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RAYMOND SPINNER, F.B.O, Complainant	)	
v.	)	CFTC Docket No. 00-R115
MICHAEL JOHN MCGRATH and DEAN WITTER REYNOLDS, INC. (d.b.a. "MORGAN STANLEY DEAN WITTER") Respondents	)	Served via overnight delivery

INITIAL DECISION

Neither side engaged in discovery or submitted a verified statement. The record in this case thus consists only of the complaint, an addendum to the complaint, and respondents' joint answer. A review of these pleadings reveals that the case involves mostly undisputed facts and that the only issue in contention involves a legal determination regarding whether respondents violated a duty to carry out Spinner's order to liquidate an account properly. This determination can readily be made on the facts as submitted and therefore no oral hearing is necessary.

The following facts are set out in the complaint and the attached exhibits. Complainant Spinner, the trustee of an employee profit-sharing plan for his self-named printing company, spoke with respondent McGrath in late February 2000.[1] He told McGrath that he wanted to redeem the plan's commodity pool interest by the end of his company's fiscal year, April 30, and to "roll over" the funds into a 401K plan. McGrath told complainant that pool redemptions had to occur on the last day of the month and that payment of funds could take up to two weeks after liquidation. Spinner's complaint states that therefore they agreed that they would redeem the pool interest as of the end of March.

The complaint also admits, however, that Spinner did not at that time request the forms necessary to accomplish the liquidation. Instead, he waited until sometime in March to request them from McGrath's assistant, who sent them to him on March 16. Spinner then waited another full week, until March 23, to tell her he had not yet received them; she agreed to send new ones. Later that same day, the first set of forms arrived and Spinner signed them. Then he mailed them to

[1] According to the respondents' answer (page 2), McGrath had recently assumed responsibility for the account and was calling to introduce himself.

McGrath, using the postage-paid envelope provided. At no point during this time, apparently, did Spinner and McGrath talk about the planned redemption.

McGrath's office received the papers on Monday, March 27, and the next day he verified Spinner's signature (as did Jill Richmond, the acting branch manager). McGrath then forwarded them to New York. When complainant called in mid-April to inquire about his funds, he claims he was first told the check was on its way, but in late April McGrath informed him that the redemption had not occurred because the forms had not arrived in New York until it was too late. According to the complaint, the forms had arrived in New York on April 3.

Spinner states that the failure to timely liquidate the futures portion of the profit-sharing plan cost the plan $11,910.63 in trading losses, plus $1,900 in accounting fees caused by having to retain the accounting firm for the plan for another year.

Respondents' version of events is not significantly different in those details that it specifically addresses. The respondents' joint answer agrees that Spinner and McGrath discussed redeeming the plan's pool participation by the end of March, although respondents contend that no firm decision was made to liquidate, and they note that Spinner did not either give an explicit instruction or request the paperwork he knew would be needed (p. 2). According to respondents, any delays in redeeming the plan's futures fund was caused first by Spinner's delay in requesting the necessary forms, second by his waiting until March 23 to sign those forms, and third, by his failure to ensure timely delivery of those forms by using a more expeditious method of sending them than first-class mail (pp. 2-4).

Attached to respondents' answer are copies of the redemption request forms signed by Spinner. Each form begins with a notification in all caps stating that the redemption request "SHOULD BE DELIVERED TO THE LIMITED PARTNER'S LOCAL DEAN WITTER BRANCH OFFICE" and "MUST BE RECEIVED BY THE GENERAL PARTNER" in its New York office "AT LEAST FIVE BUSINESS DAYS" prior to the end of the month in which redemption is to occur (Answer, exhibit A). The notice also warns that the redemption request form cannot be faxed. Thus, respondents urge, Spinner was fully aware when he signed the forms that time was running short and his casualness in not delivering the forms more expeditiously was his own fault.

Neither side has submitted copies of the pool's limited partnership agreement. However, according to two letters sent to Spinner after he complained (copies of which are attached to the complaint), one by respondent McGrath and another by branch manager Jill Richmond, the five-day receipt provision set out on the request form was part of the "prospectus."

Discussion

Preliminarily, it is determined that the five-day requirement previously had been made known to Spinner, although he may have failed to heed its significance. As noted above, in two different letters sent to Spinner the assertion was made that the redemption requirements were disclosed to him in the prospectus. When he attached those letters to his complaint, Spinner did not

take issue with that assertion. Furthermore, nowhere in his complaint has Spinner ever indicated that the materials provided when the plan joined the pool failed to inform him of the requirement that redemption requests must be received in New York five business days prior to the end of the month.[2]

There can be little doubt that with this five-day requirement Spinner could have, and should have, acted more expeditiously and prevented this dispute from arising. If Spinner, trustee of the profit-sharing plan, had merely consulted a calendar, he would have realized that requesting redemption forms in mid-March and then mailing them by ordinary surface mail would leave precious little time for redemption. After all, the forms had to be sent first to the local office and from there on to the pool operator in New York. Since "five business days" prior to the "last date" in March was the interval needed for the forms to get to New York, the forms had to *arrive* there no later than March 24.[3] It should have been clear to Spinner that having the forms mailed to him on March 16 left a mere eight days for all of the following steps to occur: mailing from McGrath's assistant; delivery to Spinner; execution of the forms; mailing the forms back to McGrath's office; receipt by McGrath; execution by him and by the local branch manager certifying that Spinner's signature was authentic (*see* Section 3 on page 2 of redemption form); and delivery to the New York office of the pool operator.

