without any interference by the clerk. The record is silent as to what the clerk would have found had she checked the status of the order, but *Do* did not impose a duty to check on the status: the violation occurred in making what turned out to be a false statement, and based thereon refusing to accept an order. *Do*, in fact, expressly anticipated complainant's case here. In deciding what "reasonable steps" the clerk could have taken instead of what he did, the Commission stated that the employee could have cautioned complainant and let her make the decision based on that caution. On the other hand, the Commission expressly stated that "[t]he employee could have accepted and forwarded the cancellation order to take its chances on the floor." *Do* at pg 43,321.

Accepting complainant's cancellation order and letting it take its chance on the floor – *i.e.*, carrying out complainant's expressed wish – is, of course, what respondent's clerk did here. Unfortunately for complainant, his decision not to monitor his account and to leave town without any confirmation left him vulnerable to losses he suffered in his open position. While he may have wished that respondent's agents would have acted expeditiously to protect him from his own carelessness, that wish does not convert to a legal obligation on respondent's part.

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[4] Complainant, in this regard, likewise has not established that a series of telephone calls involving specific transactions reported to him by respondent's order takers could legally modify his contract with respondent as to all transactions from that point on or increase respondent's legal obligations beyond those set by statute and by regulation. A few telephoned confirmations cannot be seen as authority to bind an entire company to operate entirely differently than envisioned by complainant – and relied upon by respondent – when he opened the account.

Accordingly, the complaint is DISMISSED.

Dated: August 10, 2006

JOEL R. MAILLIE
Judgment Officer