Respondents contend that this disclosure – establishing Spinner's constructive awareness of the five-day rule – ends the matter, but that is not the case. Respondents' obligations stem not only from the limited partnership agreement signed by Spinner (which apparently disclosed the five-day rule) but also from federal commodity laws. *Cf. Lee v. Lind-Waldock*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,173 at page 50,160 n.13 (CFTC June 29, 2000) (noting Commission's focus on FCMs' duties under Sections 4d and 4b of the Commodity Exchange Act rather than customer agreement). Thus, even if the five-day rule was adequately disclosed as a general matter, and even if Spinner violated his own fiduciary duties to act expeditiously, there still remains a question here as to whether *under the circumstances of this*

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[2] CFTC Rule 12.24(p)(2) expressly requires that the disclosure document sent to a prospective pool participant must include a "complete description of the frequency, timing and manner in which a participant may redeem interests in the pool." That description is required to reveal how the value will be calculated (subsection i), the conditions for redemption "including . . . the terms of any notification required and the time between the request for redemption and payment (subsection ii), "any restrictions on the redemption of a participant's interest" (subsection 3), and the "liquidity risks relative to the pool's redemption capabilities" (subsection iv). Complainant has not suggested that the document was lacking in any of these respects, and has never even hinted that the redemption form was his only notice of the redemption timing and processing requirements.

In the absence of any indication that the redemption requirements were not made known to Spinner, or that his request for redemption was somehow handled improperly when received by the pool operator, there is no need to inquire as to whether the adherence with the redemption procedure – and thus the delay in returning the plan's monies – constituted a violation of Section 4d of the Commodity Exchange Act.

[3] The redemption paragraph says "five business days prior to the last date" of the month on which redemption is to occur. Therefore, simply counting backwards from March 31 leaves March 30 (Thursday) as business day number one, and so on until business day five, which is the preceding Friday, March 24.

case respondents' actions violated their Section 4b duty of full disclosure of material facts to their customer.

Whether respondents violated Section 4b or not requires undertaking two separate inquiries, the first of which requires reviewing the communications between Spinner and respondents at three points: (1) the introductory conversation with McGrath during which liquidation was discussed; (2) the conversation in mid-March when Spinner requested the forms from McGrath's assistant; and (3) the conversation on March 23 when Spinner told the assistant that the forms had not arrived and she agreed to send them again (unnecessarily, as it turned out, since the original forms arrived that day). This first inquiry is designed to determine whether respondents were put on notice of Spinner's specific goal to redeem the plan's interest in the pool by the end of March. If they were made aware of his specific goal, they had a heightened fiduciary duty to inform him as to how to carry that goal out under the procedures they themselves had devised.

The second line of inquiry focuses on McGrath's actions on March 27 and March 28, when he received the executed redemption form and mailed it on to New York (where it arrived April 3). That inquiry is designed to determine whether McGrath failed to act reasonably both by sending the documents to New York by a more expeditious method and by not contacting Spinner to inform him that the documents were too late to accomplish redemption by the end of March.

Redemption discussion and Spinner's requests for forms: In the first, introductory, conversation, there is no reason to believe that Spinner's discussion of his tentative goal constituted sufficient information to create a heightened duty for McGrath to monitor and to assist Spinner's efforts to redeem the plan's interest. Spinner could easily have decided in the ensuing weeks to allow the plan to maintain its participation. More importantly, the discussion did not include an actual request for the forms needed to accomplish redemption, and thus Spinner's voiced strategy was too speculative to require action by McGrath.

The second conversation occurred with McGrath's assistant in mid-March. As related by Spinner, he asked her to send the paperwork and she did so on March 16. In the absence of any indication that Spinner expressed his timing goals to the assistant – which would have alerted her to the diminishing amount of time before the redemption deadline – it cannot be concluded that a simple request for forms triggered any "red flag" that would have required informing Spinner that a quicker method of delivery than regular mail was essential. Instead, it would appear that Spinner knew she was mailing the forms to him and that he waited a full week for them to be delivered before he contacted her again. Spinner's patience at this point was at least as consistent with wanting to redeem the plan's interest in April as with wanting to act in March.

The third conversation might be different, however, if – as set out in Spinner's version of events – he expressly informed the assistant when he called about the undelivered forms that time was running out for him to succeed in the planned March redemption. Spinner's version of this conversation is unrebutted on this record, and thus must be critically examined to determine its overall believability. Several factors tend to support its credibility. First, respondents have not submitted any affidavit disputing that version from the only other person with knowledge of the conversation (the assistant), and presumably they would have done so were Spinner distorting what

occurred. Second, the letters Spinner wrote to respondents beginning as early as May of 2000 explicitly stated that he informed the assistant of the expiring time, and not once in any of the several replies did any employee or agent of respondents suggest that contention was not true. Having occurred so close in time to the events in question, respondents' acquiescence to Spinner's version of the conversation could well be treated as an admission since it likely would have prompted a contemporaneous objection if untrue.

On the whole, however, I find little likelihood that Spinner strongly emphasized his expiring time in the March 23 conversation. The lack of any version of events, then or now, from the assistant (or from McGrath who is imputed to have obtained information given his assistant), is only a neutral circumstance at best, not one that mandates an adverse inference. Furthermore, that fact is significantly outweighed by another that cannot be explained if Spinner said what he claims to have said, *i.e.*, that even by Spinner's version, he and the assistant arranged for her simply to *re-mail* the documents. It strains credulity for Spinner to suggest that he was so extremely nervous about the timing but then agreed to the casual delivery of documents by ordinary mail. After all, at this point only one day remained for Spinner to execute and return the documents to McGrath and to have them received in New York by the pool operator.[4] If the first set, previously mailed, was taking a week to arrive, Spinner had absolutely no reason to believe that a second set mailed to him would arrive so much more quickly as to allow redemption in March.

It is concluded, therefore, that at no point prior to Spinner's submission of the redemption forms did McGrath come to possess sufficient information as to cause him to take special care to ensure that Spinner would be able to accomplish the redemption in time.

McGrath's processing of the forms: This aspect of respondents' handling of this transaction is both surprising and troubling. According to the undisputed facts set out in both the complaint and the answer, and the attachments to both, McGrath received the forms by regular mail and executed them on March 28, verifying Spinner's signature on the redemption request. Then he himself sent the documents on to New York, apparently by regular mail, with no apparent effort to determine if redemption might still be possible through extraordinary means. Amazingly, considering his and his assistant's earlier conversations with Spinner, McGrath never contacted Spinner to notify him that the forms were too late for a March redemption. Then McGrath committed a third startling blunder by telling Spinner in mid-April that the redemption had already occurred when in fact it had not.

It would be easy to conclude that the failure to notify Spinner constituted a failure to disclose a material fact. After all, even though the March 24 deadline had passed by the time McGrath received the papers, it is conceivable that an attempt to accommodate Spinner's goal could still have achieved a March redemption, particularly if the pool operator were contacted and

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[4] Spinner's use of the mail to send the forms back to McGrath suggests that he was not in much of a hurry. Even if he was but a few miles away (judicial notice is taken that according to Rand McNally's Atlas, Spinner's city of Carrolton, Texas, lies just four miles outside Dallas, where McGrath's office is located), using the mail for time-sensitive documents assumed a great risk that delivery beyond one day was likely. It is noted that Spinner states he used the postage-paid envelope provided.

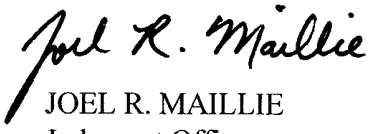
asked to waive the five-day rule. The failure to provide Spinner with information that would have allowed him to seek extraordinary action, however, or to petition the pool operator to discretionarily waive its contractual rules, will not be the sole basis for a finding of fraud. Reparations cannot reasonably be predicated on speculation that a pool participant would have been provided more than its absolute rights under the pool agreement, and those rights were limited to the right to redeem by the end of a month if a request were received in timely fashion. Thus, even though McGrath's apparent disinterest in helping his customer try to get around the rule reflects poor business judgment and an even worse customer relations instinct, there is no remedy for this customer beyond those specified in his contract.[5]

Having let the time expire before the forms were delivered in March, Spinner essentially was stuck until the end of April before he could redeem the plan's interest. Despite McGrath's gross misstatements in April that redemption had occurred (an allegation that respondents do not attempt to address in any of their letters to Spinner or their filing here), the record does not indicate that any of these statements delayed redemption further or otherwise resulted in any damages not already caused by Spinner's negligence in March.

Conclusion

For the reasons stated, the complaint is DISMISSED.

Dated: November 29, 2001



JOEL R. MAILLIE
Judgment Officer

[5] The assistant's use of ordinary first-class mail, McGrath's failure to contact Spinner, and the false statement about redemption all support the notion that McGrath did not have a clue how redemption worked, and that he was totally unaware of the five-day requirement despite executing the forms himself. McGrath's execution of the forms was solely to verify Spinner's signature, and did not involve any review of content. In contrast, Spinner, as trustee of the plan, was responsible for knowing the content or he should not have signed them. A more alert broker might have anticipated the date issue, but Spinner knew McGrath was new. McGrath also was not Spinner's sole source of knowledge about the pool in which Spinner a year before had placed the profit-sharing plan.